[redacted]

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport2482vari

CALIFORNIA REPORTER

Covering Cases Reported in

PACIFIC REPORTER

248 P.—250 P.

Cite by Volume and Page
of the
PACIFIC REPORTER

Thus:
248 P. 225

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

COPYRIGHT, 1926, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 248, Nos. 1-5; Vol. 249, Nos. 1-6; Vol. 250, Nos. 1-5.

COPYRIGHT, 1927, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 250, No. 6.

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

Cal.Rep. 248-250 P.
2-1967

CASES REPORTED

Vols. 248–250 P.

	P.	
	Vol.	Page
Adams; People v., Sup.	249	186
Adams; People v., App.	249	536
Alamitos Land Co.; Ord Land Co. v., Sup.	249	178
Allen v. Ellis, App.	250	699
Allison; People v., App.	249	881
Allison; People v., App.	250	408
Allyne v. Murasky, App.	248	944
Amling v. Bryan, App.	248	280
Anastasion; People v., App.	249	209
Anderson; Wood v., Sup.	249	862
Andrews; Gillespie v., App.	248	715
Angello, Ex parte, App.	248	731
Annen v. Annen, App.	250	580
Arnold; People v., Sup.	250	168
Aronson & Co. v. Pearson, Sup.	249	188
Aronson & Co. v. Pearson, two cases, Sup.	249	191
Arp v. Blake, App.	248	750
Aspegren & Co. v. Sherwood, Swan & Co., Sup.	250	400
Atkinson; Hammell v., App.	250	1117
Avila; People v., App.	248	693
Backman v. Guadalupe Realty Co., App.	248	296
Bacon Service Corporation v. Huss, Sup.	248	235
Badaracco; Uhl v., Sup.	248	917
Bail v. Glantz, App.	248	258
Baker v. Carstenbrook, App.	248	295
Bank of Italy; Hiroshima v., App.	248	947
Bank of Italy v. Sierra Valley Bank, App.	248	770
Barbee v. Young, App.	249	15
Barbera; People v., App.	248	304
Bargagliotti; Segarini v., App.	249	545
Barnet; Samuels v., App.	250	405
Barse v. Scott, App.	249	208
Bass v. Wardlaw, Sup.	249	184
Bauer v. Bauer, Sup.	248	507
Bauer's Estate, In re, Sup.	248	507
Bellamy; People v., App.	248	1042
Bennett; People v., App.	249	20
Bennett; People v., App.	249	212
Bennett v. San Ramon Valley Bank, App.	250	188
Benwell; L. H. Mitchel & Sons v., App.	249	30
Berettoni v. Sargentini, App.	248	760
Berryessa Cattle Co.; Le Baron v., App.	248	779
Big Rock Mut. Water Co. v. Valyermo Ranch Co., App.	248	264
Black's Estate, In re, Sup.	248	1015

	P.	
	Vol.	Page
Blake; Arp v., App.	248	750
Blumenthal v. Larson, App.	248	681
Board of Pension Fund Com'rs of City of Stockton; Klench v., App.	249	46
Bosse v. Marye, App.	250	693
Boulevard Express; Lloyd v., App.	249	837
Brandon; Fresno Inv. Co. v., App.	249	548
Briscoe; Caine v., App.	248	774
Broadway Department Store; Wright v., Sup.	250	572
Brooks; People v., App.	250	211
Brown v. Sandell, App.	249	209
Bruere; Young v., App.	248	301
Brundige; California Fireproof Storage Co. v., Sup.	248	669
Bryan; Amling v., App.	248	280
Bucke's Department Store; Murphy v., Sup.	248	668
Burks v. Stearns, App.	248	274
Burnham; Whitney v., App.	248	754
Buster; Staton v., App.	249	878
Butler; Lawrence v., App.	249	840
Caine v. Briscoe, App.	248	774
California Bean Growers' Ass'n v. C. H. & O. B. Fuller Co., App.	248	967
California Bean Growers' Ass'n v. Rindge Land & Navigation Co., Sup.	248	658
California Credit & Collection Corporation v. Mooney, Sup.	248	1020
California Credit & Collection Corporation v. Ricca, App.	249	41
California Fireproof Storage Co. v. Brundige, Sup.	248	669
California-Pacific Title Ins. Co.; Mitchell v., App.	248	1035
California Street Cable R. Co.; Driscoll v., App.	250	1062
California Transit Co.; Gorman v., Sup.	248	923
Campbell v. Campbell, App.	248	762
Carstenbrook; Baker v., App.	248	295
Casey; People v., App.	249	525
Casey; People v., Sup.	250	653
Cashel v. Industrial Accident Commission, App.	250	691
Cavaglieri Mortg. Co. v. Superior Court in and for Los Angeles County, App.	250	700
Central California Traction Co.; City of Sacramento v., App.	248	307
Chalmers v. Hawkins, App.	248	727
Charles L. Donohoe Co. v. Superior Court of Glenn County, App.	248	1007
Chronicle Pub. Co.; Moss v., App.	250	1045
Church Mfg. Co. v. Superior Court in and for Los Angeles County, App.	250	705
C. H. & O. B. Fuller Co.; California Bean Growers' Ass'n v., App.	248	967
City and County of San Francisco v. Sattan, App.	248	274
City of Gustine; Kennedy v., Sup.	248	910
City of Los Angeles; Nash v., App.	248	689
City of Pasadena; Jardine v., Sup.	248	225
City of Sacramento v. Central California Traction Co., App.	248	307
City of Sacramento v. Hunger, App.	249	223
City of Stockton v. Ellingwood, App.	248	272
City of Stockton v. Wilson, App.	249	835
City of Vallejo v. Superior Court of Napa County, Sup.	249	1084
C. J. Kubach Co. v. McGuire, Sup.	248	676
Clarke; People v., App.	248	263
Cliff House; Cushman v., App.	250	575
Clinton; People v., App.	248	929
Coddington; Sorensen v., App.	249	37
Codina; Manos v., Sup.	248	916

	Vol.	Page
Coker; People v., App.	248	542
Colberg v. State Board of Equalization, Sup.	248	244
Cole v. Manning, App.	248	1065
Collier v. Johnson, App.	249	217
Collins; People v., App.	249	60
Consulter; People v., App.	248	541
Cooper; Siem v., App.	250	1106
Coops v. Coops, App.	248	286
Cordes v. Paulson, App.	248	546
Cosgrove; Finkelstein v., App.	248	704
Cousin v. Mason, App.	248	299
Craib; People v., App.	249	543
Craighan v. O'Brien, Sup.	250	653
Cruickshank; Gibson v., App.	248	732
Crummey v. Popp, App.	249	29
Cushman v. Cliff House, App.	250	575
Cutten; Hewitt v., Sup.	248	514
Dahlberg; Goldman v., App.	249	536
David; Thoroman v., Sup.	249	513
Day; People v., Sup.	248	250
De Jarnette; Forest Lawn Memorial Park Ass'n v., App.	250	581
Derwin; People v., App.	248	1029
Detroit Fire & Marine Ins. Co.; K. Kurihara v., App.	249	215
Diamond Drill Contracting Co. v. Industrial Accident Commission of California, Sup.	250	862
Dickey v. Walrond, App.	248	710
Dillon; People v., Sup.	248	230
Don; Muraco v., App.	250	1109
Donohoe Co. v. Superior Court of Glenn County, App.	248	1007
Dowd v. Russell, App.	248	293
Dowell v. McLees, Sup.	248	511
Driscoll v. California Street Cable R. Co., App.	250	1062
Drishaus' Estate, In re, Sup.	249	515
Duggan v. Forderer, App.	249	533
Dunn; Trull v., App.	250	185
Dwyer Equipment Co.; Peerless Insurance & Brokerage Co. v., App.	248	303
Eddie v. Schumacher Wall Board Co., App.	249	235
Edwards; People v., App.	249	1090
Eichelberger, In re, App.	250	201
Eichelberger; Harris v., App.	250	201
Eiseman; People v., App.	248	716
Ellingwood; City of Stockton v., App.	248	272
Ellis; Allen v., App.	250	699
Elmore v. Tingley, App.	248	706
Ephraim; People v., App.	250	873
Ernser v. Walcott, Sup.	248	512
Estabrook; State v., Sup.	248	1015
Fagin v. Schilling, App.	250	574
Falloon v. Superior Court of Los Angeles County, App.	248	1057
Ferguson v. Oildale Mut. Water Co., App.	248	256
Finderup; Reeder v., App.	248	525
Fink, Ex parte, App.	250	714
Finkelstein v. Cosgrove, App.	248	704
Fisher; Watson v., App.	250	577
Fletcher v. Superior Court of Sacramento County, App.	250	195

	P.	
	Vol.	Page
Fontana Land Co. v. Laughlin, Sup.	250	669
Forderer; Duggan v., App.	249	533
Forest Lawn Memorial Park Ass'n v. De Jarnette, App.	250	581
Foster; People v., App.	249	231
Fouch v. Johnston, Sup.	249	852
Francis; Knights of the Ku Klux Klan v., App.	249	539
Franco; People v., App.	250	698
Fraters Glass & Paint Co. v. Southwestern Const. Co., App.	248	942
Frederick v. Landfield, App.	248	679
French; Hamilton v., App.	248	281
Fresno Inv. Co. v. Brandon, App.	249	548
Fritschi v. Fritschi, App.	249	42
Fuller Co.; California Bean Growers' Ass'n v., App.	248	967
Gandy; General Motors Acceptance Corporation v., App.	248	999
Garrett v. Superior Court, Kern County, App.	249	871
G. Cavaglieri Mortg. Co. v. Superior Court in and for Los Angeles County, App.	250	700
General Motors Acceptance Corporation v. Gandy, App.	248	999
Gibson, Ex parte, App.	248	1046
Gibson v. Cruickshank, App.	248	732
Gillespie v. Andrews, App.	248	715
Glantz; Bail v., App.	248	258
Godfrey; Robinson v., App.	248	268
Goldman v. Dahlberg, App.	249	536
Gonnermann v. Roberts, App.	248	749
Goodale v. Thorn, Sup.	249	11
Gordon v. Industrial Accident Commission of California, App.	249	844
Gordon v. Industrial Accident Commission of California, Sup.	249	849
Gordon; People v., App.	248	289
Gorman v. California Transit Co., Sup.	248	923
Gorman v. Taylor, Sup.	250	676
Grivel's Estate, In re, Sup.	249	184
Guadalupe Realty Co.; Backman v., App.	248	296
Guarantee Trust & Savings Bank; Murray v., App.	248	1039
Gunther's Estate, In re, Sup.	248	514
Haber v. Pacific Electric R. Co., two cases, App.	248	741
Halbert; People v., App.	248	969
Hall; Imperial Water Co. No. 3 v., Sup.	250	394
Hall v. James, App.	249	876
Hall; People v., Sup.	249	859
Hamilton v. French, App.	248	281
Hammell v. Atkinson, App.	250	1117
Hammond; Woolman v., App.	250	195
Harris v. Eichelberger, App.	250	201
Harris v. Harter, App.	249	39
Harter; Harris v., App.	249	39
Haskell v. Title Guarantee & Trust Co., App.	249	43
Haughey; People v., App.	250	406
Hawkins; Chalmers v., App.	248	727
Health; People v., App.	248	1027
Heath; Magoon v., App.	250	583
Hellman Commercial Trust & Savings Bank; Pearson v., Sup.	249	10
Hewitt v. Cutten, Sup.	248	514
Hewitt; People v., App.	248	1021
Higbee; People v., App.	248	927

P.

	Vol.	Page
Higgins v. Mogan, App.	248	551
Hill; People v., App.	248	714
Hillen v. Industrial Accident Commission, Sup.	250	570
Hiroshima v. Bank of Italy, App.	248	947
Hoffman; People v., Sup.	248	504
Holubar; Lichtig & Rothwell v., App.	248	735
Home v. Souden, Sup.	250	162
Hook v. Ogden, App.	248	680
Hooper; Sawyer v., App.	249	530
Hopkins; Whiting Finance Co. v., Sup.	249	853
Howard v. Winton Co., Sup.	249	511
Hoy v. Tornich, Sup.	250	565
Hughes; People v., App.	250	869
Hunger; City of Sacramento v., App.	249	223
Huss; Bacon Service Corporation v., Sup.	248	235
Hutson v. Owl Drug Co., App.	249	524
Hyatt; Los Angeles City High School Dist. of Los Angeles County v., App.	249	221
Imperial Water Co. No. 3, In re, Sup.	250	394
Imperial Water Co. No. 3 v. Hall, Sup.	250	394
Industrial Accident Commission; Cashel v., App.	250	691
Industrial Accident Commission; Hillen v., Sup.	250	570
Industrial Accident Commission; Kennedy v., App.	250	1117
Industrial Accident Commission; Western Pipe & Steel Co. of California v., App.	249	34
Industrial Accident Commission of California; Diamond Drill Contracting Co. v., Sup.	250	862
Industrial Accident Commission of California; Gordon v., App.	249	844
Industrial Accident Commission of California; Gordon v., Sup.	249	849
Industrial Accident Commission of California; Pacific Employers' Ins. Co. v., App.	249	33
Industrial Accident Commission of California; Southern California Edison Co. v., App.	248	938
Irving v. Superior Court in and for El Dorado County, App.	249	236
Iverson, Ex parte, Sup.	250	681
Jackson; People v., App.	248	1061
James; Hall v., App.	249	876
Jardine v. City of Pasadena, Sup.	248	225
Jarrett v. Redman, App.	250	183
Jarrett v. Redman, App.	250	185
Jeans; People v., App.	249	1089
Johnson; Collier v., App.	249	217
Johnson; Purdy v., App.	248	764
Johnson v. Southern Pac. Co., Sup.	248	501
Johnson v. Superior Court of San Bernardino County, App.	250	686
Johnston; Fouch v., Sup.	249	852
Johnston v. Jones, App.	248	286
Johnston Realty Corporation v. Showalter, App.	250	289
Jones; Johnston v., App.	248	286
Jones; McGee v., App.	249	544
Jones; People v., App.	248	713
Jones; People v., App.	248	964
Jones v. Superior Court of San Diego County, App.	248	292
Joseph; Nelsen v., App.	248	754
Juarez; Pearson v., App.	248	278

P.

	Vol.	Page
Justices' Court of Corcoran Tp. in and for Kings County; Westinghouse Electric & Mfg. Co. v., App.	250	1104
Kay v. Laventhal, App.	248	555
Keller; People v., App.	250	585
Kennedy v. City of Gustine, Sup.	248	910
Kennedy v. Industrial Accident Commission, App.	250	1117
Kepler, In re, App.	250	701
Key System Transit Co.; Peak v., Sup.	248	676
Kierce; Schainman v., Sup.	248	905
Kimbro v. Kimbro, Sup.	249	180
King; Pritchard v., Sup.	248	519
King's Estate, In re, Sup.	248	519
Kirby's Estate, In re, Sup.	248	517
K. Kurihara v. Detroit Fire & Marine Ins. Co., App.	249	215
Klench v. Board of Pension Fund Com'rs of City of Stockton, App.	249	46
Knight; Truitner v., App.	248	702
Knight; Truitner v., App.	248	704
Knights of the Ku Klux Klan v. Francis, App.	249	539
Kubash Co. v. McGuire, Sup.	248	676
Landfield; Frederick v., App.	248	679
Lane v. Lane, App.	248	686
Lantz v. Vai, Sup.	248	665
Larson; Blumenthal v., App.	248	681
Laughlin; Fontana Land Co. v., Sup.	250	669
Laventhal; Kay v., App.	248	555
Lawler; People v., App.	249	18
Lawrence v. Butler, App.	249	840
Lawson; Perelli-Minetti v., Sup.	249	857
Le Baron v. Berryessa Cattle Co., App.	248	779
Le Fevre's Estate, In re, App.	249	208
L. H. Mitchel & Sons v. Benwell, App.	249	30
Libhart; People v., App.	249	211
Lichtig & Rothwell v. Holubar, App.	248	735
Lindeman v. Superior Court in and for City and County of San Francisco, App.	249	880
Lindholm v. Northwestern Pac. R. Co., App.	248	1033
Linn v. Superior Court in and for Los Angeles County, App.	250	880
Lloyd v. Boulevard Express, three cases, App.	249	837
Loescher; Zahos v., App.	248	283
Lord, In re, Sup.	250	714
Los Angeles City High School Dist. of Los Angeles County v. Hyatt, App.	249	221
Los Angeles City High School Dist. of Los Angeles County v. Schumann, App.	248	737
Los Angeles County Flood Control Dist.; Los Angeles Ry. Corporation v., App.	248	532
Los Angeles Ry. Corporation v. Los Angeles County Flood Control Dist., App.	248	532
Lowder v. Union Transfer Co. of San Francisco, App.	250	703
Lucas; People v., App.	248	691
Lustig v. Superior Court of State of California, within and for Los Angeles County, App.	250	702
McCaddon; Wahl v., App.	249	222
McClure; Rich v., App.	248	275
McConville v. Superior Court within and for Los Angeles County, App.	248	553
McDonald v. Richards, App.	248	1049

	Vol.	Page
McFarland v. Spengler, Sup.	248	521
McGee v. Jones, App.	249	544
McGuire; C. J. Kubach Co. v., Sup.	248	676
McHarg v. Pickford, App.	248	270
McLees; Dowell v., Sup.	248	511
McNab v. Mills, Sup.	248	657
McPherson; Purington v., Sup.	250	657
Maescher v. Sammann, App.	248	537
Maescher's Estate, In re, App.	248	537
Magoon v. Heath, App.	250	583
Manley v. Pacific Mill & Timber Co., App.	250	710
Manning; Cole v., App.	248	1065
Manos v. Codina, Sup.	248	916
Marsh v. Marsh, App.	250	411
Marston v. Pickwick Stages, App.	248	930
Martin; People v., Sup.	248	908
Marye; Bosse v., App.	250	693
Mason; Cousin v., App.	248	299
Menefee v. Raisch Imp. Co., App.	248	1031
Miller v. Murphy, App.	248	934
Mills; McNab v., Sup.	248	657
Mitchell v. California-Pacific Title Ins. Co., App.	248	1035
Mitchel & Sons v. Benwell, App.	249	30
Mix v. Yoakum, App.	248	705
Mogan; Higgins v., App.	248	551
Monrovia Evening Post, In re, Sup.	248	1017
Moody v. Zumwalt, Sup.	248	678
Monterey County v. Rader, Sup.	248	912
Mooney; California Credit & Collection Corporation v., Sup.	248	1020
Moran; Silberschmidt v., App.	250	205
Morhar; People v., App.	248	975
Moss v. Chronicle Pub. Co., App.	250	1045
Muchupoff; People v., App.	249	240
Muraco v. Don, App.	250	1109
Murasky; Allyne v., App.	248	944
Murphy, Ex parte, App.	248	1044
Murphy v. Bucke's Department Store, Sup.	248	668
Murphy; Miller v., App.	248	934
Murray v. Guarantee Trust & Savings Bank, App.	248	1039
Nagy; People v., Sup.	248	906
Nash v. City of Los Angeles, App.	248	689
Nau v. Santa Ana Sugar Co., App.	250	705
Nelsen v. Joseph, App.	248	754
Northwestern Pac. R. Co.; Lindholm v., App.	248	1033
O'Brien; Craighan v., Sup.	250	653
O'Connell, In re, Sup.	250	390
Ogden; Hook v., App.	248	680
Ogden's Estate, In re, App.	248	680
Oildale Mut. Water Co.; Ferguson v., App.	248	256
Orange Cove Water Co. v. Sampson, App.	248	526
Ord Land Co. v. Alamitos Land Co., Sup.	249	178
Overell v. Overell, two cases, App.	248	310
Owl Drug Co.; Hutson v., App.	249	524
Pacific Electric R. Co.; Haber v., App.	248	741
Pacific Electric R. Co.; Petrie v., App.	248	741

P.

	Vol.	Page
Pacific Employers' Ins. Co. v. Industrial Accident Commission of California, App.	249	33
Pacific Mill & Timber Co.; Manley v., App.	250	710
Parker v. Superior Court in and for Los Angeles County, App.	250	587
Parrott's Estate, In re, Sup.	248	248
Pattiani v. State Industrial Accident Commission, Sup.	250	864
Paulson; Cordes v., App.	248	546
Peak v. Key System Transit Co., Sup.	248	676
Pearson; Aronson & Co. v., Sup.	249	188
Pearson; Aronson & Co. v., Sup.	249	191
Pearson v. Hellman Commercial Trust & Savings Bank, Sup.	249	10
Pearson v. Juarez, App.	248	278
Peerless Insurance & Brokerage Co. v. Dwyer Equipment Co., App.	248	303
People v. Adams, Sup.	249	186
People v. Adams, App.	249	536
People v. Allison, App.	249	881
People v. Allison, App.	250	408
People v. Anastasion, App.	249	209
People v. Arnold, Sup.	250	168
People v. Avila, App.	248	693
People v. Barbera, App.	248	304
People v. Bellamy, App.	248	1042
People v. Bennett, App.	249	20
People v. Bennett, App.	249	212
People v. Brooks, App.	250	211
People v. Casey, App.	249	525
People v. Casey, Sup.	250	653
People v. Clarke, App.	248	263
People v. Clinton, App.	248	929
People v. Coker, App.	248	542
People v. Collins, App.	249	60
People v. Consulter, App.	248	541
People v. Craib, App.	249	543
People v. Day, Sup.	248	250
People v. Derwin, App.	248	1029
People v. Dillon, Sup.	248	230
People v. Edwards, App.	249	1090
People v. Eiseman, App.	248	716
People v. Ephraim, App.	250	873
People v. Foster, App.	249	231
People v. Franco, App.	250	698
People v. Gordon, App.	248	289
People v. Halbert, App.	248	969
People v. Hall, Sup.	249	859
People v. Haughey, App.	250	406
People v. Heath, App.	248	1027
People v. Hewitt, App.	248	1021
People v. Higbee, App.	248	927
People v. Hill, App.	248	714
People v. Hoffman, Sup.	248	504
People v. Hughes, App.	250	869
People v. Jackson, App.	248	1061
People v. Jeans, App.	249	1089
People v. Jones, App.	248	713
People v. Jones, App.	248	964

P.

	Vol.	Page
People v. Keller, App.	250	585
People v. Lawler, App.	249	18
People v. Libhart, App.	249	211
People v. Lucas, App.	248	691
People v. Martin, Sup.	248	908
People v. Morhar, App.	248	975
People v. Muchupoff, App.	249	240
People v. Nagy, Sup.	248	906
People v. Piero, App.	249	541
People v. Rambaud, App.	248	954
People v. Rhinehart, App.	250	202
People v. Rhinehart, App.	250	203
People v. Richardson, App.	249	213
People v. Rickard, App.	248	255
People v. Riordan, App.	250	190
People v. Roberts, App.	250	208
People v. Rosner, App.	248	683
People v. Ryan, Sup.	250	164
People v. Sachau, App.	248	960
People v. Salas, App.	250	526
People v. Schmidt, App.	249	832
People v. Schmidt, Sup.	250	1104
People v. Schwarz, App.	248	990
People v. Schwarz, App.	248	1043
People v. Short, App.	249	878
People v. Simpson, App.	250	403
People v. Singh, App.	248	981
People v. Singh, App.	248	986
People v. Slater, Sup.	249	177
People v. Smith, App.	248	261
People v. Stevens, App.	248	696
People v. Stone, Sup.	250	659
People v. Taylor, App.	250	105
People v. T. Wah Hing, App.	249	229
People v. Vanderbilt, Sup.	249	867
People v. Viets, App.	250	588
People v. Wagner, App.	248	946
People v. Wallach, App.	250	578
People v. Weitzel, App.	249	842
People v. Whitacre, App.	248	924
People v. Will, App.	248	1078
People v. Wilson, App.	250	879
People v. Wright, App.	250	204
Perelli-Minetti v. Lawson, Sup.	249	857
Petrie v. Pacific Electric R. Co., App.	248	741
Pickford; McHarg v., App.	248	270
Pickwick Stages; Marston v., App.	248	930
Piero; People v., App.	249	541
Pius; Wetzel v., App.	248	288
Pohlman v. Smith, App.	249	238
Popp; Crummey v., App.	249	29
Porter v. Superior Court of California in and for Los Angeles County, App.	248	1077
Pritchard v. King, Sup.	248	519
Purdy v. Johnson, App.	248	764
Purington v. McPherson, Sup.	250	657

	Vol.	Page
Purington's Estate, In re, Sup.	250	657
Rader; Monterey County v., Sup.	248	912
Raisch Imp. Co.; Menefee v., App.	248	1031
Rambaud; People v., App.	248	954
Redman; Jarrett v., App.	250	183
Redman; Jarrett v., App.	250	185
Reed v. Severin, App.	249	219
Reeder v. Finderup, App.	248	525
Regents of University of California v. Riley, Sup.	250	182
Rempp; Wickham v., App.	249	37
Retsloff v. Smith, App.	249	886
Rhinehart; People v., App.	250	202
Rhinehart; People v., App.	250	203
Ricca; California Credit & Collection Corporation v., App.	249	41
Rich v. McClure, App.	248	275
Rich; Walker v., App.	249	56
Richards; McDonald v., App.	248	1049
Richards; Thresher v., App.	248	1056
Richards; Thurman v., App.	248	1057
Richardson; People v., App.	249	213
Rickard; People v., App.	248	255
Riley; Regents of University of California v., Sup.	250	182
Rindge Land & Navigation Co.; California Bean Growers' Ass'n v., Sup.	248	658
Riordan; People v., App.	250	190
Roberts; Gonnermann v., App.	248	749
Roberts; People v., App.	250	208
Robinson v. Godfrey, App.	248	268
Rosner; People v., App.	248	683
Ross' Estate, In re, Sup.	250	676
Russell; Dowd v., App.	248	293
Ryan; People v., Sup.	250	164
Rystrom v. Sutter Butte Canal Co., App.	249	53
Sachau; People v., App.	248	960
Salas; People v., App.	250	526
Sammann; Maescher v., App.	248	537
Sampson; Orange Cove Water Co. v., App.	248	526
Samuels v. Barnet, App.	250	405
Sandell; Brown v., App.	249	209
San Diego Electric R. Corporation; Tedford v., App.	249	1093
Sankey's Estate, In re, Sup.	249	517
San Ramon Valley Bank; Bennett v., App.	250	188
Santa Ana Sugar Co.; Nau v., App.	250	705
Sargentini; Berettoni v., App.	248	760
Satren v. Sponheim, Sup.	249	196
Sattan; City and County of San Francisco v., App.	248	274
Sawyer v. Hooper, App.	249	530
Schainman v. Kierce, Sup.	248	905
Schilling; Fagin v., App.	250	574
Schmidt; People v., App.	249	832
Schmidt; People v., Sup.	250	1104
Schmolke, Ex parte, Sup.	248	244
Schumacher Wall Board Co.; Eddie v., App.	249	235
Schumann; Los Angeles City High School Dist. of Los Angeles County v., App.	248	737
Schwarz; People v., App.	248	990

P.

	Vol.	Page
Schwarz; People v., App.	248	1043
Scott; Barse v., App.	249	208
Scott; Stierlen v., Sup.	248	509
Segarini v. Bargagliotti, App.	249	545
Severin; Reed v., App.	249	219
Sherwood, Swan & Co.; Aspegren & Co. v., Sup.	250	400
Short; People v., App.	249	878
Showalter; Johnston Realty Corporation v., App.	250	289
Siem v. Cooper, App.	250	1106
Sierra Valley Bank; Bank of Italy v., App.	248	770
Silberschmidt v. Moran, App.	250	205
Simmons, Ex parte, Sup.	250	684
Simpson; People v., App.	250	403
Singh; People v., App.	248	981
Singh; People v., App.	248	986
Slater; People v., Sup.	249	177
Smith; People v., App.	248	261
Smith; Pohlman v., App.	249	238
Smith; Retsloff v., App.	249	886
Sorensen v. Coddington, App.	249	37
Souden; Home v., Sup.	250	162
Southern California Edison Co. v. Industrial Accident Commission of California, App.	248	938
Southern Pac. Co.; Johnson v., Sup.	248	501
Southwestern Const. Co.; Fraters Glass & Paint Co. v., App.	248	942
Spengler; McFarland v., Sup.	248	521
Spindler v. Wittemann Co., App.	249	1092
Sponheim; Satren v., Sup.	249	196
State v. Estabrook, Sup.	248	1015
State Board of Equalization; Colberg v., Sup.	248	244
State Industrial Accident Commission; Pattiani v., Sup.	250	864
Staton v. Buster, App.	249	878
Stearns; Burks v., App.	248	274
Stewart v. Stewart, Sup.	249	197
Stierlen v. Scott, Sup.	248	509
Stierlen's Estate, In re, Sup.	248	509
Stevens; People v., App.	248	696
Stone; People v., Sup.	250	659
Superior Court in and for City and County of San Francisco; Lindeman v., App.	249	880
Superior Court in and for City and County of San Francisco; Vecki v., App.	249	547
Superior Court in and for El Dorado County; Irving v., App.	249	236
Superior Court in and for Los Angeles County; Church Mfg. Co. v., App.	250	705
Superior Court in and for Los Angeles County; G. Cavaglieri Mortg. Co. v., App.	250	700
Superior Court in and for Los Angeles County; Linn v., App.	250	880
Superior Court in and for Los Angeles County; Parker v., App.	250	587
Superior Court, Kern County; Garrett v., App.	249	871
Superior Court of California in and for Alameda County; Wood v., App.	248	784
Superior Court of California in and for Fresno County; Whitney v., Sup.	250	666
Superior Court of California in and for Los Angeles County; Porter v., App.	248	1077
Superior Court of Glenn County; Charles L. Donohoe Co. v., App.	248	1007

	Vol.	Page
Superior Court of Los Angeles County; Falloon v., App.	248	1057
Superior Court of Napa County; City of Vallejo v., Sup.	249	1084
Superior Court of Sacramento County; Fletcher v., App.	250	195
Superior Court of San Bernardino County; Johnson v., App.	250	686
Superior Court of San Diego County; Jones v., App.	248	292
Superior Court of State of California, within and for Los Angeles County; Lustig v., App.	250	702
Superior Court within and for Los Angeles County; McConville v., App.	248	553
Sutter Butte Canal Co.; Rystrom v., App.	249	53
Taylor; Gorman v., Sup.	250	676
Taylor; People v., App.	250	105
Tedford v. San Diego Electric R. Corporation, App.	249	1093
Thorn; Goodale v., Sup.	249	11
Thoroman v. David, Sup.	249	513
Thresher v. Richards, App.	248	1056
Thurman v. Richards, App.	248	1057
Tingley; Elmore v., App.	248	706
Title Guarantee & Trust Co.; Haskell v., App.	249	43
Tornich; Hoy v., Sup.	250	565
Truitner v. Knight, App.	248	702
Truitner v. Knight, two cases, App.	248	704
Trull v. Dunn, App.	250	185
T. Wah Hing; People v., App.	249	229
Uhl v. Badaracco, Sup.	248	917
Union Transfer Co. of San Francisco; Lowder v., App.	250	703
University of California v. Riley, Sup.	250	182
Vai; Lantz v., Sup.	248	665
Valyermo Ranch Co.; Big Rock Mut. Water Co. v., App.	248	264
Vanderbilt; People v., Sup.	249	867
Vecki v. Superior Court in and for City and County of San Francisco, App.	249	547
Viets; People v., App.	250	588
Wagner; People v., App.	248	946
Wahl v. McCaddon, App.	249	222
Walcott; Ernser v., Sup.	248	512
Walker v. Rich, App.	249	56
Wallach; People v., App.	250	578
Walrond; Dickey v., App.	248	710
Wardlaw; Bass v., Sup.	249	184
Washer, Ex parte, App.	248	1068
Watson v. Fisher, App.	250	577
Weitzel; People v., App.	249	842
Western Pipe & Steel Co. of California v. Industrial Accident Commission, App.	249	34
Westinghouse Electric & Mfg. Co. v. Justices' Court of Corcoran Tp. in and for Kings County, App.	250	1104
Wetzel v. Pius, App.	248	288
Whitacre; People v., App.	248	924
Whiting Finance Co. v. Hopkins, Sup.	249	853
Whitney v. Burnham, App.	248	754
Whitney v. Superior Court of California in and for Fresno County, Sup.	250	666
Whitney's Estate, In re, App.	248	754
Wickham v. Rempp, App.	249	37
Wiechers v. Wiechers, Sup.	250	397
Wiecher's Estate, In re, Sup.	250	397
Will; People v., App.	248	1078

	P. Vol.	Page
Wilson; City of Stockton v., App.	249	835
Wilson; People v., App.	250	879
Wilson's Estate, In re, Sup.	248	666
Winton Co.; Howard v., Sup.	249	511
Wittemann Co.; Spindler v., App.	249	1092
Wood v. Anderson, Sup.	249	862
Wood v. Superior Court of California in and for Alameda County, App.	248	784
Woolman v. Hammond, App.	250	195
Wright v. Broadway Department Store, Sup.	250	572
Wright; People v., App.	250	204
Yoakum; Mix v., App.	248	705
Young; Barbee v., App.	249	15
Young v. Bruere, App.	248	301
Yuba Consol. Gold Fields; Yuba Inv. Co. v., Sup.	248	672
Yuba Inv. Co. v. Yuba Consol. Gold Fields, Sup.	248	672
Zahos v. Loescher, App.	248	283
Zumwalt; Moody v., Sup.	248	678

CALIFORNIA REPORTER

248 PACIFIC REPORTER

248

199 Cal. 64

JARDINE v. CITY OF PASADENA et al., and three other cases. (L. A. 8186.)

(Supreme Court of California. July 1, 1926.)

1. Municipal corporations 🔑63(1).

Erection of isolation hospital in residential district by city *held* not such private nuisance that finding of trial court thereon supported by evidence would be determinative.

2. Constitutional law 🔑278(1).

Erection of isolation hospital in residential district *held* not in violation of Fourteenth Amendment.

3. Municipal corporations 🔑597.

Police power of city in respect to establishment and maintenance of isolation hospital is subject only to control of general laws.

4. Municipal corporations 🔑597.

Under Const. art. 11, § 11, and Pasadena City Charter, art. 1, § 3, subds. 6 and 20, location, establishment, and maintenance of isolation hospital was within police power of city.

5. Municipal corporations 🔑597.

Under Pasadena City Charter, art. 8, § 10, legislative body of city has power of protecting public health.

6. Municipal corporations 🔑63(1).

Legislative body of city, in adopting ordinance fixing location of isolation hospital, was exercising legislative function.

7. Municipal corporations 🔑122(2).

Every intendment is to be indulged in, and all doubts resolved in favor of, validity of ordinance fixing location of isolation hospital.

8. Municipal corporations 🔑63(1).

Determination of facts by legislative body of city which warrant its action will not be set aside or disregarded by court, unless clearly and palpably wrong.

9. Municipal corporations 🔑597.

Evidence *held* to sustain finding of city legislative body as to proper selection of site for isolation hospital.

10. Nuisance 🔑3(8).

Hospital constructed and maintained for treatment of contagious and infectious diseases is not "nuisance per se."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance per se.]

11. Nuisance 🔑4.

Erection of isolation hospital will not be restrained as nuisance on mere fear of danger of infection to surrounding premises.

12. Nuisance 🔑33.

Evidence as to danger of infection *held* insufficient to support finding that isolation hospital in residential district would constitute private nuisance.

13. Municipal corporations 🔑601.

Municipality has right to amend its zoning ordinance as new and changing conditions warrant and require such revision.

14. Municipal corporations 🔑601.

Erection of hospital will not be enjoined as violating zoning ordinance prohibiting erection of hospitals, which was repealed by ordinance fixing location of hospital.

15. Municipal corporations 🔑996—City will not be restrained from using property purchased for waterworks for location of hospital.

City will not be restrained from using property for isolation hospital because purchased with part of proceeds from bond issue for acquisition of water system under Pasadena City Charter, art. 1, § 3, where purchase price of property was transferred to waterworks bond fund.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Separate suits by John E. Jardine, by the Pasadena Orange Growers' Association, by Morris Cohn and others, and by E. Fleur and others, against the City of Pasadena and others. Decree for plaintiffs, and defendants appeal. Reversed.

James H. Howard and R. R. Hess, both of Pasadena, for appellants.

Gibson, Dunn & Crutcher, O'Melveny, Millikin, Tuller & Macneil, Walter K. Tuller, and Norman S. Sterry, all of Los Angeles. for respondents.

LENNON, J. A rehearing was granted in this case, in response to a petition in which it was strenuously urged by respondents that the action of a legislative body was conclusive only with reference to public rights, and that when a question of private rights was involved jurisdiction was vested in the trial court in the first instance to determine whether private rights had been invaded, and the finding of the trial court, if supported by evidence, was controlling upon the appellate court.

Two fundamental questions were involved in the present controversy: (1) Did the establishment of the isolation hospital constitute a private nuisance with reference to respondents? and (2) Was the action of the legislative body in fixing and establishing a certain block of land as a suitable site for the construction and maintenance of an isolation hospital clearly and palpably arbitrary and unreasonable?

In the former opinion this court held in effect that, if the appellate court upon a review of the record found evidence which warranted a finding that the action of the legislative body was not arbitrary and unreasonable, the action of the legislative body must be upheld.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1, 2] Respondents, however, insist that the objection that the isolation hospital constituted a private nuisance raised a question of private rights, that private rights could only be determined by a judicial tribunal, and that the finding of the trial court relative to those private rights, if supported by the evidence, is determinative of the entire controversy. Respondents in this behalf also invoke the aid of the Fourteenth Amendment. In short, it is respondents' contention that the private rights of the individuals involved are paramount and controlling in the instant case. With this contention we cannot agree.

[3] It must be conceded that the establishment and maintenance of the isolation hospital was an exercise of the police power of the city. And in this respect the police power of the city is as broad as that possessed by the Legislature itself, subject only to the control of general laws. Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 226, 230, 73 P. 987. Almost invariably in cases of the exercise of the police power both public and private rights are involved. And it is almost inevitable, since the very foundation of the police power is the control of private interests for the public welfare, that the public rights will come into conflict with private rights. As public rights are enlarged, private rights are diminished; as private rights are enlarged, public rights are diminished. The mere fact, therefore, that private rights are involved cannot make these rights the controlling factor in the controversy between public benefit and private rights. If private rights were the controlling factor the result would be that almost every attempted exercise of the police power would be rendered nugatory by the fact that private rights had been interfered with. For instance, the exercise of the police power as exemplified by zoning ordinances sometimes depreciates the value of private property, not only in a monetary sense, but in the sense that it deprives the owner of his freedom to use his property as he sees fit. Yet it cannot be said that, in a case involving the validity of a zoning ordinance, the question of private rights is controlling. In that case the determinative factor is whether or not the regulations prescribed by the zoning ordinances are or are not reasonable and for the promotion of the general welfare.

It is of course unnecessary to say that the cases cited from other jurisdictions are of value only by reason of their persuasive force, and need not therefore be distinguished and discussed. The case of Bloom v. City and County of San Francisco, 64 Cal. 503, 3 P. 129, involved the defective and improper sewerage of a city and county hospital. The decision that the city and county of San Francisco was liable for damages has, of course, no application to the instant case, where the nuisance complained of is not the improper conduct of the isolation hospital, but its establishment and maintenance at all on the site chosen. The cases of Sullivan v. Royer, 72 Cal. 248, 13 P. 655, 1 Am. St. Rep. 51, and Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A. L. R. 343, involved the effect of a grant by the city of a permission to an individual to do a certain act or to carry on a certain business. In these cases it was properly held that the permission by the city did not carry with it the authorization to the individual to commit a nuisance. Of course, rules applicable to public grants of privileges to private parties can have no pertinency to a case where the government itself seeks by appropriate means to accomplish for the public benefit any of the objects confided to its jurisdiction. 2 Wood on Nuisance (3d Ed.) p. 1097. The case of Fisher v. Zumwalt, 128 Cal. 493, 61 P. 82, involved the distinction between a public and a private nuisance, as did also the case of Lind v. City of San Luis Obispo, 109 Cal. 340, 42 P. 437. In the case of People v. City of Reedley, 66 Cal. App. 409, 226 P. 408, the appellate court found that there was sufficient evidence to sustain the finding of the trial court that there was no nuisance, and hence anything which was said relative to the power of the state board of health to authorize a nuisance was not essential to the decision. Moreover, the discussion does not have any relevancy to the exercise of the police power of a municipality. It concerns itself with the effect of a certificate by a state board of health, and held that the securing of a permit by the city to dispose of its sewage in a certain way was merely the fulfilling of a prerequisite prescribed by the board of health, and that the granting of the certificate did not grant immunity to the city, if in fact that method of disposal consituted a nuisance. In short, the requirement of a certificate from the state board of health was in effect a regulation of the conduct of the city for the better health protection of the citizens of the state, and it was held, and properly so, that it was such a regulation and was not intended as an authorization for conduct which, despite the regulation, would be harmful to others. It is apparent from a reading of the decision that the question of sanitation involved was already covered by state regulations, and no question of the right of the city under its police power was raised or decided. Indeed, in none of the cases cited by respondents was the question of the police power of the city raised or discussed. They are all, therefore, distinguishable from the instant case upon that one fact alone.

We are satisfied in the main with the opinion as originally rendered, which, with certain amendments, reads as follows:

"These are appeals from separate judgments rendered and entered in four separate and distinct actions. The several actions were, for the purposes of trial, consolidated by stipulation of the parties, and the appeals come to this court upon a single record. The facts are substantially the same in each of the four cases. The city of Pasadena, by Ordinance No. 2176, fixed and established a certain block of land owned by and situate in said city as a suitable site for the construction and maintenance of an isolation hospital under the direction of the health department of said city. The several suits were instituted by the several plaintiffs, who were the owners of property adjacent to the block selected as the site for and upon which the isolation hospital was being erected, to enjoin the construction and maintenance of said hospital.

"The grounds upon which the plaintiffs sought an injunction are these: (1) The location and maintenance of the isolation hospital in the particular place selected by the city constitutes a nuisance by reason of the fact that (a) it endangers the health, comfort, and well being of the plaintiffs and their families and damages their property; and (b) there is a danger of infection to the underground water supply of the property owners in the vicinity of the hospital by reason of the presence of the hospital and the system of sewage proposed to be used in connection therewith; (2) the city is estopped to maintain an isolation hospital in a district designated by a zoning ordinance of the city as a residence district, which ordinance expressly prohibits the erection of hospitals or sanitariums within such residence district which embraces the site of the isolation hospital; and (3) the property, having been purchased with part of the proceeds of a bond issue voted for the purpose of acquiring and maintaining a waterworks system, cannot be used as the site of an isolation hospital by the city nor for any purpose other than that for which it was originally acquired.

"Judgments were entered in favor of the plaintiffs, declaring the maintenance of said isolation hospital to be a nuisance, and permanently enjoining the defendants from maintaining or using the building erected upon the site in question as an isolation hospital. From those judgments the defendants appeal."

The selection of the hospital site was a matter within the legislative discretion of the board of directors of the city, and, unless in the exercise of that discretion the board acted arbitrarily and unreasonably, their action ought not to be enjoined.

[4] "The location, establishment, and maintenance of such an institution is clearly within the scope of the police power of the city. General police authority to protect the public health is conferred upon the city by section 11 of article 11 of the state Constitution, which provides that 'any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' In addition, the charter of the city of Pasadena contains the following provision: 'The said city * * * shall have the power * * * to erect, construct and maintain * * * hospitals.' Subdivision 6, § 3, art. 1, of the Charter (Stats. 1901, p. 888). The city is also given charter powers 'to make and enforce all such local, police, sanitary and other regulations as are deemed expedient to maintain the public peace, protect property, promote the public morals, and preserve the health of the inhabitants of the city.' Subdivision 20, § 3, art. 1, of the Charter (Stats. 1901, p. 890).

[5] "The function of carrying this municipal power into effect is conferred upon the legislative body of the city. Thus the legislative body is vested with authority 'to make and pass all ordinances, resolutions and orders not repugnant to the Constitution of the United States, or of the state of California, or to the provisions of this charter, necessary for the municipal government and management of the affairs of the city, for the execution of the powers vested in the city and for carrying into effect the provisions of this charter.' Section 10, art. 8, of the Charter (Stats. 1901, p. 904). It is also given authority 'to pass ordinances upon any other subject of municipal control, or to carry into force or effect any other powers of the municipality.' Section 10, art. 8, of the Charter (Stats. 1901, p. 904).

[6] "The legislative body of the city of Pasadena, in adopting the ordinance fixing the location of the isolation hospital, was exercising its legislative function. Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 P. 977; Nickerson v. San Bernardino, 179 Cal. 518, 177 P. 465; Hill v. Board of Supervisors, 176 Cal. 84, 167 P. 514.

[7, 8] "Every intendment is to be indulged in, and all doubts resolved in favor of the validity of its action." The legislative determination of the facts which warrant the action of the legislative body will not be set aside or disregarded by the court unless the legislative discretion is clearly and palpably wrong and such appears to be and is found to be the fact from the evidence educed before the trial court. In re Miller, 162 Cal. 687, 124 P. 427; Stockton v. Stockton, 41 Cal. 147; Ex parte Tuttle, 91 Cal. 589, 27 P. 933; In re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; In re King, 157 Cal. 161, 106 P. 578.

[9] "There is in the record before us ample evidence to sustain the express finding of the legislative body as set forth in the ordinance that the property in controversy is located in an area adapted to use as a site of an isolation hospital. And such evidence also sustains the finding, necessarily implied from the very fact of the enactment of the ordinance, that the health of the persons living in the immediate vicinity will not

be endangered by the proper maintenance of the isolation hospital in the particular locality in question, and that there is no danger of infection of the underground water supply from the presence of the hospital and the system of sewage employed therewith. The evidence shows that the hospital is located in a sparsely settled section of the city, upon a tract of land containing 6.225 acres, entirely owned by the city in fee and entirely surrounded by public highways. A substantial fence has been placed about the building. There is no dispute but that the hospital is being constructed in accordance with the best and most modern conception of the practical application of sanitary science and fully and efficiently equipped for the proper conduct of a modern hospital. There is in the evidence the testimony of medical experts to the effect that any possible danger of contagion arising from the presence of an isolation hospital in a neighborhood may be entirely neutralized and effectively overcome by the application of modern preventive medical measures. Thus, while the evidence shows that certain dangers exist, it also shows, without conflict, that means have been devised to meet and overcome them.

[10] "That the possibility of the danger of contagion has been overcome by modern preventive medical measures is demonstrated by the well-known fact that isolation wards are commonly maintained in hospitals, surrounded by large numbers of people, patients, visitors, and nurses. A hospital constructed and maintained for the treatment of contagious and infectious diseases is not per se a nuisance. Board of Health v. Inhabitants of City of Trenton (N. J. Ch.) 63 A. 897. In San Diego Tuberculosis Association v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A. L. R. 513, this court disposing of the contention that a hospital, no matter how well conducted, is a menace to the public peace, morals, health, and comfort, said: 'A well-conducted, modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent institutions. * * * There is not the slightest danger of the spread of disease from it and this is the only possible ground on which objection could be made to it.'

"The determination of the legislative body necessarily implied in the enactment of the ordinance that there was no danger of an infection of the water supply of the neighborhood is likewise supported by evidence in the record before us. It is true that the evidence shows that the hospital site is somewhat below the level of the nearest municipal sewer, and that the building is sewered by means of draining into a concrete sump with a capacity of about 320 gallons from which it is raised to a street sewer, with a maximum lift of 9 feet, by means of an automatic bilge pump. There is evidence, however, to the effect that the sump is equipped with an alarm bell, which would warn of the presence of water above the level to which it is supposed to be kept by the automatic pump, and is capped with a tight cover so that water under pressure could not escape from it, but would overflow the plumbing in the hospital, thereby indicating that the pump was not working properly. There is also evidence to the effect that the equipment is thoroughly modern and adequate to effectively perform the work required of it." The implied finding of the legislative body that, under modern conditions and with care and diligence used in the maintenance of the isolation hospital and all of its appurtenances, there will be no danger of the spreading of contagious and infectious diseases ought not, therefore, to be disregarded.

[11] "It is true that there exists a strong prejudice on the part of some people against living in the vicinity of such an institution, and as a consequence the value of the land for residential purposes will necessarily be depreciated. But if there be no actual danger of infection, as has been determined by the board of directors of the city, the mere fear of such a danger will not suffice to warrant the issuance of an injunction. Dean v. Powell Undertaking Co., 55 Cal. App. 545, 203 P. 1015; Cook v. City of Fall River, 239 Mass. 90, 131 N. E. 346, 18 A. L. R. 119.

"It may be that, upon complaint and proof by the plaintiffs that the isolation hospital and its appurtenances are not being properly maintained and operated, its improper maintenance may be enjoined. But the complaints in the several suits here before us are directed against the isolation hospital merely as such, and the question of its improper maintenance is not, therefore, involved in these proceedings."

[12] At this point it may be noted that the findings of the trial court to the effect that the maintenance and operation of the isolation hospital would constitute a nuisance rests upon two classes of evidence: First, upon the evidence of real estate agents and others to the effect that the establishment and maintenance of said hospital upon the chosen site will cause a depreciation in property values of the plaintiffs and others in that vicinity; second, upon the testimony of medical experts that in their opinion there will be danger of the spread of contagious and infectious diseases to residents in the neighborhood thereof such as the danger of infection from insects such as flies, fleas, or mosquitos, or from animals such as rats or other rodents, cats, dogs, or birds, or from children or feeble-minded people wandering into the hospital or into dangerous proximity thereto or from escaping patients, or from possible infection of the clothing of nurses, attendants, or from unknown carriers of disease. Concerning this latter class of evi-

dence it is in our opinion entirely speculative, and amounts to no more than the conclusion of these opinion witnesses that every hospital in which any infectious disorders are treated, regardless of the perfection of its construction and operation in accordance with the most up-to-date principles, methods, appliances, and preventatives, constitutes a menace to public health and a nuisance per se in its relation to dwellers in the vicinity of its proposed location. We cannot subscribe to such a doctrine, since to do so would result in the exclusion of all hospitals treating infectious diseases from cities and other places in the near vicinity of private abode, a conclusion obviously in conflict with the clearest mandates of public policy and the exercise of the police power in relation to public health. In addition it may be noted that the specific reasons given by these expert witnesses for their conclusions, viz. the possible spread of infection through insects, animals, heedless persons, or the infected clothing of nurses and others engaged in the operation of the hospital when coming into contact with the outside world, are reasons which, even if cogent, have no greater significance in their application to those residing in the vicinity of the hospital than they would have to the public at large, and hence would not suffice to constitute such special elements of injury as would serve to create a private nuisance for which these plaintiffs would be entitled to relief in this form of action. As to the first above-stated form of proof, viz. evidence of reduced property valuations, such evidence would not of itself, as already above stated, supply sufficient basis for injunctive relief.

[13, 14] "There can be no question but that a municipality has the right to amend its zoning ordinance from time to time as new and changing conditions warrant and require such revision. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479. To hold otherwise would be to fix cities' development in the mould of the first zoning ordinances enacted. In the instant cases Ordinance No. 2176, fixing the location of the isolation hospital by express terms, repeals all ordinances and parts of ordinances inconsistent therewith. That portion of Ordinance No. 2176 which fixes the location of the isolation hospital in the particular district, is necessarily inconsistent with the provisions of that section of the zoning ordinance (section 8, subd. 3) which prohibits the erection of hospitals in such district, and such section of the zoning ordinance is thereby repealed by the enactment of Ordinance No. 2176. That section of the zoning ordinance prohibiting the erection of the hospitals and sanitariums in the particular district having been repealed, the erection of an isolation hospital may not be enjoined upon the ground that it is in violation of the zoning ordinance.

[15] "The fact that the property in controversy was purchased with part of the proceeds of a bond issue voted for the purpose of acquiring and constructing a waterworks and system to supply water to said city and its inhabitants does not give to the plaintiffs, as taxpayers, the right to restrain the city from using the property in question for any purpose other than water development. The plaintiffs argue that, if property be purchased with the proceeds of bonds voted for a particular purpose, the property so purchased would not be available to the city for any other use. The record shows that the bonds in question were voted 'for the purpose of acquiring and constructing a waterworks and system to supply water to the city' and that the electors were not called upon to authorize the purchase of the particular property which the city subsequently purchased, but in general terms authorized the incurring of the indebtedness for the purpose of acquiring and constructing a waterworks and system to supply water to said city and its inhabitants. The officers of the city sold the bonds, and with the proceeds bought the properties of the Pasadena Land & Water Company, which included the property in controversy. By Ordinance No. 2176. the board of directors of the city transferred the particular property in controversy to the health department as a hospital site, at the same time transferring, from the general fund of the city to the waterworks bond fund, the amount of the market value of the land transferred to be used for purposes for which said bond fund might lawfully be expended. The transfer to the bond fund of a sum of money equal to the market value of the land in controversy, which the record shows was found by the board to be useless for the purpose for which it was first purchased. subserved the purpose for which the bonds were voted in the first instance. Inasmuch as the bonds were not voted for the purchase of this particular property, it was well within the general power of the city to control and dispose of it as its legislative body might deem best. Charter, § 3, art. 1 (Stats. 1901, p. 888).

"It will not be necessary for us to discuss in detail other contentions incidentally made, which are necessarily involved in the main contentions which we have already discussed and disposed of."

The judgment is reversed.

We concur; WASTE, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

199 Cal. 1

PEOPLE v. DILLON. (Cr. 2796.)

(Supreme Court of California. June 28, 1926. Rehearing Denied July 26, 1926.)

1. Municipal corporations 🔑174—Offense of city commissioner of finance in paying for private purchases of others from city funds held under Code provision denouncing unauthorized use of public money (Pen. Code, §§ 424, 426, 503, 504; Const. art. 11, § 17).

Offense of city commissioner of finance in paying for personal purchases of others with city funds *held* governed by Pen. Code, § 424, passed in obedience to Const. art. 11, § 17, denouncing unauthorized use of public money as defined in section 426, and is not ruled by sections 503, 504, relating to embezzlement, notwithstanding accused might have been proceeded against under latter statutes.

2. Criminal law 🔑29.

That accused might have been prosecuted under another statute is no defense.

3. Constitutional law 🔑70(3).

Province of regulating quantum and kind of proof required to establish guilt in any class of crime is legislative prerogative, and courts may not interfere except in extreme cases.

4. Officers 🔑121.

In prosecution of public officer under Pen. Code, § 424, for malfeasance in use of public money, proof of fraudulent intent is unnecessary.

5. Embezzlement 🔑2.

Legislature has right to provide that embezzlement of public moneys is offense, even though accused have no fraudulent intent.

6. Criminal law 🔑21.

In view of Pen. Code, §§ 7, 20, proof of intent to violate law is not essential to conviction; intention to commit forbidden act being sufficient.

7. Officers 🔑121.

Pen. Code, § 424, making wrongful appropriation or use of public moneys a crime, without proof of fraudulent intent, is proper exercise of police power.

8. Officers 🔑111.

Custodians of public moneys or funds must hold and keep them inviolate and disburse them only in strict compliance with law.

9. Officers 🔑122.

In prosecution under Pen. Code, § 424, for malfeasance in use of public funds, refusal of instruction that state must prove existence of intent to appropriate moneys to unauthorized use *held* proper.

10. Constitutional law 🔑70(3).

Wisdom of statute is not judicial question.

In Bank.

Appeal from Superior Court, Fresno County; Edward I. Butler, Judge.

Charles F. Dillon was convicted of malfeasance in use of public funds while occupying office of Commissioner of Finance of City of Fresno, and he appeals. Affirmed.

Carl E. Lindsay, Matthew Conley, and Lindsay & Conley, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

SEAWELL, J. Appellant, commissioner of finance of the city of Fresno, this state and as such officer charged by the laws of the state and by the charter provisions of said city of Fresno with the recipt, safe-keeping, transfer, and disbursement of the public funds of said city, was convicted upon 11 counts of an indictment which contained a total of 33 counts charging him with malfeasance in the use of public funds while he was occupying said office. The gravamen of the said 11 counts upon which convictions were had, and which constitute the basis of this appeal, are identical except as to dates, persons, and amounts, and, in substance, allege that said officer, by virtue of his office as commissioner of finance, did, without authority of law, appropriate sums of public moneys to the use of the several persons named therein, contrary to the law prescribing his duties as such public officer.

By virtue of his office as commissioner of finance, appellant also performed the duties of city purchasing agent for said city of Fresno, and as such public officer was able to and did obtain substantial discounts on all contracts of purchases of materials or supplies made by him for the use and benefit of said city in the course of his official duties. Appellant, making use of the advantages that the prestige of the office of city purchasing agent afforded, made a number of purchases extending over a period of 2 years of automobile tires and automobile accessories for the private use and benefit of a number of the city's officers and employees and for two other persons who were not in any way connected with the city government. In one instance a camping outfit was purchased. The persons thus favored were enabled to purchase for their private use, through the agency of said official, supplies and materials at prices apparently available only to the city, and which were lower than the prices demanded of persons not privileged to enjoy the favor of said purchasing agent. Usually, it appears, the sales and deliveries of goods were made directly by the seller to the purchaser. Requisitions were subsequently drawn by appellant as finance commissioner, and the amount of the article purchased was afterwards paid to the seller by warrants drawn on the city treasury, which were drawn and signed by the appellant in his official capacity. In other words, public funds were used in making payments for goods that were purchased for admittedly private uses. The city was reimbursed through appellant's office either by cash payments or by checks of the purchasers made payable to the city or to the appellant. Payments, so far as shown by the transactions before us in the instant case, in some instances were made forthwith upon delivery of the goods, in others within a period of 30 days or more thereafter, while in one case no reimbursement had been made to the city at the time of the commencement of the trial.

The indictment, which is in the language of the Code section defining the offense, was framed upon the authority of section 424, subds. 1 and 2, Penal Code, which provide as follows:

> "Sec. 424. Embezzlement and falsification of accounts by public officers. Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who either:
>
> "1. *Without authority of law*, appropriates the same, or any portion thereof, to his own use, or to the *use of another;* or,
>
> "2. Loans the same or any portion thereof; makes any profit out of, or uses the same for *any purpose not authorized by law;* * * *
>
> "Is punishable by imprisonment in the state prison for not less than one or more than ten years, and is disqualified from holding any office in this state." (Italics supplied.)

The other subdivisions of said section—3, 4, 5, 6, and 7—provide, in the order of enumeration, that each officer who knowingly keeps any false account or makes any false entry or erasures in any account of or relating to the same, or fraudulently alters, falsifies, conceals, destroys, or obliterates any such account, or willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority, or willfully omits to transfer the same, when such transfer is required by law, or willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same, is likewise guilty of a felony, and is punishable as prescribed by the general penal clause of said section heretofore set out.

The section as it now exists is the result of an amendment approved March 3, 1905, and it is the latest act prescribing a penalty for the violation of the statutory duties of officers charged with the receipt, safe-keeping, transfer, or disbursement of public moneys.

It is clear that the said section has to do solely with the protection and safe-keeping of public moneys as defined by section 426, Penal Code, and the duties of the public officer charged with its custody or control and with *no other kind of public property.* The phrase "public moneys" includes "all bonds and evidence of indebtedness, and all moneys belonging to the state, or any city * * * and all moneys, bonds, and evidences of indebtedness received or held by state, county, district, city, or town officers in their official capacity." Section 426, supra.

[1] Section 17, art. 11, state Constitution, adopted in 1879, provides:

> "The making of profit out of county, city, town, or other public money, or *using the same for any purpose not authorized by law*, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law." (Italics supplied.)

It will be observed that subdivision 2, § 424, Penal Code, responds to the mandate of the Constitution in substantially the same language used in the Constitution, and there can be no doubt but that it was re-enacted in obedience to said constitutional mandate. Neither the same nor substantially the same language used with reference to the single subject of the duties of an officer charged with the receipt, safe-keeping, transfer, and disbursement of public moneys appears in any other section of the Penal Code. Section 424 was re-enacted subsequent to the adoption of the Constitution of 1879. We make this early observation in refutation of the contention made by appellant to the effect that it was not the legislative intent that section 424 should be applied to the facts of the instant case in the limited and restricted sense which the letter of its text would seem to compel, but that the case is ruled by sections 503 and 504, Penal Code, the first of which defines in general terms embezzlement to be the "fraudulent appropriation of property by a person to whom it has been intrusted," while the latter, section 504, provides that every officer of this state, or of any county, city, or other municipal corporation, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation, public or private, who *fraudulently* appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, is guilty of embezzlement.

[2] Conceding that a public officer who embezzles public moneys that have come into his possession by virtue of his office may properly be proceeded against as prescribed by section 504, supra, it by no means follows that said section occupies the entire legislative field with respect to the safe-keeping of public moneys and the duties of public officers with reference thereto. It is certain that the indictment was drawn under section 424, and no attempt was made to conform with the requirements of section 504. If the conviction is sustainable under the former section, it would not be rendered void by reason of the existence of said section 504. "It is no defense under one statute that the defendant might

have been prosecuted under another." Bishop, New Criminal Procedure, § 612, subd. 4.

[3-7] Section 504 merely defines embezzlement, and fixes the punishment of both public and private corporate officers who may commit the offense as therein described. It does not assume to regulate the official conduct of public officers in charge of the public revenue, nor does it command or forbid the doing of the many acts specially mentioned in section 424, supra, as safeguards of the public moneys. On the other hand, the subject-matter and the language of section 424 clearly indicate that the legislative mind was intently concerned with the single, specific subject of the safekeeping and protection of public moneys and the duties of public officers in charge of the same. No language is to be found in the act which supports the contention that a public officer who uses public moneys for a "purpose not authorized by law," and which is designated a felony, and not embezzlement, cannot be prosecuted under the provisions of section 424, Penal Code, a section enacted in obedience to the express mandate of the Constitution, nor is there any room for the claim that the prosecution must fail because, forsooth, there is to be found in another part of the Code a section that is less specific and direct in its application to the particular subject of legislation. The province of regulating the quantum and kind of proof that shall be required to establish guilt in any class or grade of crime is a legislative prerogative, pure and simple, and courts may not interfere with this right except in extreme cases. No one will deny the power or right of the Legislature to provide that embezzlement of public moneys is committed by a public officer when he uses public funds in a manner forbidden by law, even though he may have no fraudulent intent when he does so. To render a person guilty of crime it is not essential to a conviction that the proof should show such person to have entertained any intent to violate law. Pen. Code, § 7; People v. O'Brien, 96 Cal. 171, 31 P. 45. It is sufficient that he intentionally committed the forbidden act. Statutes which come clearly within the exercise of the police power of the state, of which section 424 is a striking example, fully illustrate the rule. People v. McClennegen, 195 Cal. 445, 234 P. 91, and cited cases. Section 20, Penal Code, is too clear to require juridical support. It provides:

> "In every crime or public offense there must exist a union, or joint operation of *act* and *intent*, or criminal negligence." (Italics supplied.)

The only construction that may be placed upon the above-quoted section is that there must be an intent to do the forbidden thing or commit the interdicted act. It furnishes no basis for the claim that there must exist in the mind of the transgressor a specific purpose or intent to violate law. If it were so, innumerable statutes would be rendered ineffectual. The true rule was announced a number of years ago in People v. O'Brien, supra. Denis O'Brien was named as grantee in a conveyance of a certain tract of land. After the execution and delivery of the deed to him, he erased his name and inserted the name of his wife. In this form the deed was at his request recorded in the office of the county recorder. Thereafter he called upon the county recorder before whom the deed had been acknowledged, informed him that he had erased his own name and substituted the name of his wife as grantee, and requested the recorder to change the record so that it would speak the truth with reference to the transaction. The grantor named in the deed and Mrs. O'Brien having consented to the making of the change, the recorder, as requested by O'Brien, changed the record by erasing the name of the wife, Mary O'Brien, and inserting the name of the husband, Denis O'Brien. The defendant, Denis O'Brien, was convicted of the crime of altering the public record. He was prosecuted under the provisions of sections 113 and 114, Penal Code, which make it a crime for a public officer, or a person not a public officer, to willfully alter a public record. Fraudulent intent is not specifically made an ingredient of the offense. In that case, as in the instant case, it was urged that it was necessary in making out the offense to prove a fraudulent intent. After holding that ignorance of the law, upon rules that rest upon public necessity, the welfare of society, and the safety of the state, does not constitute a legal excuse for the commission of a criminal act, the decision proceeds to discuss fraudulent intent as an element of crime. We quote:

> "It is a familiar rule that to constitute crime there must be a union of act and intent; but our Code provides that 'the word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.' Pen. Code, § 7. In Halsted v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, this subject was carefully considered and elaborately discussed. After reviewing the authorities, the court reached the conclusion stated in the syllabus, viz. that, 'when an act, in general terms, is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered. The question appertains to the department of statutory construction, and, to introduce into the act the requisite of a guilty mind, it must appear that such was the intent of the lawmaker.' In State v. McBrayer, 98 N. C. 623 [2 S. E. 756] the court said: 'It is a mistaken notion that positive, willful intent to violate the criminal law is an essential ingredient in every criminal offense, and that where there is an absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids

an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation.' [Citing cases.] * * *

"It has been held that one who marries a second time under an honest but erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. 2 Wharton's Crim. Ev. (8th Ed.) § 1695a. The same principle is applied to many cases, such as selling intoxicating liquors to minors, abducting girls under a certain age, usurping an office under the belief that the usurper was truly elected, illegal voting under the belief that the voter is a qualified elector, publishing a libel in ignorance of its contents, storing gunpowder, and the like. 1 Wharton's Crim. Law, § 88; 2 Wharton's Crim. Law, § 1584; Hill v. State, 62 Ala. 170. * * *

"Sections 7, 112, and 113 of the Penal Code, when read together, clearly establish the proposition that it was not necessary in making out the offense to prove any fraudulent intention on the part of the defendant."

The changing of a record to make it conform with the fact, or to speak the truth, is surely less reprehensible than is the conduct of a public officer who, in the face of the express provisions of the law, withdraws public funds from their lawful place of deposit and uses them or permits them to be used in the transaction of private business by others and in open violation of law.

That it was not the purpose of the framers of section 424, supra, to incorporate or adopt, by implication or otherwise, the elements essential to constitute embezzlement as defined by section 504, is made manifest by the context of section 424. A number of the acts therein described as felonies do not possess a single element of the statutory definition of embezzlement. In fact, considered as unrelated acts, many of them bear not the slightest analogy to acts ordinarily regarded as elements essential to constitute embezzlement. The greater number of the acts therein denounced as felonies are not punishable under the provisions of said section 504, and, if appellant's argument is sound, it is no offense for a public officer to use public moneys for private purposes ad libitum if there exists no fraudulent intent. In the face of the many statutes enacted for protecting and safeguarding the revenue of the state and the declared policy of the whole scheme of legislation such a contention is rather appalling.

To again state the situation more succinctly, section 424 has to do solely with the receipt, safe-guarding, transfer, and disbursement of *public moneys* by official custodians Its care is for but one single subject, to wit, *public moneys*, while section 504 defines embezzlement generally as it relates to private officers as well as to public officers and provides for the punishment of officers who embezzle *any kind of property* which may have come into the possession of said officers, whether acting in a public or private capacity. Said sections are arranged and captioned under different titles in the Code. Section 424 appears in part 1, tit. 12, entitled, "Crimes against the Revenue and Property of this State," while section 504 is found in part 1, tit. 13, c. 6, under the title "Embezzlement."

People v. Church, 3 N. Y. Cr. R. 57, was a case that presented a striking resemblance in many important features to the instant case. On principle it cannot be distinguished. It is pertinent both as to offenses made indictable under two separate statutes and also as to the question of fraudulent intent. Church was the custodian of the public funds of the city of Troy. He was convicted on an indictment which charged him with having fraudulently and feloniously appropriated to his own use certain United States Treasury notes, the property of said city of Troy, with the intent to convert them to his own use. Upon disposing of the first point, which is not material to any issue before us, the case tersely disposes of the two main points made by appellant which were referable to statutes of New York very similar, in substance, to the Code sections under consideration:

"With respect to the other points, I think the district attorney might have framed the indictment under either section 470 or section 528. An illegal act frequently offends against the provisions of two or more statutes, and a prosecution under any one of them is proper. Commonwealth v. McConnell, 11 Gray (Mass.) 204; Commonwealth v. Trickey, 13 Allen (Mass.) 559; 1 Bish. on Crim. Law [7th Ed.] § 778. There is, however, a marked distinction between the two sections. Under section 528, the important element of the offense consists in 'the intent to deprive or defraud the true owner of his property' which is distinctively alleged in the pending indictment. Section 470 does not require any such intent to exist in the mind of the defaulting official when he is appropriating public moneys intrusted to him. More must be proven against the defendant to convict him under the pending indictment, than if on trial under section 470."

Admittedly there is a specific class of offenses created by statutes which make the intent to accomplish an evil design or purpose an essential ingredient of the offense; just as essential as the act itself. In that class of crimes the act and specific intent, operating together, constitute the crime, and it is not complete if the intent is absent. An assault with a deadly weapon with intent to commit murder furnishes a typical illustration of this class of crimes. It is not only necessary to prove the assault but also the specific intent with which the assault is made. So with the crime of embezzlement, except in that class of offenses where the statute defines certain interdicted acts and declares them per se to constitute embezzlement, as was done by the Legislature of 1851 (Hittell's General Laws, 1850–64, p. 698) with reference to this identical subject. In addition to showing the appropriation of another's property the specific intent to appropriate it to one's self with a fraudulent intent is essential to constitute the crime. But the statute in the instant case does not make fraud an ingredient of the offense. There is nothing contained in the body of the act to show that it was the purpose of the Legislature to require a criminal intent in the doing of the things therein denounced as a crime. To justify a court in introducing into an act a requisite not found therein, it must affirmatively appear that such was the intent of the Legislature. People v. O'Brien, supra. No such showing can be made in view of the Code section itself and the history of antecedent and present legislation on the subject.

[8] The safe-keeping of public moneys has, from the first, been safeguarded and hedged in by legislation most strict and severe in its exactitudes. It has continuously been the policy of the law that the custodians of public moneys or funds should hold and keep them inviolate and use or disburse them only in strict compliance with the law. The public treasury or depository of public funds was created solely as an agency for the receipt and disbursement of public funds with reference to public business and not as a place of exchange for the transaction of private business in the sense that banks and other commercial institutions are created or chartered. A brief résumé of the several acts of the Legislature defining the duties and prescribing the penalties for violations thereof will suffice to make clear the legislative policy with respect to public moneys. As early as 1851 the Legislature provided that, if any public officer—

> "charged with the safe-keeping, transfer or disbursement of public moneys, shall convert to his own use in any way whatever or shall use by way of *investment* in *any kind of property or merchandise*, or shall loan with or without interest any portion of the public moneys, bonds, * * * every such act shall be *deemed* and *adjudged* to be an *embezzlement* of so much of said moneys as shall be thus taken, * * * which is hereby declared to be felony." (Italics supplied.) Hittell's General Laws, 1850–64, p. 698.

This was the first act to specifically prohibit the use of public money for private uses. It will be noted that to loan or use the public moneys in violation of the act was made per se embezzlement, a felony. Nothing further than the use of the moneys in violation of the act was required to be proved. By an act entitled "An act to provide for the better keeping, protection and disbursement of public moneys," Approved March 24, 1863 (Stats. 1863, p. 97), it was provided that it should be the duty of every public officer, intrusted with the custody and disbursement of public moneys, to keep and disburse in coin so much of said moneys as he shall have received in coin and in paper currency so much thereof as he shall have received in said currency. Such officer was required to keep all moneys in his custody or under his control in *his own possession*. He was forbidden to place the same or any part thereof in the possession of any bank or banker, or any person or persons whatsoever, to be used by them for any purpose whatever for their own benefit or for the benefit of any other person or persons. Said officer was forbidden and prohibited from loaning, borrowing, or in any manner using said public moneys or permitting the use thereof by any other person for any purpose whatever, except as provided by the laws of the state. Said officer was prohibited from changing or converting public money, or any part thereof, from coin into currency or from paper currency into any other paper currency or coin. The only method by which public moneys could be placed without the possession of the custodian was by making a special deposit of the same with a bank.

Upon the adoption of the Codes in 1872, the Penal Code was arranged in the following order:

> "Title XII.
>
> "Of crimes against the revenue and property of this state."

In the space intervening between the title above set out and the subject-matter of the section of the Code which contained the number of said section, there was printed in small type and arranged in numerical order the number of the several sections of the Code included within the title above designated. To illustrate:

> "Section 424. Embezzlement and falsification of accounts by public officers."

Directly under this section followed section 425, in form as follows:

> "Section 425. Officers neglecting to pay over public moneys."

The other sections contained within the title followed with brief references made to each subsequent section as above indicated. This arrangement, which brief reference to each section, was made for the sake of convenience and was no part of the title or subject-matter of the act. In 1880 section 424 was amended, and the language of the subhead used by the Code compilers as means of identification was adopted as the title to an amendment of the said Code section, as follows:

> "An act to amend section 424 of the Penal Code relating to embezzlement and falsification of accounts by public officers." Amends. to Codes 1880 (Penal) p. 39.

Said section was amended in 1905 (Stats. 1905, p. 53) for the last time in precisely the same manner. Thus it will be seen that the designation of the offense, to wit, "Embezzlement and falsification of accounts by public officers," which appears as the side heading to section 424 as it is printed in the Code at the present time, had its origin with the codifiers or compilers in 1872, but it was neither a part of the body of the Code section nor a part of the original act.

"Embezzlement" was defined by section 504, under title 13, c. 6. Following the same method of arrangement as was adopted in the preceding title defining "crimes against the revenue and property of this state," the following side head appears:

> "504. When officer, etc., of any association, guilty of embezzlement."

Thus it will be seen that no reference whatever was made in the subheading, which corresponds in arrangement with section 424, to embezzlement of public moneys or revenues by a public officer. But as above pointed out, the subheads or side heads were the result of compilations. In other words, the subhead to section 424 as inserted in the Code of 1872 was carried into the title of the amending acts of 1880 and 1905. This circumstance, however, is not sufficient to change the substance of the statute or overcome the manifest intent of the Legislature.

Whether a use of public moneys by a public officer in any manner not authorized by law becomes, in the purview of the statutes on the subject, ipso facto, embezzlement, is a question about which we express no opinion, as the case is ruled by section 424 as herein construed.

[9] Prejudicial error is assigned upon the ground that the court refused to give certain instructions requested by the defendant. Those instructions were based upon the theory that to justify the conviction of the defendant it was incumbent upon the prosecution to establish the existence in the mind of said defendant of an intent to appropriate said public moneys to a use not authorized by law. In our view of the law such instructions were properly refused.

Appellant has earnestly called to our attention unusual and exceptional instances in which the law, if interpreted as we construe it, would bring about a hard situation. He uses to illustrate his argument the case of a public officer who, in obedience to an invalid statute which he believes to be valid, in good faith, disburses money as therein directed and thereafter said statute is declared to be invalid. In such a case, it is argued, the public officer would be unjustly punished as a felon. Our answer to this argument is that no such case is before us. The officer in the instant case did not act in obedience to a law presumably valid, but he acted in disobedience and contrary to the statute as written. Besides, it is not necessary to here declare what the decision of this court might be in case an officer acted in good faith under color of the authority of law.

[10] It is not for us to consider the wisdom of the statute. It cannot be said to be invalid on the ground that it is unreasonable or harsh. An officer accepts his office with a knowledge of its duties, and in the instant case there was little excuse for the defendant to have been misled into the error he committed. Certainly there was no provision of law or rule of moral right that could have justified him in making the uses of public moneys which the evidence shows he made. The wisdom of the Legislature in requiring custodians of public moneys to hold them inviolate is both a protection to the public and to the officer, as it tends to remove from him the temptations that beset those who have large sums of money in their possession free from immediate demands.

The judgment and order appealed from are affirmed.

We concur; WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; FINLAYSON, Justice pro tem.

---

199 Cal. 21

BACON SERVICE CORPORATION v. HUSS.
(S. F. 11419.)

(Supreme Court of California. June 30, 1926.
Rehearing Denied July 30, 1926.)

1. Automobiles 🔑65—Motor Vehicle Transportation License Act held measure to provide revenue for public highways outside cities (St. 1923, p. 706).

Motor Vehicle Transportation License Act *held* designed to impose license tax on operators of motor vehicles for hire on highways to provide revenue to maintain and repair highways outside incorporated cities, and not to be police measure.

2. Automobiles 🔑73—Constitutional law 🔑205(3)—Statutes 🔑72—Exemption of operators transporting persons to and from public schools from motor vehicle license tax held valid (Motor Vehicle Transportation License Act [St. 1923, p. 706], § 1; Vehicle Act [St. 1923, p. 538] § 78; Const. art. 1, §§ 11, 21).

Exemption of operators of motor vehicles used solely to transport persons to and from public schools from Motor Vehicle Transportation License Act 1923, § 1, *held* reasonable when construed in light of Vehicle Act 1923, § 78, and not violative of Const. art. 1, § 21, prohibiting discriminatory grant of privileges, and section 11, requiring general laws to be uniform.

3. Automobiles 🔑73—Constitutional law 🔑205(3)—Statutes 🔑72—Exemption of persons transporting their own property or employees, and those not transporting for hire, from motor vehicle license tax, held valid (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 1; Const. art. 1, §§ 11, 21).

Exemption of operators of motor vehicles solely to transport their own property or employees or both, and persons transporting no persons or property for hire, from Motor Vehicle Transportation License Act 1923, § 1, *held* reasonable, under Const. art. 1, §§ 11, 21.

4. Automobiles 🔑73—Constitutional law 🔑205(3)—Statutes 🔑74(1).

Exemption of city vehicles not running over regular routes from Motor Vehicle Transportation License Act (St. 1923, p. 706) § 9, *held* reasonable, under Const. art. 1, §§ 11, 21.

5. Automobiles 🔑73—Constitutional law 🔑205(3)—Statutes 🔑74(1).

Exemption of sight-seeing motor vehicles from Motor Vehicle Transportation License Act (St. 1923, p. 706) § 9, *held* unreasonable, and hence invalid under Const. art. 1, §§ 11, 21.

6. Automobiles 🔑73—Constitutional law 🔑205(3)—Statutes 🔑72—Exemption of operators deriving percentage of gross receipts from mail contracts from motor vehicle license tax held invalid (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 10; Const. art. 1, §§ 11, 21).

Exemption of operators who derive percentage of their gross receipts from United States mail contracts from Motor Vehicle Transportation License Act 1923, § 10, *held* unreasonable, and hence invalid under Const. art. 1, §§ 11, 21.

7. Statutes 🔑64(1)—Entire act fails if unconstitutional portions are inseparable from balance thereof or their exclusion renders act inoperative as complete enactment.

Where unconstitutional portions of an act are so connected with the rest of act as to be inseparable therefrom or to render it inoperative as a complete legislative enactment, in event they are excluded, entire act fails.

8. Statutes 🔑64(1)—Valid portions of act will stand if completely operative with unconstitutional portions excluded and it was legislative intent to enact former regardless of latter.

Where an act is operative as a complete legislative enactment with unconstitutional portions excluded, and intent of Legislature was to enact valid portions irrespective of invalid portions, valid portions will be permitted to stand.

9. Statutes 🔑64(8)—Provision that if portion of act be held unconstitutional "decision shall not affect remaining portions" held mere evidence of legislative intent and not binding on court (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 11).

Provision that, if any portion of act be held unconstitutional, such decision shall not affect validity of remaining portions, Motor Vehicle Transportation License Act 1923, § 11, cannot bind court, but is deemed legislative declaration of intention that separable invalid portions should not destroy entire act.

10. Statutes 🔑64(8)—Provision that Legislature would have passed act, and each portion, irrespective of fact that any portion be declared unconstitutional, requires court to support legislative will as far as possible (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 11).

Provision that Legislature would have passed act, and each portion thereof, irrespective of fact that any portion be declared unconstitutional, in Motor Vehicle Transportation License Act 1923, § 11, requires court to support legislative will so far as possible.

11. Statutes 🔑64(1).

Where provisions of act are excluded because objectionable under Const. art. 1, § 11, requiring uniformity, act stands as if provisions had never been inserted.

12. Automobiles 🔑73—Provision that moneys collected from motor vehicle license tax shall be appropriated to state and to counties for highways held not unconstitutional as imposition of taxes by Legislature on counties (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 8; Const. art. 11, § 12, art. 4, § 36).

Provision in Motor Vehicle Transportation License Act 1923, § 8, that moneys collected from license tax upon vehicles operated for hire on highways shall be paid into state treasury and apportioned, half to state and half to counties, for maintainance and repair of public highways, *held* not violative of Const. art. 11, § 12, prohibiting Legislature from imposing taxes upon counties or residents thereof for county purposes.

13. Statutes 🔑64(8)—Provision that moneys collected from motor vehicle license tax shall be paid into state treasury held unaffected by assignment of part to counties (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 8).

Provision in Motor Vehicle Transportation License Act 1923, § 8, that moneys collected from license tax upon vehicles operated for hire on highways shall be paid into state treasury, *held* not affected by provision assigning portion thereof to counties, even if invalid.

14. Automobiles 🔑73—License tax of percentage of gross receipts on motor vehicles operated for hire held valid (Motor Vehicle Transportation License Act [St. 1923, p. 706] § 4; Const. art. 13, § 14).

License tax upon operation of motor vehicles for hire on public highways of percentage of gross receipts under Motor Vehicle Transportation License Act 1923, § 4, *held* valid, being a property tax and not a franchise tax which, under Const. art. 13, § 14, must be assessed at actual cash value.

15. Statutes 🔑64(8)—Invalidity of exemptions of sightseeing vehicles and those deriving receipts from mail contracts in Motor Vehicle Transportation License Act 1923, held not to destroy whole act (St. 1923, p. 706, § 11).

That exemptions of operators of sight-seeing motor vehicles and those deriving receipts from United States mail contracts were void *held* not to invalidate remainder of Motor Vehicle Transportation License Act 1923, provisions being separable, and section 11, providing that invalidity of any portion should not destroy remainder.

16. Appeal and error 🔑843(2)—Supreme Court properly determined validity of repealed act, where rights and liabilities thereunder survived repeal (Motor Vehicle Transportation License Act [St. 1923, p. 706]; St. 1925, p. 833).

Validity of Motor Vehicle Transportation License Act 1923, though subsequently repealed by Act May 23, 1925 (St. 1925, p. 833, *held* properly considered by Supreme Court, where rights, duties, and obligations of those subject to act survived repeal.

In Bank.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by the Bacon Service Corporation against Fred C. Huss, as Captain of Fresno County Traffic Squad, to enjoin enforcement of Motor Vehicle Transportation License Act of 1923. Judgment for plaintiff, and defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for appellant.

Theodore M. Stuart, of Fresno, for respondent.

SHENK, J. The plaintiff and respondent is a California corporation having its principal place of business in the county of Fresno. It has been and is engaged in the business of transporting property for hire as a private carrier and persons and property for hire as a common carrier over the public highways of the state by means of motor vehicles operated between fixed termini and over regular routes. The defendant and appellant is a law enforcement officer of the state whose duties relate chiefly to the enforcement of laws governing the use of the public highways by motor vehicles in Fresno county. In July, 1924, he was threatening criminal prosecutions against the respondent for alleged violations of the provisions of an act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the state of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses, * * *" approved June 13, 1923 (Stats. 1923, p. 706). This action was brought to enjoin him from enforcing or attempting to enforce the provisions of that act. The complaint set forth the foregoing facts, and charged that said act contravened certain provisions of the state and federal Constitutions and was therefore void.

The appellant answered admitting generally the allegations of the complaint, but denying specifically the alleged unconstitutionality of the act. By stipulation, the cause was submitted to the trial court on the facts alleged in the complaint and on the issues of law raised by the answer. The court found the allegations of the complaint to be true, concluded that the act was void in its entirety as in violation of both state and federal Constitutions, and rendered judgment enjoining the defendant from enforcing the same. The defendant appeals. The sole question for determination is the alleged unconstitutionality of the statute.

[1] As indicated by its title, the act was designed to impose a license tax upon those engaged in the business of operating motor vehicles upon the public highways for the transportation of persons or property for compensation. Section 1 defines certain words and phrases employed in the act. The term "operator" is declared generally to include all persons, firms, associations, and corporations who operate motor vehicles upon any public highway in the state and thereby engage in the transportation of persons or property for hire or compensation. The term "motor vehicles" is defined to mean and include all vehicles, automobiles, trucks, or trailers operated upon or over the public highways of this state whether the same be propelled or operated by steam or electricity or propelled or operated by combustion of gasoline, distillate or other volatile and inflammable liquid fuels. The term "gross receipts from operation" is declared to include all receipts from the operation of any such motor vehicle beginning and ending entirely within this state and excluding revenues from interstate commerce.

Section 2 of the act provides:

> "Each operator of a motor vehicle within this state who transports or desires to transport for compensation or hire persons or property upon or over any public highway within this state shall apply to and secure from the board of equalization of the state of California a license to operate each and all of the motor vehicles which such operator desires to operate or which such operator from time to time may operate."

Under section 4 of the act the renewal of said license is made conditional on the payment by the applicant of 4 per cent. of the "gross receipts from operation" ascertained as provided in the act. Said section further provides:

> "That there shall be deducted from said four per cent. of the gross receipts the amount of any county or municipal licenses, and any city, or county or city and county taxes paid by such operators to any city, or county, or city and county in this state upon any of the property actually used and necessary in the operation of such motor vehicles for the transportation of persons or property and upon such payment said state controller shall issue a receipt, in duplicate, to such applicant."

It is provided in section 7 that any operator using the public highways of the state for the transportation of persons or property for hire, either as a public or private carrier, without first obtaining the license and making the return of gross receipts provided for, is guilty of a misdemeanor and is punishable by a fine or imprisonment or both. Section 8 provides that after the funds are paid to the state they shall be apportioned one-half to the state of California and one-half to its several counties as therein provided, the whole to be used exclusively for the maintenance and repair of the state and county highways.

The respondent concedes the right of the state to impose a license for revenue on all persons operating motor vehicles for hire on the public highways. It makes no objection to fixing the amount of such license tax at a percentage of the gross receipts, but it has refused to comply with the requirements of the law because of its alleged invalidity resulting from certain exemptions included in sections 1, 9, and 10 of the act. Section 1 excludes from the definition of the term "operator" every one "who solely transports by motor vehicle persons to and from or to or from attendance upon any public school," and also every one "who solely transports his or its own property, or employees, or both, and who transports no persons or property for hire or compensation." Section 9 reads as follows:

> "This act shall not apply to taxicabs, drays, transfer vehicles and other like city motor vehicles which do not run over regular routes nor shall it apply to hotel busses meeting trains, cars or boats or to sightseeing motor vehicles."

And section 10 provides:

> "Nothing in this act shall be construed to apply to nor to levy a license upon the operation of any motor vehicle or motor vehicles of any operator, or the gross receipts therefrom, when as much as fifteen per cent. of the gross receipts of such operator in the aggregate from such motor vehicle or motor vehicles shall have been earned by the transportation of United States mails, parcels post or other government matter under contract with the federal government."

The respondent contends that the statute applies only to some of those who operate motor vehicles for hire over the public highways and in terms exempts others who stand in the same relation to the burdens imposed as does the respondent; that no reasonable distinction can be found to justify their preference; and that the act is therefore in violation of section 21 of article 1 of the state Constitution, prohibiting the granting of privileges or immunities to citizens or any class of citizens which, upon the same terms, are not granted to all citizens; also in violation of section 11 of article 1 requiring laws of a general nature to have a uniform operation; also in violation of section 12 of article 11, which prohibits the Legislature from imposing taxes upon counties or the inhabitants thereof for county purposes, and in violation of section 14 of article 13, providing that all franchises other than those mentioned in the section shall be assessed at their full cash value exclusively for the benefit of the state.

On the former hearing the subject was treated particularly with reference to the applicability of section 11 of article 1 of the Constitution. A rehearing was granted in order that more attention might be given in the first instance to the effect of section 21 of article 1, in the light of the provision of section 11 of the act in question.

An examination of the entire statute discloses that the obvious and only purpose of the act was to provide a revenue with which to maintain and repair the public highways of the state outside of incorporated cities, and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire over such public highways. The act is not a police measure in any sense. It provides for a license tax for revenue purposes only. As stated, the respondent concedes that this is a proper purpose to justify a license tax. It contends, however, that if operators of motor vehicles for hire constitute a proper classification to satisfy constitutional requirements, there is no natural, intrinsic, or constitutional distinction between the use to which its motor vehicles are put and the use exercised by certain of the exempted vehicles.

[2] Taking up the exemptions in the order in which they appear in the statute, it is first noted that section 1 exempts operators of motor vehicles used solely for the transportation of persons to and from the public schools. In providing for this exemption, the Legislature doubtless had in mind the motor vehicles operated by or under contract with public school authorities for the conveyance of school children to and from school. The expense of such operation is a charge on the public treasury, and the exaction of the license tax thereon would naturally increase the general tax burden. The state has a special interest in the development of the public school system and in as full and regular school attendance as possible. To that end such conveyances have been provided at public expense. It is easily conceivable that the Legislature had in mind that by relieving such operators from a state license tax, cheaper transportation for a public purpose would thereby be had. An instance of a similar classification is noted in the exemption from the payment of registration fees under the California Vehicle Act of vehicles owned by the state or by any political subdivision thereof (section 78, Stats. 1923, p. 538). There would therefore seem to be no objection to the classification of motor vehicles so operated at public expense apart from those operated for hire by private individuals, associations, and corporations.

[3] The next exemption applies to those who use said public highways for the transportation of their own property or employees or both and to those who transport no persons or property for hire or compensation. It is

obvious that those who operate motor vehicles for the transportation of persons or property for hire enjoy a different and more extensive use of the public highways. They are thereby enabled to engage in business on the public highways and to provide for themselves a livelihood, particularly because of the existence of the public highways and the facilities thereby afforded. Such extraordinary use constitutes a natural distinction and a full justification for their separate classification and for relieving from the burden of the license tax those who merely employ the public highways for the transportation of their own property or employees.

[4] The respondent next contends that the exemption of "taxicabs, drays, transfer vehicles, and other like city vehicles which do not run over regular routes" is such an exemption as disturbs the required uniformity of the act. It is apparent that this exemption and the further exemption of hotel busses meeting trains, cars, or boats were intended to apply to those who are engaged in the business of operating such motor vehicles for hire within the limits of incorporated cities. As such, they may be properly so separately classified for the reason that highways within municipalities are usually not maintainable directly at the expense of the state but from municipal revenues derived from the exercise of municipal powers of license and taxation, and it must be assumed that the Legislature had this distinction in mind in limiting the license to the use of highways maintainable by the state and for whose maintenance municipalities are not responsible.

In providing for the exemptions heretofore considered, we are of the opinion that the Legislature has not acted arbitrarily nor without reason in making such classifications. We do not intend to hold, however, that the exemptions provided for in section 9 of the act would apply to operators therein mentioned who are engaged also in the business of transporting passengers or property for hire outside of incorporated cities as the fact in each case may appear.

[5] A different situation is presented as to the exemptions next to be considered. It is insisted by respondent, and it is not denied by the appellant, that sight-seeing motor vehicles carrying passengers for hire are quite generally operated in county territory outside of incorporated cities. That being the fact, it is clear that the operators of such vehicles come within the definition of those who are required to obtain licenses and to pay 4 per cent. of their gross receipts to the state under the general provisions of the act. There appears to be no natural or intrinsic and certainly no constitutional distinction between the use of the public highways by the vehicles of the respondent and the same use by sight-seeing busses regularly using the highways of the state outside of municipalities in the business of transporting persons or property for hire.

[6] Likewise it is insisted by the respondent that the exemption of operators who derive as much as 15 per cent. of their gross receipts from United States mail contracts constitutes a classification having no basis of distinction except the arbitrary declaration of the statute itself. It is difficult to perceive how this exemption may be justified when it relieves from the burden of the license tax those operators who conduct a motor bus business outside of municipalities and who perchance may have acquired a government contract for the carriage of mail from which they derive at least 15 per cent. of their gross receipts. Under this exemption the entire revenues of such operators derived from business exclusive of mail contracts—and which may be as much as eighty-five per cent. of their gross receipts—are relieved from the deduction of 4 per cent. license tax while a like percentage of the gross receipts of those operators of the same class having no mail contracts are subjected to the tax. We see no legally justifiable basis for the distinction. It will be noted that the statute does not merely exempt the mail contract revenues from the license tax of 4 per cent., but exempts the entire revenues of such operators from the requirements of the act. We think that the exemption of sight-seeing motor busses operating outside of municipalities and the exemption of the entire revenues of operators a part but not all of whose business embraces the carriage of United States mail and parcels post by contract were not based on any properly cognizable theory of classification. In further considering these exemptions it would seem desirable and necessary to view them first in the light of respondent's contention that they are in violation of section 21 of article I of the Constitution. It is insisted that they confer special privileges and immunities upon the operators there singled out which are not enjoyed by the same classes covered by the general terms of the act. It requires no argument or citation of authority to demonstrate that the respondent's position in this respect is well taken. We feel no hesitancy in holding that said exemptions attempt to confer special privileges and immunities upon operators of such sight-seeing busses and mail and parcels post contract carriers in violation of said section 21 and are therefore void.

[7, 8] It is then to be determined what effect the presence in the act of those unlawful exemptions had on the balance of the act. It is well settled that if the objectionable portions of an act are so connected with the rest of the act as to be inseparable therefrom or to render the act inoperative as a complete legislative enactment in the event the objectionable portions be excluded, the entire act must fall. It is also the rule that if the act, with the objectionable portions excluded, be

completely operative as a legislative enactment and it is plain from the terms of the act that the objectionable portions were not the considerations or conditions which moved the Legislature to enact the statute and that it was the intention of the Legislature to pass the act though the objectionable portions were eliminated, then the balance of the statute may be permitted to stand as a complete expression of the legislative will. The rule in such cases is expressed in Hale v. McGettigan, 114 Cal. 112, 45 P. 1049, where it is said:

> "Whether a statute containing an unconstitutional provision, with others which are constitutional, will be sustained as to those which are constitutional and held invalid merely as to those which are not, depends upon the nature of the different provisions in view of the evident purpose of the Legislature. If the provisions are so interdependent that those which are invalid are to be regarded as the condition or consideration upon which others were enacted, and it is evident that the Legislature would not have enacted the statute except in its entirety, and did not intend that any part should have effect unless the whole could be made operative, the entire statute must be held invalid. On the other hand, if the different parts of the statute are severable and independent of each other, and the provisions which are within the constitutional power of the Legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the statute itself that it was the intent of the Legislature to enact these provisions irrespective of the others, the unconstitutional provisions will be disregarded and the statute read as if these provisions were not there. For the purpose of statutory construction, the intention of the Legislature, as shown by the general scope and purpose of the law, is to be ascertained. It is never to be assumed that the Legislature intended to enact an unconstitutional statute, or that it supposed that any part of its act was beyond its constitutional power; and, if the general scope of an act is within its power, the act is not to be rendered null by reason of a subsidiary provision which was beyond its power to enact. If the manifest purpose of the Legislature can be carried into effect by upholding the act and disregarding such subsidiary provisions, that purpose will not be defeated by an unconstitutional provision contained in a subordinate section in the act."

See, also, People v. Capelli, 55 Cal. App. 461, 203 P. 837.

It cannot be questioned that the said unlawful exemptions are separable from the balance of the act, and when they are eliminated it is apparent that the statute is a legislative enactment complete in all respects and sufficient to accomplish the purposes for which it was adopted. It remains only to consider whether it was the intention of the Legislature, gathered from the act itself, that the statute should operate notwithstanding the unlawful exemptions in the event such exemptions be stricken as constitutionally unauthorized. The provisions of section 11 of the act afford unmistakable evidence that such was the legislative intent. That section reads as follows:

> "If any section, subsection, clause, sentence or phrase of this act is for any reason held to be unconstitutional such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, clauses or phrases be declared unconstitutional."

[9] The purpose of that section was undoubtedly to meet such a situation as is here presented. It was inserted in the act for the purpose of indicating to the court, when required to pass upon the constitutionality of the act or of any portion thereof, and to apply the rules of law applicable thereto, that the statute would have been enacted with the objectionable portions omitted in the event the court should conclude that said portions were separable and beyond the power of the Legislature lawfully to incorporate in the statute. It is conceded by the respondent that—

> "Without such a declaration in the statute it would be the duty of this court, if the act were in part constitutional and in part unconstitutional, to sustain the constitutional part if the good and the bad were not so blended that they could not be separated and the constitutional part could stand alone as a complete expression of the intention of the Legislature."

But it is insisted that section 11 is ineffectual to accomplish the purpose contended for by the appellant. It is first pointed out that it is beyond the power of the Legislature to bind the court by the assertion that if any portion of the act "is to be held unconstitutional, such decision shall not affect the remaining portions" of the act. To this contention we accede. But we cannot view the language of the statute as an inexorable command for it is a judicial question in each case whether the good may stand notwithstanding the bad. But the use of such language may rightly be considered by the court as a declaration of intention on the part of the Legislature that in so far as lay within its power a separable invalid portion of the act should not destroy the whole.

[10, 11] It is next contended that the second sentence of section 11, to the effect that the Legislature would have passed the act and each portion thereof "irrespective" of the fact that any portion be declared unconstitutional, is a challenge to the courts that the Legislature would have persisted in adopting an unconstitutional act, including the invalid portions, notwithstanding certain parts of the act be held unconstitutional. To this we cannot agree. The second sentence is inaptly worded just as the first sentence is too broad in its apparently mandatory phraseology. But here again the purpose of the language is plain. It is an assurance to the

court that the Legislature would have adopted the act with the invalid portions excluded if it had known that the inclusion thereof was constitutionally unauthorized, thus evidencing an intention which otherwise might not have been apparent on the face of the act, and indicating a purpose to avoid if possible a determination by the court that it could not be said from the language of the act whether the Legislature would have enacted the statute with the invalid portions excluded. The section also makes it plain that if any exemptions should be held invalid it was the intention of the Legislature that the operators whose exemption was attempted should be subjected to the general requirements of the act. A section similar to section 11 was involved in the Motor Vehicle Act of 1913 (St. 1913, p. 639), and was given its proper effect in the Matter of the Application of Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706, where it was said:

> "Similar sections have been subjects of interpretation in other states and its seems to be the concensus of belief that they impose upon the courts the duty of supporting the legislative will as far as possible [citing cases]."

When the invalid portions of the act here in question are excluded, it is clear that the balance of the act contains all of the elements of a completely operative statute and that it was intended by the Legislature so to be. The enactment then is in the same status it would have assumed had the unlawful exemptions originally not have been included therein. In other words, their inclusion was a nullity, and the operators thus attempted to be exempted are included within the general terms of the act and can claim no rights or privileges by reason of the attempted exemption because, under the prohibitory provisions of the Constitution, they were never entitled to the same. As so construed the statute is not then objectionable to the provisions of section 11 of article I of the Constitution requiring uniformity. Nor does this conclusion result in judicial legislation as urged by respondent. It is no more than the application of approved rules of construction, having in mind that the power of the court to declare a statute unconstitutional is one of the utmost delicacy in its exercise and should not be asserted to strike down the statute unless there is no proper basis for its reconciliation with the organic law. Stockton & V. R. Co. v. City of Stockton, 41 Cal. 147, 159; Matter of Application of Miller, 162 Cal. 687, 124 P. 427. Section 11 of the act is not an attempted delegation of legislative authority to the court, nor is it an inconsistent alternative. It is a positive declaration of the purpose of the Legislature to put the law in force to the full extent of the legislative constitutional power. Snetzer v. Gregg, 129 Ark. 542, 196 S. W. 925, L. R. A. 1917F, 990; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L. R. A. (N. S.) 466; Standard Lumber Co. v. Pierce, 112 Or. 314, 228 P. 812; 6 R. C. L. 123. It may be granted that if the problem here presented were approached solely from the standpoint of the applicability of section 11 of article I and that if there were no place in its proper solution for a consideration of section 21 of the same article in connection with section 11 of the act, then the conclusion might seem irresistible that the entire statute would fall for lack of uniformity. But the latter conclusion is properly made unnecessary by measuring the statute by other constitutional tests which when properly applied permit the act in general to stand.

The case of Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40, is strongly relied upon by the respondent. A careful consideration of the decision in that case in the light of the terms of the statute then before the court discloses that the conclusions there reached are not controlling in the present case nor are they inconsistent with the rules applied in this controversy. The statute involved in that case provided generally for the creation of irrigation districts in counties throughout the state and conferred special powers upon the board of directors of such districts over irrigation and other districts theretofore organized and existing in all counties pursuant to general state laws. The act then provided that nothing therein contained should affect or apply to any irrigation, protection, flood control, conservation, or other improvement district situated wholly or in part within any county which had adopted a county charter prior to June 4, 1915, or within any city and county, and that the board of directors provided for in the act should have no power or jurisdiction within the excepted counties or city and county. It was held that there was no natural, intrinsic or constitutional distinction between districts in chartered and unchartered counties and that the act was therefore void for lack of uniformity in its operation throughout the state. The reasoning and conclusions of the court in that case when applied to the particular act under consideration cannot be questioned, but they do not here apply for several reasons. In the first place, if the act there involved were considered a burden imposed on the districts included within its general terms and that special privileges and immunities were granted to the districts in the excepted counties the exceptions would be objectionable to section 21 of article I of the Constitution. But there was no language in the act such as was incorporated in section 11 of the present act, evidencing the intent of the Legislature that if the exceptions be held to be unconstitutional the remainder of the act, if possible, should stand. Furthermore, there were in that case valid reasons for concluding that the exceptions in the act were material considerations or conditions attending the favorable vote on the entire measure in the Legislature and that without the exceptions the statute would not have been adopted. Again, if the general terms of that act be deemed a denial of the same privilege, the general terms of the act would necessarily fall as in contravention with section 21 of article I and nothing would remain to operate as a legislative enactment.

Other cases cited by respondent do not warrant a different conclusion. In City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604, the privileges were conferred by the general terms of the act and the disabilities or burdensome conditions were imposed upon the municipalities included in the exception and the entire act was therefore properly declared void. In the case of In re Raleigh, 177 Cal. 746, 171 P. 950, this court had under consideration the Real Estate Brokers' License Law of 1917.[1] The act contained an exemption of those who had received from the insurance commissioner or the bureau of building and loan supervision a certificate of authority or license to do business within this state. The exemption was held to be unlawful and the entire act was declared to be invalid. There was nothing in the statute in that case which indicated that if the attempted exemption were invalid and separable the balance of the act should shtand or that the Legislature would have adopted the statute with the invalid exemption omitted.

It is contended by respondent that Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822, is decisive of the present case. Its effect in that respect might be conceded if it were here determined that the valid and invalid portions of the act in question were inseparable. The Federal Trade Act of Congress, approved August 24, 1921, 42 Stat. 187, under consideration in that case, was found to contain regulations which were unenforceable. The act also contained a section which was the same in effect as section 11 of the present act. The court determined that the invalid portions were so interwoven with the other regulations contained in the act as to be impossible of separation and to render the saving clause ineffectual. A similar saving clause was considered in an Alabama case, concerning which it was held that "such an expression in an enactment serves only to render certain the legislative intent with respect to passage of the valid parts, notwithstanding the invalid, and does not avail to clothe the valid with immunity from the invalidating effect" of the law because of the inseparable blending of the bad and good. State v. Montgomery, 177 Ala. 212, 241, 59 So. 294, 302. In Dorchy v. State of Kansas, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686, it was said that such a saving clause was "not an inexorable command" to the court. So here it is recognized that such a clause cannot always save a statute. In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, the Anti-Trust Law of Illinois was under consideration. It provided that its terms should "not apply to agricultural products or live stock while in the hands of the producer or raiser."[2] It was determined that those affected by the general terms of the act were denied the equal protection of the law and the whole statute must fall for the reason "that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation." The effect of a saving clause was not there involved. In Spraigue v. Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. Ed. 115, the court having found certain provisions of a Georgia statute invalid, refused to declare that the balance of the act should remain unaffected for the reason "that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant." It was held that such a construction would confer "upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions." Likewise in that case the effect of a saving clause was not before the court.

Respondent relies on a statement in Lewis' Sutherland on Statutory Construction (volume 1, 2d Ed. § 306) where it is said:

> "If, by striking out a void exception, proviso or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."

The foregoing is unquestionably the rule except when a contrary legislative intent is ascertainable from the language of the statute or the general purposes or terms of the act. But when it appears in the statute that it was the intent that the separable void portion should not destroy the whole, the invalidity of the entire statute will not necessarily result, especially when it is determined, as here, that such was the intent, and that the remainder is a full and complete legislative enactment of the subject to which it relates.

Numerous other cases cited and relied upon by respondent have been examined. In many of them we find a general recognition of the rules applied in the present case, and we find none of them, when properly considered, compelling a conclusion contrary to that at which we have arrived.

Cases from other jurisdictions, cited by the appellant, declare the effectiveness of such a saving clause in proper cases. In N. R. Bagley Co. v. Cameron, 282 Pa. 84, 127 A. 311, it was held that a saving clause declaring statutory provisions separable is effective to raise a presumption of the intent to severally enact the remaining provisions of the act if any severable parts thereof be declared unconstitutional. In Saari v. Gleason, 126 Minn. 378, 148 N. W. 293, it was held that under such a saving clause the rule is that if a part of a statute be unconstitutional the remaining portions must nevertheless be sustained if enough is left to constitute an enforceable law. In Ohio Tax. Cases, 232 U. S. 576, 34 S. Ct. 372, 58 L. Ed. 737, such a saving clause was given recognition. Further reference to this line of cases is deemed unnecessary, but for a general statement of the rule as applied in this state see 5 Cal. Jur. 643, 648, and supporting cases cited.

---

[1] St. 1917, p. 1579.

[2] Laws Ill. 1893, p. 184, § 9.

[12, 13] In section 8 of the act it is provided that all moneys collected under and by virtue of the act, except such sums as are received for emblems, shall be paid into the state treasury and credited to the motor vehicle fuel fund. This section then appropriates one-half of said collections to the state to be devoted to the maintenance and repair of public highways. The other one-half is apportioned to the several counties of the state in accordance with the plan therein provided and to be devoted exclusively to the maintenance and repair of public highways within the counties. It is contended by the respondent that section 12 of article 11 is thereby violated which provides, among other things, that the Legislature shall have no power to impose taxes upon counties or upon the inhabitants of any county for county purposes, but may by general law vest in the authorities of the county the power to assess and collect taxes for such purposes. We find no merit in this contention. The license taxes here imposed by the Legislature are in furtherance of a state purpose for the maintenance of state highways and to extend aid in the maintenance of county highways. This action of the Legislature would seem to be fully authorized by section 36 of article 4 of the Constitution, which provides that—

> "The Legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance in whole or in part of any county highway."

See Buckingham v. Commary-Peterson Co., 39 Cal. App. 154, 167, 178 P. 318.

The cases of People v. Martin, 60 Cal. 153, and San Francisco v. Insurance Co., 74 Cal. 116, 15 P. 380, 5 Am. St. Rep. 425, relied upon by the respondent, are not in point for the reason that the license taxes there involved were required to be paid into the county treasuries and were imposed and made available for expenditure for county purposes in the absence of constitutional authority or a general law authorizing the county authorities to impose the same. But in any event the assignment of a portion of the fund accumulated under the act here in question to the several counties of the state would not destroy the effectiveness of that portion of the act which requires the license tax to be paid into the state treasury. Matter of the Application of Schuler, supra, 289.

[14] There is no merit in the contention of the respondent that the license tax here involved is a tax on its so-called franchise or right to operate its motor vehicles under a certificate of public convenience and necessity issued by the railroad commission, and therefore void under section 14 of article 13 of the Constitution. That section provides that all franchises such as the respondent claims to own shall be assessed at their actual cash value and be taxed at the rate of one per cent. each year exclusively for the purposes of the state. It is argued that inasmuch as section 8 of the act in question provides that one-half of the license tax collected shall be paid to the several counties the section of the Constitution referred to has been violated. The answer is that the tax on the alleged franchise of the respondent as contemplated by the section of the Constitution referred to is a property tax on an ad valorem basis and is not in any sense a license tax for the privilege of carrying on a business such as the act here involved intended to impose.

[15] We therefore conclude that when the separable and unlawful exemptions are excluded from the act as being obnoxious to section 21 of article I of our state Constitution, the remainder of the act is a completely enforceable statute as to all operators engaged in the business of using the public highways of the state outside of municipalities for the transportation of persons or property for hire, including those unlawfully exempted, and that the remainder of said act violates no provision of the state or federal Constitutions invoked by the respondent.

[16] The act here under consideration was repealed by section 11 of a similar act approved May 23, 1925 (Stats. 1925, p. 833). Inasmuch as certain rights, duties, and obligations of those operators who were subject to the requirements of the 1923 statute, and who were doing business between the effective date of that act and the effective date of the 1925 statute, as well as the rights of the state to revenues during that period, still survive said repeal, the questions involved herein are not considered moot.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.; LAWLOR, J.

199 Cal. 51

COLBERG et al. v. STATE BOARD OF EQUALIZATION et al. (S. F. 11452.)

(Supreme Court of California. June 30, 1926. Rehearing Denied July 30, 1926.)

1. Automobiles ⊂⊃77—Renewal of license to operate motor vehicle for hire held properly conditioned on payment of license tax (Motor Vehicle Transportation License Tax Act [St. 1923, p. 706]; St. 1925, p. 833, § 11).

Under Motor Vehicle Transportation License Tax Act 1923, subsequently repealed by Act May 23, 1925 (St. 1925, p. 833) § 11, requiring operator of motor vehicles for hire on public highways to secure license and making payment of specified percentage of gross receipts a prerequisite to renewal thereof, renewal of license *held* properly conditioned on payment of such fee.

2. Mandamus ⊂⊃16(1).

Writ of mandate will not issue where repeal of act under which relief was sought has made question moot.

In Bank.

Application for writ of mandate by William C. Colberg and another against Board of Equalization of the State of California and members thereof to compel issuing of license to operate motor vehicles for hire under Motor Vehicle Transportation License Tax Act of 1923. Writ denied.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondents.

SHENK, J. [1, 2] This is an application for a writ of mandate to compel the respondents to issue to the petitioners the renewal of a license to operate their motor vehicles for hire pursuant to the Motor Vehicle Transportation License Tax Act of 1923 (Stats. 1923, p. 706). The petitioners, who are operators as defined by that act, refused to pay the license tax for the same reasons advanced by the plaintiff and respondent in the case of Bacon Service Corporation v. Fred C. Huss, etc. (S. F. No. 11419) 248 P. 235, this day decided, wherein the constitutionality of the statute was upheld. They seek the issuance of the license on the theory that the provisions of the act which require the same may be valid and enforceable notwithstanding the alleged unconstitutionality of the remaining provisions of the act requiring the payment of license tax. A petition for rehearing was granted herein for the same reasons noted in the above case this day decided. On the grounds stated in the opinion in that case, it is here decided that the provisions of said act both as to the license and as to the license tax were applicable to the petitioners herein, and that a renewal of the license was properly conditioned by the respondents on the payment of the accrued license fee. Said act was repealed by section 11 of a similar act approved May 23, 1925 (Stats. 1925, p. 833). From our ruling as to the validity of the 1923 statute, it follows that the petitioners were not entitled to said license except upon payment of the license tax.

On the authority of the above case this day decided, and on the additional ground that the issues herein would seem to have become moot by reason of the repeal of the act under which the relief was sought, the peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.; LAWLOR, J.

---

199 Cal. 42

Ex parte SCHMOLKE. (Cr. 2840.)

(Supreme Court of California. June 30, 1926. Rehearing Denied July 30, 1926.)

1. Automobiles ⊂⊃73—Constitutional law ⊂⊃205(3)—Statutes ⊂⊃72—Exemptions of operators transporting persons to and from public schools, and those not transporting for hire, from motor vehicle tax, are valid (Motor Vehicle Transportation License Tax Act [St. 1925, p. 833] § 1; Const. art. 1, §§ 11, 21).

Exemption of operators of motor vehicles used solely to transport persons to and from public schools and those solely transporting their own property or employees or both, and those not transporting for hire, from Motor Vehicle Transportation License Tax Act, § 1, imposing tax upon operation of motor vehicles on public highways, are reasonable, and so valid under Const. art. 1, §§ 11, 21.

2. Automobiles ⊂⊃73—Constitutional law ⊂⊃205(3)—Statutes ⊂⊃74(1)—Exemptions of vehicles operated within city limits from motor vehicle license tax held valid. (Motor Vehicle Transportation License Tax Act [St. 1925, p. 833] §§ 4, 9; Const. art. I, §§ 11, 21).

Exemption of vehicles operating within incorporated cities or towns from Motor Vehicle Transportation License Tax Act, § 9, *held* valid, under Const. art. 1, §§ 11, 21, in view of section 4 of the act that vehicles operating both within and without city should be exempt only to extent county and municipal licenses and taxes are paid by them.

3. Automobiles ⊂⊃73—Classification of operators of motor vehicles for licensing is justified by nature of business transacted (Motor Vehicle Transportation License Tax Act [St. 1925, p. 833]).

Under Motor Vehicle Transportation License Tax Act, it is not the type of vehicle, but nature of business conducted on highways, that justifies classification made in the statute.

4. Automobiles 🔑73—That concerns transporting own materials added cartage of price held not to require inclusion in classification of those engaged in transporting for hire (Motor Vehicle Transportation License Tax Act [St. 1925, p. 833]).

That concerns used public highways for transporting their own materials and added cost of cartage to price of material delivered *held* not to require their inclusion in classification of those engaged in business of using highways for transportation for hire singled out by Motor Vehicle Transportation License Tax Act for payment of license fee.

5. Licenses 🔑7(2).

Classification for licensing purposes is within Legislature's discretion, and its determination will not be overthrown unless palpably arbitrary.

6. Statutes 🔑47.

Exemption of vehicles operating within "usual transfer delivery zone" from Motor Vehicle Transportation Tax Act [St. 1925, p. 833] § 9 *held* void for vagueness.

7. Statutes 🔑64(8)—Void portion of act, separable from remainder, will be ignored in considering validity of remainder of act (Motor Vehicle Transportation License Tax Act [St. 1925, p. 833] § 12).

Where void portion of Motor Vehicle Transportation License Tax Act is incidental to and separable from remainder of act, it will be ignored in considering validity of remainder of act, in view of section 12 that Legislature would have adopted act with unconstitutional portions omitted.

8. Automobiles 🔑73—Exemption of revenue derived from carrying mail under contract entered into before named date after act was adopted from motor vehicle license tax held valid (Motor Vehicle Transportation License Tax Act [St. 1925, p. 833] § 9½; Rev. St. U. S. § 3966 [U. S. Comp. St. § 7459]).

Provision that Motor Vehicle Transportation License Tax Act, § 9½, should not apply to income derived from carrying United States mail under contract entered into before May 1, 1925, *held* valid, since such revenues may be separately classified, and date named, though subsequent to adoption date, was not discriminatory, in view of circumstances and Rev. St. U. S. § 3966 (U. S. Comp. St. § 7459).

In Bank.

Application for writ of habeas corpus by Paul Schmolke to be directed to Chief of Police, City and County of San Francisco, to secure his release from custody upon charge of violating Motor Transportation License Act of 1925. Writ discharged, and petitioner remanded.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, and Theodore M. Stuart, of Fresno, for petitioner.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

SHENK, J. The petitioner seeks a release on habeas corpus from his detention by the chief of police of the city and county of San Francisco. He was arrested pursuant to a warrant issued upon the filing of a complaint in the police court of said city and county charging him with a misdemeanor in that he did, on the 21st day of September, 1925, engage in the business of transporting property for hire upon and over the public highways of the state of California without having obtained a license so to do as required by the Motor Vehicle Transportation License Tax Act, approved May 23, 1925 (Stats. 1925, p. 833). In and by said act it is made a misdemeanor, punishable by fine or imprisonment or both for any person, firm, association, or corporation to operate motor vehicles for hire upon and over the public highways of the state without procuring a license and thereafter paying the license fees as prescribed in said act. The petitioner is now and for several years last past has been engaged in the business of operating for hire motor vehicles upon and over the public highways of the state. He has refused to apply for a license, claiming that the said act is unconstitutional. The objections which he urges in that respect are substantially the same as those made by the plaintiff and respondent in Bacon Service Corporation v. Fred C. Huss, etc. (S. F. No. 11419) 248 P. 235, this day decided. The 1925 statute covers the same subject-matter as the former statute (Stats. 1923, p. 706), which it repeals. The provisions of the present statute are the same as the 1923 statutes with certain exceptions which will be noted.

In section 1 of the present statute the definition of an "operator" is the same as declared in the former statute, but following the definition a new provision is inserted requiring that all exempted freight-carrying vehicles shall obtain exempt emblems from the state board of equalization and display the same in the manner provided. No objection is raised to this additional regulation. Section 4 provides for the payment of the license fee after deduction therefrom of all county and municipal licenses and taxes and is substantially the same as the former statute. Section 7 provides the penalties for violations of the act and section 8 for the allotment of the revenues derived under the act. These sections are likewise substantially the same as the former statute. Section 9 is as follows:

> "This act shall not apply to hotel busses meeting trains or boats, nor to taxicabs, drays, transfer vehicles and other like city motor vehicles operating within incorporated cities or towns or the usual transfer delivery zone adjacent thereto, nor shall it apply to such vehicles operating between incorporated cities or towns where no portion of any state or county highway is traversed in said operation."

Section 9½ provides:

> "Nothing in this act shall be construed to apply to nor to levy a license upon that part of the gross income from the operation of any motor vehicle earned on account of carrying United States mail or parcels post under any contract with the United States government entered into prior to the first day of May nineteen hundred twenty-five."

Section 12, referred to in the former decision as the saving clause, is the same as section 11 of the former statute.

It is insisted by the petitioner that the exclusion from the definition of the term "operator" in section 1 of those who solely transport persons by motor vehicle to and from or to or from public schools and of those who solely transport their own property or employees or both and of those who transport no persons or property for hire or compensation constitute unlawful exemptions; that the exemptions provided for in section 9 of hotel busses, etc., and other like city motor vehicles operating within incorporated cities or towns, are unlawful, and that the designation of "the usual transfer delivery zone adjacent to" incorporated cities or towns is void for vagueness; and that the exemption in section 9½ of that part of the gross income of operators derived from United States mail and parcel post contracts entered into prior to the first day of May, 1925, is unlawful. It is urged that the said exemptions are in violation of sections 11 and 21 of article 1 of the state Constitution; that the allotment of one-half of said revenues to the counties in the state is in violation of section 12 of article 11, which prohibits the Legislature from imposing taxes on counties or the inhabitants thereof for county purposes; that the alleged unlawful provisions of the act are inseparable from the remainder and invalidate the entire statute; that the act as a whole is obnoxious to section 25 of article 4 of the Constitution, which, among other things, prohibits the Legislature from passing local or special laws for the assessment or collection of taxes; or granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity, and exempting property from taxation. It also is contended that the said act violates the Fifth and Fourteenth amendments of the federal Constitution.

[1, 2] Considering first the objections to the several provisions of the act and then to the act as a whole, it will be noted that the exemptions provided for in section 1 have been determined in the Bacon Service Corporation Case to be lawful exemptions. It will also be noted that in section 9 of the act sightseeing busses are not exempted and that said section as re-enacted makes more certain the intention of the Legislature to exempt from the provisions of the act only those motor vehicles for hire which are operated within the limits of incorporated cities. It was doubtless contemplated by the Legislature that many operators might operate both within and without incorporated cities and towns. This might be true as to many motor vehicles mentioned in section 9. If any of those motor vehicles should be operated for hire as a business and not incidentally on the public highways outside of incorporated cities, it would seem to be clear that they would be subject to the license tax. This conclusion is fortified by a consideration of the terms of section 4 of the act, which provides for a deduction from the license tax of all sums paid by any operator on account of county or municipal taxes or licenses. It is thus made plain that it was the intention to exact the license fee from those only who use the public highways outside of incorporated cities in the conduct of their business, and that as to those whose business is operating exclusively within such cities the license is not required, this on the theory that the latter are or may be called upon to respond to a license tax or other exaction imposed for like purposes by the municipality itself, and that as to those operating both within and without incorporated cities they should receive a credit in their state license tax for whatever amount they are required to pay as county and municipal licenses and taxes. There would seem to be nothing unfair or unjust in the license plan thus laid out by the statute. We are of the opinion that the exemptions and classifications provided for in section 9, when read in conjunction with the rest of the act, do not amount to arbitrary action or unlawful discrimination on the part of the Legislature.

[3] In connection with the return to the writ herein, a stipulation of facts was filed from which it appears that at the time of and for more than six months prior to the filing of the stipulation on December 24, 1925, there were and are numerous persons, firms, associations, and corporations operating motor vehicles on the public highways for hire who are exempted from the license tax imposed by the act in question. But it does not appear that those who were and are so operating and are so exempted do not fall within the classification of those who are lawfully exempted. It also appears in the stipulation that the type of motor vehicles used by the exempted classes is similar to the type used by licensed operators. This fact we deem immaterial. It is not the type of vehicle, but the peculiar nature of the business conducted upon and over the public highways, that justifies the classification of the statute for licensing purposes.

[4, 5] Again, it appears in the stipulation that numerous business concerns, such as lumber and building material dealers, use the public highways for the transportation of their merchandise and add the cost of cartage to the price of the material delivered. These facts might be sufficient upon which to

separately classify such use for the purpose of regulation or license or both, but they would not necessarily compel their inclusion in the classification singled out by the statute of those engaged in the business of using the public highways for the transportation of persons or property for hire. In exercising its power to classify the Legislature has a wide discretion. The presumptions are in favor of the validity of the legislative determination, and it will not be overthrown unless it is palpably arbitrary. County of San Luis Obispo v. Murphy, 162 Cal. 588, 123 P. 808, Ann. Cas. 1913D, 712; 5 Cal. Jur. pp. 832, 833, and cases cited.

[6, 7] It also appears from said stipulation that "the usual transfer delivery zone" outside of incorporated cities referred to in section 9 of the act is traversed by public highways upon and over which certain exempted operators operate their motor vehicles for hire. If such operators be lawfully exempted, no complaint may, of course, be made. But if they belong to the class of operators who conduct their business within the limits of incorporated cities and who desire to engage in such business also in county territory adjacent to said cities, it would seem to be impossible for them to determine to what extent the public highways in the adjacent outside territory would be in the "usual transfer delivery zone." We fail to be cognizant of any standard of measurement by which an operator could foretell the extent of any such "zone" and be certain that he was not transgressing the law when he proceeded to conduct his business on the public highways therein. No reason has been suggested by the respondent for the inclusion of said clause in the statute. It is unquestionably void for vagueness. In re Peppers, 189 Cal. 682, 209 P. 896. But its invalidity cannot affect the remainder of the act when considered in its entirety. The clause is merely incidental to the main purposes of the act and is separable therefrom. In view of section 12 of the act it should be wholly disregarded in the enforcement of the statute. Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

[8] It also appears from the stipulation that there are numerous persons, etc., operating upon and over said public highways and carrying United States mail and parcels post for hire under contracts with the United States government entered into prior to the first day of May, 1925. As we understand the petitioner's contention on this branch of the case, it is that if it be within the power of the Legislature to classify for purposes of legislation the revenues derived from United States mail and parcels post contracts, still the exemption provided for in section 9½ is invalid for the reason that it purports to exempt only the revenues from such contracts as were entered into prior to May 1, 1925, thus unlawfully discriminating, so it is claimed, against operators whose contracts were entered into after that date. It is assumed that the revenues from such contracts may be subjected to the license tax as an exaction by the state for the maintenance of the public highways. See Dickey v. Turnpike Co., 37 Ky. (7 Dana) 113; 31 Cyc. 975. If so, we think there is a reasonable basis for their separate classification for the purposes of legislation. It has been held that a mail contractor is not a common carrier but is rather a public agent of the United States employed in performing a governmental function. A. T. & S. F. R. Co. v. United States, 225 U. S. 640, 32 S. Ct. 702, 56 L. Ed. 1236; 31 Cyc. 999. When he acts in the dual capacity of a governmental agent and an ordinary operator for hire, that portion of his revenues which is derived from his mail contracts would seem also to be the proper subject of legislative classification. It was undoubtedly the intention to make the statute apply prospectively and thus to avoid interference with a public service under existing contracts. The Legislature may have considered that in any event the powers of the Postmaster General extend only to the authorization of mail carrying contracts for limited periods. R. S. 3966 [U. S. Comp. St. § 7459]. It may also have considered that in fixing May 1st, which was several days after the measure was finally adopted by both houses of the Legislature, as the dividing point of time, sufficient notice was thereby afforded to contractors carrying United States mail and parcels post and to prospective contractors to take into account the proposed license tax in entering into new contracts. Whether or not it would be legal notice we deem unimportant. It might have been more in accordance with precision in legislation to have fixed the dividing point at the effective date of the statute, but it may not be said that in designating May 1st any unlawful discrimination was thereby effected.

No additional facts set forth in said stipulation call for further remark. What was said in the Bacon Service Corporation Case, supra, as to the effect of section 12 of article 11 and other provisions of our Constitution in relation to the statute in question, sufficiently disposes of petitioner's contentions. When the statute is construed in the light of that case and of the foregoing discussion, we are satisfied that no unlawful exemptions are incorporated in the act, and when the fatally vague and indefinite clause in section 9 is stricken the statute is a complete expression of the legislative will as ascertained from the language thereof. As such it contravenes no provision of the state or federal Constitutions.

The many authorities cited by the petitioner have been noted. The Attorney General does not dispute the rules therein laid down, but only their applicability to the case in hand. We find in none of them, when carefully examined and well considered, anything inconsistent with the conclusions herein expressed.

The writ is discharged, and the petitioner remanded.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.; LAWLOR, J.

199 Cal. 107

In re PARROTT'S ESTATE. (S. F. No. 11663.)

(Supreme Court of California. July 9, 1926.)

1. Taxation 🔑895(6).

Where comaker of joint and several note paid his one-half of debt before the one-half owed by deceased comaker was paid, discharged portion could not be treated as an unsatisfied obligation of deceased comaker in determining inheritance tax.

2. Executors and administrators 🔑241.

Allowance of full amount of indebtedness on joint and several note against estate of deceased maker did not absolve surviving maker from obligation, nor extinguish right of heirs to compel contribution.

3. Taxation 🔑895(6).

Within Inheritance Tax Act (St. 1913, p. 1066), a "debt" is one which has actual existence.

[Ed. Note.—For others definitions, see Words and Phrases, First and Second Series—Debt.]

4. Taxation 🔑895(6).

Allowance of claim against estate of deceased for full amount of note of which deceased was comaker did not have conclusive effect of judgment, but was subject to attack in inheritance tax proceedings, in view of Code Civ. Proc. § 1636.

5. Taxation 🔑895(6).

In cases of doubtful validity of deduction in determining inheritance tax, question may be postponed until doubt is resolved.

6. Taxation 🔑864.

Only property existing at time of death is subject to tax, under Inheritance Tax Act (St. 1913, p. 1066), and right to the tax accrues then, but tax may be thereafter determined, and then relates back to time of death.

7. Statutes 🔑245—Interpretation of taxation act should not ignore legislative intention, or make its application impractical, unfair, or unreasonable (Civ. Code, §§ 4, 3542).

Interpretation of taxation act should not be with hostility, nor with intent to ignore legislative intention, nor make its application impractical, unfair, or unreasonable, in view of Civ. Code, § 3542, requiring interpretation of statute to be reasonable, and section 4, requiring interpretation of statute to be liberal to effect its objects and to promote justice.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of Mary Emilie Parrott, deceased. From an order confirming the report of the inheritance tax appraiser, John Parrott, Jr., and another, as executor and executrix of said estate, appeal. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellants.

Dion R. Holm and A. W. Brouillet, both of San Francisco (Wesley E. Marten, Inheritance Tax Atty., of Sacramento, of counsel), for respondent.

SEAWELL, J. Mary Emilie Parrott died March 1, 1922, a resident of the county of San Mateo, this state. The fair market value of her estate was appraised by the inheritance tax appraiser at $1,301,470.69. The sole question presented by this appeal is whether the appraiser should have made a deduction of $260,000, as evidenced by a joint and several promissory note made by her and her comaker from the market value of said estate, instead of a deduction of but one-half of said amount, to wit, $130,000, which deduction was allowed by him as a debt owing by her at the time of her demise. The appeal was taken from that portion of the order of the court confirming the inheritance tax appraiser's report allowing a deduction of but $130,000.

The case is submitted upon an agreed statement of facts. Decedent left a brother surviving her, Joseph A. Donohoe. Prior to her death she and her said brother made, executed, and delivered their joint and several promissory note secured by a mortgage upon real property owned by them in equal undivided interest to the Hibernia Savings & Loan Society, or order, in the principal sum of $340,000. At the date of decedent's death said promissory note of $340,000 had been drawn upon by decedent and her said brother, in equal amounts, to the extent of $260,000, which latter sum constituted the joint and several indebtedness of said decedent and her said brother, and was due and payable at the date of the death of the former. In due course thereafter, said Hibernia Savings & Loan Society, mortgagee, filed its claim against the estate of said Mary Emilie Parrott, deceased, for the full amount owing on said note, to wit, $260,000. On September 20, 1922, the claim was allowed by the executor and executrix and subsequently was allowed and approved by the court. Thereafter the principal sum due on said note was increased to $287,000. The solvency of Donohoe at all the times herein mentioned is an admitted fact.

On January 9, 1925, pending the settlement of the estate of Mary Emilie Parrott, deceased, Joseph A. Donohoe, the comaker, paid individually to said Hibernia Savings & Loan Society one-half of the entire joint and several obligation of himself and decedent, which payment included $143,500 as principal, and $509.20 as interest, aggregating $144,009.20. On March 10, 1925, the heirs and successors in interest of decedent paid on account of the balance due on said joint and several transaction $130,932.75 and agreed to pay the balance of the principal and interest to said note holder and mortgagee and to hold said Joseph A. Donohoe harmless from any liability thereon.

[1, 2] The facts of the case speak in complete vindication of the trial court's action. It is the stipulated fact that decedent and her brother owned in equal undivided interests real property located at Market and Taylor streets, city and county of San Francisco, the value of which was $1,000,000. This valuation admittedly gave them as tenants in common an equity in excess of $600,000 over and above the principal sum of said note and mortgage. As owners of said real property they jointly and severally executed the note and mortgage and received $260,000 in equal shares for the use and benefit of each. Mary Emilie Parrott died March 1, 1922. About seven months thereafter the claim of the mortgagee for the full amount of principal and interest as evidenced by said note was presented to the estate and approved as provided by the probate law. On January 9, 1925, pending the administration of said estate, and at a time before the estate had paid any inheritance tax whatever, also before the appraiser had made his report in said matter, the comaker, Joseph A. Donohoe, jointly and severally liable with said Mary Emilie Parrott, paid said note holder and mortgagee $144,009.20, which sum was in full of his one-half liability on account of the principal sum and interest then due on said note and mortgage. Two months thereafter the heirs and successors in interest of decedent paid on account of themselves upon the principal then due $130,932.75, "and assumed and agreed to pay the balance of the principal and interest upon said note and mortgage, and to hold said Donohoe safe and harmless from any liability therefrom." Thus the mortgage lien upon the interest of said Donohoe and the heirs of Mary Emilie Parrott was discharged with the exception of an unpaid balance owing from said heirs to said mortgagee. It will be observed that Joseph A. Donohoe, whose solvency at all times mentioned in the proceedings was admitted, paid one-half of the entire joint and several indebtedness before the inheritance tax appraiser made his computation and report showing any deductible indebtedness from the value of the estate. By the payment of one-half of said indebtedness, Donohoe, of course, acknowledged his liability to that extent, and by the heirs agreeing to hold him harmless as to the unpaid balance they also acknowledged the existence of a mutual understanding, which may well be implied as having existed from the inception of the transaction, that Donohoe's indebtedness arising out of said transaction was not to be considered as an indebtedness of the estate, but that said indebtedness was to be borne in equal amounts by the makers of said note, their heirs, or successors in interest. Donohoe and Mrs. Parrott owned a transferable, inheritable interest in the real property mortgaged, and, Donohoe having paid the whole of his portion of the indebtedness before Mrs. Parrott's heirs paid any part of theirs, the discharged obligation of Donohoe could not be treated as an unsatisfied obligation of Mrs. Parrott, or of her heirs or successors. The formal presentation and allowance of the indebtedness against the Parrott estate did not absolve Donohoe from his obligation, nor did it extinguish the legal right of the heirs of said comaker to compel contribution by him. The remedy given by statute to a creditor to pursue the estate of the comaker of a joint and several promissory note for the full amount thereof does not destroy the right of the heirs of said comaker to enforce contribution by the other maker. Donohoe's interest in the real property was at no time subject to an inheritance tax, while the interest passed by the decedent to her heirs was liable for such tax. His portion of the obligation, though unextinguished at the time of the death of decedent, but thereafter paid, could not be shifted from himself to the Parrott estate for the purpose of furnishing a fictitious basis of a tax reduction computation in favor of said estate. The mortgage debt was a lien upon the real property of Joseph A. Donohoe and the estate of the decedent, tenants in common, and no suit could have been maintained against the executor and executrix of said estate, unless a claim was first presented to the representatives of said estate. The debt never lost its joint and several character, no matter which obligor paid it, and if, as in this case, the surviving obligor paid his portion of said indebtedness, such portion could not be regarded or considered as a subsisting debt of the other.

[3, 4] The procedural rules of probate law do not possess judicatory powers in matters to which manifestly they were not intended to apply. The Inheritance Tax Act (St. 1913, p. 1066) is quite convincing to the point that a debt of which the act takes notice is one which has actual existence, and it does not attempt to artificially create a debt where in fact none exists. The fact that the note, as between the payors and payee, possessed the potentialities of an enforceable demand against either one of the debtors, affected his or her estate only in the proportion that he or she was required to pay it. The amount that the estate was required to pay on said

obligation was the amount of the estate's indebtedness. No greater demand than was paid by the estate was enforceable against it. The allowance of the claim did not have the conclusive force and effect of a judgment. It was subject to attack. Section 1636, Code Civ. Proc.; Estate of Loshe, 62 Cal. 413.

[5, 6] In cases of doubtful validity the question of deduction may be postponed until the doubt is resolved. Matter of Dimon, 82 App. Div. 107, 81 N. Y. S. 428. The act, which is very comprehensive, expressly recognizes the impracticability of determining the indebtedness of a decedent at the time of death, and provides in numerous sections for the refund of taxes erroneously paid, as well as the assessment of the tax in cases where deductions for debts have been erroneously made. It is true that only property which exists at the time of the decedent's death is subject to the tax and the right of the state to the tax accrues at the time of death, but this does not mean that the tax may not be thereafter determined, and when so determined it relates back to the time of death. No question of after accrued or acquired property is presented by this case; the question here being the amount of the allowance that should be made as a debt reduction.

[7] We think there is no room in this case for the play of the strict construction rule. The order appealed from is sustained by a fair interpretation of the act. Revenue or taxation acts are not to be approached with a spirit of hostility and with a purpose of ignoring the intention of the Legislature, even though it should clearly appear in the body of the act. The maxims of jurisprudence that "interpretation must be reasonable" (section 3542, Civ. Code) and that a statute is to be "liberally construed with a view to effect its objects and to promote justice" (section 4, Civ. Code) are generally applicable and must be given effect. The interpretation of tax statutes must in all cases be reasonable. Riley v. Havens, 193 Cal. 432, 225 P. 275. No construction should be given a statute which would make its application impracticable, unfair, or unreasonable. Watson v. Greely, 69 Cal. App. 643, 232 P. 475.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.

199 Cal. 78

PEOPLE v. DAY. (Cr. 2864.)

(Supreme Court of California. July 1, 1926. Rehearing Denied July 30, 1926.)

1. Criminal law 🔑878(3).

Where statute describing one offense contains element not contained in statute describing another offense, acquittal of count under one statute will not operate as acquittal of count under other.

2. Criminal law 🔑199.

Acquittal of higher offense necessarily involves acquittal of lesser offense included therein, and therefore accused cannot be tried for another higher offense involving same lesser offense and be convicted thereon.

3. Criminal law 🔑199.

Where two higher offenses embracing the same lesser offense are presented to jury in alternative counts, rule that acquittal as to one, operating as acquittal of lesser offense included therein, is bar to conviction of other, is not applicable, in view of Pen. Code, § 954.

4. Criminal law 🔑878(3)—Charges held not identical, and hence acquittal of one was not acquittal of other (Pen. Code, §§ 244, 245).

Count charging assault with caustic chemical under Pen. Code, § 244, *held* to state offense not completely identical with count under section 245, alleging that accused feloniously placed and threw corrosive acid and caustic chemical at another likely to produce great bodily injury, and hence acquittal under one count was not acquittal under other.

5. Indictment and information 🔑119.

Statement in second count of indictment, based upon Pen. Code, § 245, that it was statement of same offense charged in first count under section 244, might be disregarded as surplusage, where obvious meaning was that it was statement of same transaction.

6. Assault and battery 🔑48.

Violation of Pen. Code, § 244, denouncing assault with caustic chemical, does not require that great bodily harm be or may have been caused.

7. Assault and battery 🔑74.

Indictment under Pen. Code, § 245, for assault with means likely to produce great bodily harm, must aver facts necessary to show likelihood that great bodily harm would ensue.

8. Criminal law 🔑46—That mental and moral age of accused was that of child under 14 held not to affect responsibility for crime (Pen. Code, § 26, subd. 1).

That defendant's "mental and moral age" was under 14 did not affect her responsibility for crime under Pen. Code, § 26, subd. 1, as statute refers to physical age and not mental or moral age of accused.

9. Criminal law 🔑1169(1)—In prosecution for assault with caustic chemical, where defense was accidental spilling of chemical, error, if any, in admitting testimony before grand jury relating to picking up bottle and cork held not prejudicial.

In prosecution for assault with caustic chemical, defended on ground that chemical was spilled accidentally upon injured person, error, if any, in admitting testimony of witness before grand jury, which was merely cumulative and related only to picking up bottle and cork, *held* not prejudicial.

10. Criminal law ⚷829(4)—Where theory of accidental spilling of chemical was covered, refusal of requested instruction as to accidental spilling while contemplating suicide held not error.

In prosecution for assault with caustic chemical, where defense that chemical was spilled on injured person accidentally was properly covered by instructions, refusal to give instruction to acquit if spilling occurred accidentally while accused was contemplating suicide *held* not error.

Seawell, J., and Waste, C. J., dissenting in part, but concurring in conclusion.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Grace Bernice Day was convicted of assault with a caustic chemical, and she appeals. Affirmed.

Max Lewis, of Los Angeles, and Anderson & Anderson, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

LENNON, J. The indictment contained two counts. The first count accused the defendant Grace Bernice Day of the crime of assault with a caustic chemical, a felony, committed as follows:

> "* * * on or about the 23d day of February, 1925, at and in the * * * county of Los Angeles, state of California, the said defendants, Grace Bernice Day and Carlyn Lundstrom, did willfully, unlawfully, maliciously, and feloniously place and throw upon the person of another, to wit, one Darby Day, the younger of that name, a human being, a certain corrosive acid and caustic chemical, to wit, nitric acid, with the felonious intent then and there and thereby to injure the flesh and disfigure the body and person of the said Darby Day."

Count 2 charged as follows:

> "For a further and separate cause of action, being a different statement of the same offense as that set forth in count 1 hereof, the said Grace Bernice Day and Carlyn Lundstrom did then and there willfully, unlawfully, violently, and feloniously place and throw a certain corrosive acid and caustic chemical, to wit, nitric acid, upon the head, body, and person of one Darby Day, the younger of that name, a human being, which said throwing and placing of said acid upon the person of the said Darby Day, as aforesaid, did then and there cause grievous and serious and permanent bodily injuries to the said Darby Day, and was then and there exerted against the said Darby Day by the said defendants by means likely to, and which did, produce great bodily injury to the said Darby Day."

The following verdicts were brought in by the jury:

> "We, the jury in the above-entitled action, find the defendant Grace Bernice Day guilty of assault with a caustic chemical, a felony as charged in count No. 1. * * *"

And:

> "We, the jury in the above-entitled action, find the defendant Grace Bernice Day not guilty as charged in count No. 2 of the indictment."

Carlyn Lundstrom was acquitted by the jury under both counts of the indictment. The defendant was sentenced to San Quentin for the term prescribed by law for the crime of assault with a caustic chemical.

The appeal is from the judgment and from the order denying defendant's motion for a new trial.

The evidence is sufficient to sustain a verdict of guilty on the first count of the indictment. It was defendant's defense that she had purchased the nitric acid in question for the purpose of committing suicide; that while she and her husband were seated in an automobile in front of his home she uncorked the bottle preparatory to taking the acid; that her husband started the car abruptly, and by so doing caused the acid to be splashed both on himself and on her. It is admitted by the defendant that the bottle of nitric acid was in her hand at the time it was splashed or thrown upon her husband. The trial of the case therefore resolved itself into the question of whether the acid was accidentally splashed upon Darby Day or whether it was maliciously thrown upon him by his wife "with the intent to injure or disfigure the body and flesh" of said Darby Day. It will suffice to say that, in addition to the direct testimony of Darby Day, there was introduced in evidence testimony of circumstances attending and surrounding the occurrence tending to substantiate the theory of the prosecution that the acid was maliciously thrown. There is the outstanding and uncontradicted fact that, after the occurrence, the defendant immediately jumped into the waiting automobile driven by her sister, without stopping to see whether or not her husband had been seriously injured. This fact is scarcely compatible with the theory that the acid was accidentally thrown. There is also in evidence the fact that the defendant was familiar with the properties of veronal, and the fact that, if taken in large quantities, this drug would cause death. It is scarcely conceivable that the defendant would have selected nitric acid as a method of committing suicide when she had at her command the means of committing suicide in a much less painful manner.

[1] The claim is made by the defendant that, by the verdict of acquittal on count 2, she was acquitted of the offense charged in count 1. This claim is predicated upon the theory that there is such a complete identity of the offenses charged in the two counts of the indictment that an acquittal of one of-

fense will operate as a bar to a conviction of the other offense.

It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. If, however, the statute describing one offense prescribes as an essential element the statement of a fact not prescribed by the statute describing the other offense, and if in the statement of the transaction in the different counts that fact is included in the statement of the transaction based upon the statute requiring it, and omitted in the statement of the transaction based upon the statute not requiring it, the verdict of acquittal upon one of the counts is not necessarily an acquittal upon the other. In such a situation the jury may well find that the fact required as an essential element of one of the offenses is not true, and therefore be required to render a verdict of acquittal upon that count, but, since that fact is not an essential element to constitute the other offense, be justified in rendering a verdict of guilty as to that count. It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate. Murphy v. United States (C. C. A.) 285 F. 801, 814; Gavieres v. United States, 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489; Morey v. Commonwealth, 108 Mass. 433.

[2, 3] This is the test used to determine the validity of a plea of once in jeopardy interposed to a subsequent indictment after an acquittal or conviction upon one indictment. Of course, no plea of twice in jeopardy or former acquittal was or could have been made by the defendant in this action, inasmuch as she was tried but once. It should be noted, however, that all of the rules applicable to a plea of once in jeopardy do not have application to a determination of whether the offenses stated in different counts of an indictment are identical. Thus the rule, applicable to jeopardy, that an acquittal of a higher offense necessarily involves an acquittal of a lesser offense included therein, and that thereafter the defendant cannot be tried for another higher offense involving therein the same lesser offense, has no application to a situation where the two higher offenses are presented to the jury in alternative counts. People v. McDaniels, 137 Cal. 192, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81; People v. Defoor, 100 Cal. 150, 34 P. 642. If an accused is acquitted after a trial upon an indictment containing but one count, the jury necessarily found that the elements composing a lessor offense included within the higher offense charged were absent, for otherwise it would have been their duty to convict the defendant of the lesser offense. However, if a defendant is acquitted upon one count of an indictment containing alternative counts, it does not follow that the jury found all of the elements essential to the offense stated in that count absent, but merely that they found absent the element or elements distinguishing the offense stated in that count from the offense stated in the alternative count.

Originally section 954 of the Penal Code did not permit the inclusion in one indictment or information of two or more different offenses, even if they were connected together in their commission and arose out of the same transaction. In 1915 it was amended to read as follows:

> "The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts. * * *"

The evident purpose of this amendment was to widen the latitude permitted a prosecuting attorney in setting out the different offenses, which in his opinion the evidence before him at the time of drawing the indictment or information showed had been committed. To hold that, when two alternative counts are presented to the jury, an acquittal of a higher offense stated in one count necessarily involves an acquittal of the lesser offense included therein, and is a bar to the conviction of the higher offense set out in the alternative count, would practically nullify the beneficial object of the amendment. The true test as previously indicated is the presence of a fact necessary in one offense and absent in another.

[4] An application of this test to the pleadings here involved convinces us that the offenses are not completely identical and that the jury may well have acquitted the defendant of the crime charged in the second count, although at the same time finding her guilty of the crime charged in the first count.

[5] Despite the fact that the preamble to the second count states that this count is a statement of the same offense as that set out in count one, it is apparent that what was meant was that the second count was a statement of the same transaction. The statement may therefore be disregarded as mere surplusage. People v. Evanoff, 45 Cal. App. 108, 187 P. 54.

Clearly two separate and distinct offenses, described and designated by different Code sections, were attempted to be stated by the separate counts of the indictment. The two counts were obviously based upon separate sections of the Penal Code defining different offenses. In count 1 the defendant was charged with the crime of assault with a caustic chemical. In count 2 the crime is designated as assault by means and force likely to produce great bodily harm. Section 244 of the Penal Code, the basis of the first count, reads as follows:

"Every person who willfully and maliciously places or throws or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

Section 245 of the Penal Code, the basis of the second count, reads as follows:

"Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the state prison, or in a county jail, not exceeding ten years, or by fine not exceeding five thousand dollars, or by both."

[6] An analysis of the two Code sections used as the basis for the two counts demonstrates that the elements requisite for a conviction under section 244 of the Penal Code are not identical with the elements required under section 245. Section 244 requires proof of the fact that the acid actually touched the person of another. No proof is required by section 245 that the means or force likely to produce great bodily injury was actually exerted against the person of another. Under section 244 the defendant could not be found guilty of the specific offense if the attempt to throw or place acid upon the person of another failed of fruition. Under section 245 the defendant would be guilty, although the assault was not actually consummated. By section 245 proof is required that the means or force used must be likely to produce great bodily injury. While it may oftentimes happen that the throwing of the acids described by section 244 of the Penal Code would have the result of producing great bodily injury, the fact that it does so, or even that it will have the properties of doing so, is not required by said section. The crime is complete if any quantity of acid so described, however small in quantity or however weak in strength and however incapable of producing great bodily harm, is thrown or placed upon the person of another, if done willfully and maliciously, with the intent to injure the flesh or to disfigure to the slightest extent the body of another. It is apparent, therefore, that the two crimes as designated and described by the two sections of the Penal Code are separate and distinct offenses, although they may well arise out of the same transaction.

[7] An examination of the statement of the offenses charged in the two counts discloses the fact that the differentiation made in the two offenses by the two Code sections has been made by the indictment in at least one respect, and this is sufficient to support the conclusion that the offenses are not identical. The prosecutor, in draughting the first count of the indictment, followed closely the language of section 244 of the Penal Code, and stated the offense in almost the identical language of the Code section. In the second count, in order to aver that the means and force was likely to produce great bodily harm, it was necessary, not only to allege that the means and force was likely to produce great bodily harm, but it was necessary to aver additional facts to substantiate this conclusion. The pleader did this by averring that, as a result of the means and force used, the complaining witness did suffer great bodily harm. Herein lies the distinction between the first and second count. To find the defendant guilty under the first count it was immaterial whether the victim did or did not suffer great bodily harm or whether the acid thrown had the property of causing great bodily harm. To find the defendant guilty under the second count it was necessary to find that the means and force used was likely to produce great bodily harm. In other words, if the jury believed that the acid thrown was not a means or force likely to produce great bodily harm, it was at liberty to acquit upon the second count and convict upon the first count. It is immaterial that the evidence may show that as a matter of fact the acid was means likely to produce great bodily harm, and that as a matter of fact the victim did suffer great bodily harm. The determination of this fact was for the jury. Carrignan v. U. S. (C. C. A.) 290 F. 189, 190.

[8] The court did not err in denying the defendant's motion for a new trial based upon affidavits filed after the trial of the case, to the effect generally that the mental and moral age of the defendant was that of a child under the age of 14 years. Section 26 of the Penal Code, subd. 1, is not susceptible of the constrained construction contended for by the defendant. Said section reads as follows:

"All persons are capable of committing crimes except those belonging to the following classes: 1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

Said section clearly refers to the physical age of a child, and has no reference to the mental or moral age of an adult.

[9] The error, if any, in the permitting in evidence the testimony of Jesse Farr, who had died previous to the trial, taken before the grand jury, is not sufficient to warrant a reversal. His testimony, incorporated in the stenographic report of the proceedings before the grand jury, referred solely to the picking up of the bottle and cork, and was merely cumulative of evidence of other witnesses. Furthermore, defendant's defense was predicated solely upon the position that the acid was accidentally splashed upon her husband and not upon a denial that she had a bottle of nitric acid with her at the time and place charged. It cannot be said, there-

fore, that she was prejudiced by the introduction of this testimony.

[10] No error was committed by the trial court in refusing the instruction requested by the defendant that:

> "The court instructs the jury that suicide or an attempt to take one's life is not a crime in California. If you find that the defendant Bernice Day spilled the acid accidentally while endeavoring to open the bottle for the purpose of enabling her to take the acid to destroy herself, you shall acquit the defendant of the crime or offense charged in the indictment."

The real issue in the lower court was not whether the alleged acts as outlined in the indictment were done in an attempt to commit suicide, but whether they were accidentally done. If done accidentally, it was immaterial whether done pursuant to a plan to commit suicide or for any other reason. The instruction requested was therefore sufficiently covered by the following instruction given by the trial court:

> "The defendant Grace Bernice Day claims that the acid was spilled accidentally and that she had no intention of using it upon the person of her husband, Darby Day, Jr. If you find from the evidence that this is true, you must acquit the defendants, or if after due consideration of all the testimony you are not convinced of the guilt of the defendants beyond a reasonable doubt and to a moral certainty, you must acquit them."

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; FINLAYSON, Justice pro tem.

CURTIS, J., deeming himself disqualified, does not participate in the foregoing.

SEAWELL, J. (concurring in conclusion but dissenting from a portion of majority opinion). I am in disagreement with the construction placed upon section 244, Penal Code, by the prevailing opinion, wherein it is said:

> "While it may oftentimes happen that the throwing of the acids described by section 244 of the Penal Code would have the result of producing great bodily injury, the fact that it does so, or even that it will have the properties of doing so, is not required by said section. The crime is complete if any quantity of acid so described, however small in quantity or however weak in strength and however incapable of producing great bodily harm, is thrown or placed upon the person of another, if done willfully and maliciously with the intent to injure the flesh or to disfigure to the slightest extent the body of another."

The section thus construed reads:

> "Sec. 244. *Assaults with Caustic Chemicals.* Every person who willfully and maliciously places or throws or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

The purpose of said section is too evident to require discussion. It was clearly enacted to deter wicked and viciously disposed persons from injuring the flesh or disfiguring the body of a human being by the use of acids of any kind which contain caustic or corrosive properties sufficiently strong to accomplish the purpose of the person who throws them or causes them to be placed upon the body of another with the intent mentioned in said Code section. Caustic chemicals are thus defined by Webster's New International Dictionary:

> "1. Capable of destroying the texture of anything or eating away its substance by chemical action; burning; corrosive."

Vitriol and corrosive acids are known to possess properties similar to, if not identical with, those of caustic chemicals. The section is aimed at such chemicals as do harm to the human flesh, and is not directed against an adulteration, as the opinion holds, so weakened as to be utterly harmless. Society has suffered neither danger, damage, nor annoyance by the vicious throwing of harmless adulterations upon its citizens, but it has been outraged by the throwing of vitriols, corrosive acids, and caustic chemicals upon its citizens. Therefore we must conclude that the Legislature, by the enactment of section 244, was moved by a sense of legislative accomplishment, and was not wandering in a mere vacuity of purposelessness.

The crime consists in throwing upon the person of another any kind of vitriol, etc., that would ordinarily disfigure the flesh by burning by chemical action, and there is nothing either in its language nor in the reason for the legislation that can justify the inference that an adulteration containing any quantity of said acids, however infinitesimal, impotent, or harmless said adulteration may be, was intended to supply the ingredients of the crime. The throwing of "any vitriol, corrosive acid," etc., means vitriol and acids which contain the essential properties that characterize them as capable of doing the damage specifically mentioned in the statute.

It is an axiom of criminal law that a naked intent is not sufficient to constitute a criminal offense, however wicked the design of the accused may be.

To constitute the crime defined by said section 244, supra, there must be an accompanying overt act, intent, and the ability upon the part of the person accused to accomplish the act defined by statute. Had the appellant mistaken a vial of water for a vial of vitriol and thrown it upon the person intended to be injured, the crime described by said section 244 would not have been made out. Neither would it have been made out if the proof showed that a mere drop of vitriol, or any one of the other acids named in the statute, had been placed in a gallon of water and thus diluted to a degree that it was absolutely harmless to human flesh. If such had been the case, the ability to commit the offense was totally lacking, notwithstanding the evil intent.

Vitriol or caustic chemicals depend for their characterization upon the strength of the chief ingredients which enable them to fulfill their offices. When they lack such strength and are reduced to a state of harmlessness, they have lost their main characteristic.

The language of the opinion specifically referred to herein is not only obiter, in my opinion, but it is not a correct statement of the law. The latter reason has prompted my dissent from that portion of the opinion above reviewed.

I concur in the conclusion, however.

I concur: WASTE, C. J.

---

78 Cal. App. 87

PEOPLE v. RICKARD. (Cr. 1369.)

(District Court of Appeal, Second District, Division 1, California. May 21, 1926.)

1. Intoxicating liquors ⚷236(11).

Evidence *held* to sustain conviction of illegal sale of intoxicating liquor.

2. Criminal law ⚷1037(1).

Assignment of error in misconduct of district attorney will be overruled, where transcript shows that point is trivial and no assignment of misconduct was made at the time.

3. Criminal law ⚷358—Where defendant claimed that he was on a hunting trip at time of alleged sale of liquor and until September 18th, excluding evidence that he stopped at a store on road to hunting grounds on September 18th held not error.

Where defendant, charged with illegally selling intoxicating liquor in afternoon of September 15th, claimed that he was on a hunting trip from the morning of September 15th until September 18th, sustaining objection to question whether defendant stopped and bought some groceries at store on road to hunting grounds on September 18th *held* not error.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Dr. Joseph Rickard was convicted of illegal sale of intoxicating liquor, and from an order denying his motion for a new trial he appeals. Affirmed.

W. S. Staley and Ernest N. Clark, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J. [1] The evidence shows that the intoxicating liquor alleged to have been sold by the defendant to J. B. Davis and Ralph Cooke was sold and delivered in the following manner: Cooke went to Rickard's ranch and gave him some money. Rickard then delivered to Cooke a gunnysack containing some article or package, which Cooke did not see. Cooke drove away with this package and delivered it to Fred Buck. Cooke did not look into the sack at all and did not see the contents. But the sack and its contents remained unchanged during all of the time while in Cooke's custody. Buck testified that the article received by him from Cooke at the stated time and place was a sack containing a gallon jug, which with its contents remained continuously and unchanged in his possession down to the time of the trial, except that a small amount of the contents had been taken out for analysis by a chemist. There was ample evidence that the jug contained whisky, and that the same was intoxicating liquor. Under appellant's claim that the evidence is insufficient to justify the verdict, he specifies only that the witness Cooke did not see the contents of the sack or of the jug within the sack, and that there was a failure in the courtroom at the trial to identify the jug. It is sufficient to say in reply that the jug was identified, and that under the circumstances shown in the evidence it was not necessary that Cooke should have seen the contents of the sack.

[2] Appellant further complains that the district attorney was guilty of misconduct at the trial of this case. An examination of the parts of the transcript indicated by appellant's counsel shows that as applied to this record the point is trivial, and that no assignment of misconduct was made at the time.

[3] In Cooke's testimony, he fixed the time of his transaction with the defendant as being late in the afternoon of September 15, 1925. The defendant, on the other hand, testified that at about 10 o'clock that morning he left his ranch (where the sale was charged to have taken place), and did not return until the 18th. There were other witnesses in corroboration of this alibi. The only error assigned by appellant in addition to those above stated relates to the testimony of the witness Patton. Patton had a grocery store at a place on the road between defendant's ranch and the place to which defendant claims he went on his hunting trip. The court sustained an objection made by the district attorney to a question in which Patton was asked to say whether or not, on September 18th, defendant stopped at Patton's store and bought some groceries. The court sustained the objection on the ground that the evidence was not material in assisting to discover whether the offense charged was committed on the 15th day of September. It does seem

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to have been an item of very minor importance.

The order denying a new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

---

78 Cal. App. 74

FERGUSON v. OILDALE MUT. WATER CO.

(Civ. 3084.)

(District Court of Appeal, Third District, California. May 18, 1926.)

1. Appeal and error 🔑612(2).

Clerk may only certify judgment roll and notice of appeal.

2. Appeal and error 🔑653(1).

Trial court, and not appellate court, has authority to amend record itself, though appellate court may correct transcript to make it correspond to record.

3. Appeal and error 🔑659(4).

On suggestion of diminution of record, appellant cannot file orders of lower court not forming part of record on appeal, nor request supplemental transcript containing matters not made part of record.

4. Appeal and error 🔑649.

On application to trial court for authentication of items improperly included in clerk's transcript, respondent may object to inclusion in record before allowance thereof, in view of Code Civ. Proc. § 953a.

5. Dedication 🔑19(2).

Subdivision of tract leaving streets throughout, and filing and recording map designating streets, with certificate attached stating reservation of streets to public purposes, *held* to amount to dedication.

6. Dedication 🔑16(1), 37—"Dedication" of land for public use consists of offer and acceptance, which latter may be either actual, or implied from user.

"Dedication" of property for public use consists of offer and acceptance, which latter may be actual as by formal acceptance by proper authorities, or implied as when used by public for length of time sufficient to show intent to accept.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

7. Dedication 🔑53.

Where owner subdivides plat, street reserved for public use is merely subject to easement of public; ownership of soil being in owner of lots, in view of Civ. Code, §§ 831, 1112.

8. Dedication 🔑53.

Owner, subdividing tract into lots, with reservation of streets for public use, *held* not entitled to object to laying of water pipes in street, as ownership of soil had passed to purchasers of lots.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Andrew Ferguson against the Oildale Mutual Water Company to enjoin excavating and laying water pipes through certain land. Judgment for defendant, and plaintiff appeals. Affirmed.

Emmons & Aldrich and J. Ogden Reavis, both of Bakersfield, for appellant.

W. A. McGinn, of Bakersfield (Claflin & Lambert, of Bakersfield, of counsel), for respondent.

FINCH, P. J. The defendant is a mutual water company. The plaintiff brought this action to obtain an injunction restraining the defendant from making excavations and laying water pipes through certain parcels of land alleged to belong to plaintiff. In addition to denying many allegations of the complaint, the answer alleges as a separate defense:

> "That on June 16, 1910, a map entitled 'Map of Wait's Subdivision' was filed in the office of the county recorder of Kern county by plaintiff; that the property set forth in plaintiff's amended complaint is particularly set forth and described in said map as reserved for public use for whatever public purpose they are intended; and said mentioned property * * * is set forth and designated on said map as streets and alleys respectively; that following the recordation of said map plaintiff made numerous conveyances of lots in said Wait's subdivision, in which conveyances reference was made to the said map; * * * that since June 16, 1910, the property described in plaintiff's amended complaint has been traveled over generally by the public, and is now being generally traveled over by the public; that on the 24th day of February, 1920, the board of supervisors of Kern county declared the property * * * to be public highways; that on the 16th day of May, 1921, the said board of supervisors of Kern county granted to defendant permission to lay water pipes in, along, and through the property."

The findings recited that the case was submitted upon an agreed statement of facts and the court found that the plaintiff was not, at the times mentioned in the complaint, the owner of the parcels of land described therein, but that "said lots were and are public highways." Judgment was entered denying an injunction and awarding defendant its costs of suit. The plaintiff has appealed from the judgment. The plaintiff filed with the clerk a notice stating that he had appealed from the judgment and requesting:

> "That a transcript of all the proceedings, records, and documents in said cause be made up and prepared, including the judgment roll, stipulation of facts, all exhibits, all rulings, instructions, statements, and minute orders of the court."

The clerk's transcript, certified by the clerk alone, is the only record brought up on appeal. It sets forth at length what purports to be the "stipulation of facts" upon which the cause was submitted to the trial court for decision.

[1-4] "It is competent for the clerk to certify only the judgment roll and the notice of appeal." Lake v. Harris (Cal. Sup.) 243 P. 417. Appellant suggests a diminution of the record and has applied for an order "permitting him to file a duplicate of those portions of the transcript now on file, to wit, stipulation as to the facts of the case, minute order of trial and submission, * * * accompanied by the certificate of the judge who tried the case that the same are correct." It does not appear that the trial judge has authenticated that portion of the record in the trial court now sought to be brought up or that appellant has taken any steps to procure an authentication thereof. "It is the court below, and not the appellate court, which has authority to amend the record itself, although the appellate court may correct the transcript in order to make it correspond to the record. Consequently an appellant cannot file, upon a suggestion of a diminution of the record, orders of the lower court which do not form any part of the record on the appeal, nor request a supplemental transcript containing matters which have not been made a part of the record." 2 Cal. Jur. 677; Espinosa v. Gould, 47 Cal. App. 316, 318, 190 P. 481. Upon application by appellant to the trial court for the authentication of items improperly included in the clerk's transcript, the respondent would have the right to object to the inclusion of any of such items in the record before the settlement and allowance thereof. Code Civ. Proc. § 953a; Lake v. Harris, supra. Waiving all defects in the record on this appeal, however, and giving full consideration to the agreed statement of facts, it clearly appears therefrom that plaintiff is not entitled to judgment.

[5] It appears from such agreed statement, in so far as material to the questions presented by this appeal, that the facts are as hereinafter stated. The plaintiff, being the owner of a certain tract of land, subdivided it into 68 lots, generally 50 by 100 feet in size, leaving convenient streets and alleys running through the tract. June 16, 1910, he filed and caused to be recorded in the office of the county recorder a map of such subdivision, showing the said lots, numbered from 1 to 68, and the said streets and alleys, designated as such on the map. Attached to the map was plaintiff's certificate stating that the map "particularly sets forth and describes all the parcels of land within said subdivision reserved for public use by their boundaries, courses, and extent for whatever public purpose they are intended, and also lots for sale by their numbers and dimensions." The plaintiff thereafter conveyed all but six of the lots to various persons. "All such conveyances have been made by reference to the said map." The streets designated "on said map have been at all times herein mentioned traveled over generally as highway by the public." May 16, 1921, the board of supervisors made an "order permitting the defendant herein to lay water mains in and along" said streets. Thereafter the defendant laid "pipes in and along" said streets "for the purpose of conducting water to its stockholders * * * and is now conducting water to its said stockholders of which there are nine in said * * * subdivision and intends to and will serve all people residing in said * * * subdivision who become members of the said defendant company." The plaintiff was, at all times mentioned, engaged, as a public utility, in the sale and distribution of water for domestic and irrigation purposes to various persons residing in the subdivision, and for that purpose he had laid water pipes in the streets thereof. The defendant's water pipes are located near the curbs on the opposite sides of the streets from the lots now owned by the plaintiff.

[6-8] It is clear that the plaintiff dedicated the streets in question to public use. A dedication consists of an offer and acceptance. "The acceptance may be actual or implied. It is actual when formal acceptance is made by the proper authorities, and implied when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication." Inyo County v. Given, 183 Cal. 415, 418, 191 P. 688, 690. "It is not necessary that the acceptance by the public be manifested by any direct action, ordinance, or declaration of the public authorities." Venice v. Short Line Beach Land Co., 180 Cal. 447, 450, 181 P. 658, 660. It is not contended that the streets are not public highways, but that such highways are mere easements and that the title to the land over which they pass, subject to the easements, remains in the owner of the soil. This may be conceded. Porter v. City of Los Angeles, 182 Cal. 515, 519, 189 P. 105. "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." Civ. Code, § 831. "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." Civ. Code, § 1112. As no different intent appears from the agreed statement of facts, it must be presumed that each conveyance made by the plaintiff transferred to the grantee "the soil of the highway in front to the center thereof." It follows that the plaintiff is not the owner of any of the lands in which the defendant maintains its water pipes, and therefore is not entitled to judgment.

It would serve no useful purpose to permit the appellant to file a supplemental transcript and his application therefor is denied.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

---

78 Cal. App. 49

BAIL v. GLANTZ. (Civ. 5391.)

(District Court of Appeal, First District, Division 1, California. May 17, 1926.)

1. Brokers 🔑53—Real estate broker is entitled to commissions if he set in motion events which without break in continuity proximately caused vendor and purchaser to agree, but not if he merely imparted information; "procuring or inducing cause."

Real estate broker is entitled to commissions if he was "procuring or inducing cause of sale," which means that he set in motion a chain of events, which, without break in continuity, caused vendor and purchaser to agree, and his efforts were proximate cause of agreement, but it is not enough that he contribute indirectly by imparting information tending to arouse interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Procuring Cause.]

2. Brokers 🔑54.

If, after broker initiates negotiations, seller takes completion of sale into his own hands, he is estopped to contend that broker has not produced purchaser ready, able, and willing to buy.

3. Appeal and error 🔑842(1), 1010(1).

Whether sale is primarily result of real estate broker's efforts is question of fact on which trial court's conclusions, sustained by substantial evidence, will not be disturbed.

4. Brokers 🔑86(4).

Evidence *held* to sustain finding that real estate broker was efficient and procuring cause of sale.

5. Brokers 🔑57(2).

Change by landowner in consummating sale in price or terms from those specified in broker's contract cannot impair right to commissions, and hence taking part payment in property rather than cash as specified did not defeat liability.

6. Brokers 🔑57(2).

Where landowner took charge of negotiations initiated by broker, and within time limited by broker's contract made binding agreement for disposal of land for other property and cash, when or whether transfers were consummated are immaterial to liability for commissions.

7. Appeal and error 🔑1011(1).

Finding of trial court on conflicting evidence as to value of real property is conclusive on appeal in suit for real estate broker's commissions.

8. Appeal and error 🔑1056(4).

In action for real estate broker's commissions, of all over specified sale price, exclusion of evidence of amount received from sale of property taken by owner as part payment *held* not harmful error, where trial court found market value of property on conflicting evidence.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by B. G. Bail against C. W. Glantz, to recover commissions claimed to be due on a sale of real property. From the judgment both plaintiff and defendant appeal. Affirmed.

Clarence A. De Lancey, of San Francisco, for appellant.

Carl F. Wood, of Oakland, for respondent.

KNIGHT, J. Plaintiff brought this action to recover the sum of $1,000 claimed to be due as real estate commissions, and was given judgment for $500. Defendant has appealed upon the grounds that plaintiff was not entitled to a judgment for any amount and that the trial court erred in excluding a portion of defendant's evidence. Plaintiff, being dissatisfied with the amount of the judgment, has also appealed.

The written contract of agency between the parties, dated October 18, 1923, conferred upon plaintiff as agent, for a period of 15 days following the execution of the contract, the exclusive right to sell defendant's property, situate on the Trestle Glen road, Oakland, for the sum of $11,500, upon the following terms, to wit:

"All cash, or fifty-five hundred dollars ($5,500) cash; balance seven per cent. * * *"

Said contract further provided that:

"When the agents have produced a purchaser on the terms above set forth, or other terms acceptable to me, or if I deal either before or after the expiration of this contract with any person, to whose attention said property was brought through the efforts or services of the agents rendered hereunder during the life of this agreement, I will pay to said agents at their office in Oakland, California, a commission of all over the selling price above specified."

The trial court found:

"That plaintiff within said fifteen (15) day period produced a purchaser, to wit, one D. M. Stewart, on terms acceptable to defendant, and said property was brought to the attention of D. M. Stewart through the efforts and services of plaintiff, rendered by plaintiff during said fifteen (15) day period; that said defendant did sell said property to said D. M. Stewart on the 31st day of October, 1923, on terms acceptable to defendant at the price of twelve thousand ($12,000) dollars;" and that therefore plaintiff was entitled to a commission of $500.

The undisputed evidence shows that on October 31, 1923, and within the 15-day period fixed by the agency contract, defendant entered into a written agreement with Stewart, whereby defendant agreed to convey to Stewart the property mentioned in the agency contract subject to an incumbrance of $6,000, and Stewart agreed to pay to defendant the sum of $1,000 in cash and to convey to him property situate in the Alden tract, Alameda county. Soon after the date of the expiration of the agency contract, the transaction between defendant and Stewart was consummated in accordance with the terms of their agreement. The defendant contends that the findings above quoted are not supported by the evidence, in that there was no proof showing that plaintiff produced a purchaser, or that "said property was brought to the attention" of Stewart through plaintiff's efforts or services.

[1-3] Under a contract such as the one here considered, the rule is that the broker has earned his commission when it is shown that he was the efficient cause of the sale; and his rights are the same whether his activities constitute the origin or the ending of a continuous series of negotiations leading to the successful consummation of the sale. It is not enough that he contribute indirectly or incidentally to the sale by imparting information which tends to arouse interest, but it is sufficient if it be established that he set in motion a chain of events which without break in their continuity caused the buyer and seller to come to terms, that his efforts constituted the proximate cause of the meeting of the minds of the principals, and he will not be deprived of his commissions because the negotiations which are brought about and partially carried on by him are afterwards completed by the parties themselves or through some one else. Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Sargent v. Ullsperger, 54 Cal. App. 384, 201 P. 934. It is necessary for the broker to prove therefore that he was the efficient or procuring cause of the sale; in other words, it must appear that his efforts had to do with the meeting of the minds of the seller and buyer (Webster v. Parra [Cal. App.] 237 P. 804), but if, after he initiates the negotiations, the seller takes into his own hands the completion of the sale, the broker is so completely discharged from responsibility in the premises that the seller is estopped to contend against the broker's claims for commissions that the broker has not produced a purchaser who is ready, able, and willing to make the purchase. Constant v. Wallace, 62 Cal. App. 768, 217 P. 1081:

> "The expression 'procuring and inducing cause,' as used in the books, refers to the cause originating from a series of events that without break in their continuity results in the prime object of the employment of the agent." Roth v. Thomson, 40 Cal. App. 208, 180 P. 656, quoting approvingly the rule stated in Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820.

In any event the question of whether or not the sale is primarily the result of the broker's efforts is one of fact, and the trial court's conclusions thereon will not be disturbed on appeal if there be substantial evidence to sustain them. Sessions v. Pacific Improvement Co., supra.

[4] The testimony given by plaintiff was to the effect: That, after the execution of the agency contract, he advertised the property for sale, that he cleaned the premises, swept the house, mowed and watered the lawn, and made the place as attractive as possible for selling purposes. That on the afternoon of October 27, 1923, while he was upon the property showing it to prospective buyers, Stewart came in to inspect the same. That he pointed out to him the advantages of the property, including the workmanship, decorating, and materials, the fireproof roof, tiled bathroom, tiled sink, the breakfast room, and other attractive features. He also explained to him that the owner would install a furnace, an automatic water heater, and fence the back yard. He furthermore supplied Stewart with information as to the amount of the selling price, the terms of payment, and discussed with him the possibility of a trade. Plaintiff's testimony as to his interview with Stewart and the latter's inspection of the premises was corroborated generally by Stewart, although the latter disagreed to some extent in regard to the details of the information imparted to him by plaintiff. That same evening plaintiff informed defendant of Stewart's visit to the property, and, although at that time plaintiff did not know Stewart's name, told defendant of the interest this prospective buyer had taken in the property, but that he "did not come to anything definite before leaving." The next day Stewart, accompanied by his wife, returned to make further inspection of the property. When they arrived, plaintiff was temporarily absent, but defendant was there and engaged in a conversation with Stewart concerning a sale or trade of the property. Just as Stewart and his wife were leaving, plaintiff came upon the premises, and defendant asked him if he knew "that fellow," to which plaintiff replied, "Yes; that is the man that was here yesterday, or the day before, whichever it was, that I was telling you about, that had the little place to trade." Continuing the conversation, plaintiff and defendant discussed the location and value of the property Stewart had offered in trade, also defendant's intention to inspect Stewart's property and the probability of the consummation of the sale on the terms proposed by Stewart.

After defendant examined Stewart's property, another conversation took place between plaintiff and defendant, concerning the value of Stewart's property, in which defendant stated, in effect, in the presence of plaintiff's wife, that he was not having an easy task in making a trade with Stewart, whereupon plaintiff suggested that he would be glad to see what he could do with him. Defendant replied that he wanted plaintiff to "lay off of" Stewart, that he would "handle" him, and that the matter of plaintiff's commissions would be taken care of when the transaction was closed. On or about November 2d, defendant informed plaintiff that the agreement for the disposal of the property had been signed. Plaintiff expressed his pleasure, and added that he would put in his claim for commissions with the title company. Defendant told him, however, not to do so, because he did not want Stewart to know that he (defendant) was paying a commission; defendant further stating that plaintiff was entitled to a commission which he (defendant) would take care of "on the outside." About November 12th, after the conveyances between defendant and Stewart had been recorded, another conversation occurred between plaintiff and defendant, during which plaintiff demanded a settlement regarding his commissions. Defendant stated that, although he had intended to pay plaintiff about $300, he was unable to do so because of added expense in fixing up the trestle Glen property before Stewart would accept it. Defendant then asked plaintiff how much he expected. Plaintiff stated that he expected the commission called for by the contract, and defendant replied that in that event they could not settle at all, that, if plaintiff thought he could get that amount, to "go ahead." Thereupon plaintiff commenced this action.

It is our opinion that under the authorities hereinabove cited the evidence narrated was amply sufficient to warrant the trial court in concluding that plaintiff was the efficient and procuring cause of the sale of defendant's property, and therefore its findings to the effect that, within the limitation of time fixed by the contract, plaintiff produced a purchaser on terms acceptable to defendant, and that the property was brought to the attention of said purchaser through the effort and services of plaintiff, must be sustained.

[5, 6] Defendant further contends that there was no evidence of a sale of the property on October 31, 1923, claiming in this respect that the transaction between defendant and Stewart constituted an exchange of properties and not a sale, and moreover that the exchange was not consummated until after the limitation of time fixed by the agency contract; consequently plaintiff was not entitled to commissions. We think neither proposition is maintainable. Regarding the first one, a change made by the owner, when consummating the sale, in the price of the land or the terms of the sale from those specified in the broker's contract, cannot of itself affect or impair in any way the right of the broker to his commissions (Roth v. Thompson, supra); and, as to the latter proposition, the evidence shows that defendant, of his own accord, took charge of the negotiations with the proposed purchaser and within the period of time fixed by the agency contract entered into a binding agreement with him for the disposal of the same upon terms acceptable to defendant. It was immaterial, therefore, so far as plaintiff's commissions were concerned, when, if at all, the transfers of the properties were consummated. Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 173 P. 1109; Sessions v. Pacific Improvement Co., supra; Twogood v. Monnette, 191 Cal. 103, 215 P. 542; Johnson v. Krier, 59 Cal. App. 330, 210 P. 966; Purcell v. Firth, 175 Cal. 746, 167 P. 379.

[7] Plaintiff and defendant both complain of the trial court's finding that the selling price of defendant's property was $12,000. It is evident, however, that defendant's acceptance of Stewart's real property in part payment of the purchase price for the property covered by the agency contract made it necessary for the trial court to determine the market value of Stewart's property at the time of the execution of the so-called exchange agreement of October 31, 1923, and much conflicting evidence was offered upon that subject. From all the facts and circumstances thus presented, the court concluded that defendant received for his property a value equivalent to a selling price of $12,000. In that state of the record the determination of the trial court is conclusive on appeal against both parties.

[8] The exclusion by the trial court of the evidence sought to be introduced by the defendant to show the net amount received by him from a subsequent sale of the Stewart property, if error, was not harmful. As above indicated, the material question for the trial court's determination was the market value of the Stewart property at the time defendant accepted it as part payment on the purchase price, and evidence of the subsequent selling price, if admissible at all to prove a prior market value, would have amounted to nothing more than another circumstance relating to an issue upon which a conflict of evidence already existed.

Finding no merit in either appeal, the judgment is affirmed. Neither side having prevailed on the appeal, and, the judgment being neither modified nor reversed, each side must bear his own costs of appeal.

We concur: TYLER, P. J.; CASHIN, J.

78 Cal. App. 68

PEOPLE v. SMITH. (Cr. 1282.)

(District Court of Appeal, First District, Division 1, California. May 18, 1926.)

1. Robbery 🔑20—Variance between indictment alleging robbery of personal property of certain person, and proof showing it belonged to such person's employer, held immaterial.

Variance between indictment alleging robbery of personal property of certain person, and proof showing it belonged to such person's employer, *held* immaterial, since charge of robbery may be sustained if property taken belonged to any person other than defendant.

2. Robbery 🔑17(5).

Under Pen. Code, § 956, erroneous allegation as to ownership of property is immaterial, if offense is otherwise described with sufficient certainty to identify act of robbery.

3. Criminal law 🔑1169(5)—Testimony of officer's conversation with defendant, regarding statement by latter's wife as to deposit of money with his mother, held not error as allowing wife to testify against him, where it was stricken (Pen. Code, § 1322, Code of Civ. Proc. § 1881).

Testimony of officer's conversation with defendant regarding statement by latter's wife as to his deposit of money with his mother, *held* not error as violating Pen. Code, § 1322, or Code of Civ. Proc., § 1881, by allowing wife to testify against defendant, where testimony was stricken and jury instructed to disregard it.

4. Criminal law 🔑407(1)—Admission of parents' statement as to defendant's deposit of money, allegedly obtained in robbery, with mother, held proper in showing his passive conduct in face of accusatory statement.

Admission of written statement by defendant's parents as to his deposit of money, alleged to have been obtained in robbery, with mother, which accompanied their return of money to officer and was subsequently shown to defendant, *held* proper as showing defendant's passive conduct in face of accusatory statement.

5. Criminal law 🔑1137(5)—Defendant, who failed to deny having given money allegedly obtained in robbery to mother, cannot complain of admission of statements as to delivery of such money to her.

Defendant, who while testifying did not deny having given money, allegedly obtained in robbery, to mother, but stated he was not sure of amount, cannot complain of admission of statements by wife and parents relative to delivery of such money to mother.

Appeal from Superior Court, City and County of San Franscisco; J. J. Trabucco, Judge.

William R. Smith was convicted of first degree robbery, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco (Austin Arnold, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. An appeal by defendant from a judgment of conviction of first degree robbery and from an order denying his motion for a new trial. The sufficiency of the evidence upon which the conviction is based is not questioned, but appellant urges as grounds for reversal that there was a fatal variance between the allegations of the indictment and the proof in regard to the ownership of the property stolen from the victim of the robbery, and that the court erred in ruling upon the admissibility of certain evidence offered and received on behalf of the prosecution.

[1, 2] The indictment charged appellant with having robbed one Wilbur A. Johnson of the sum of $17,996, "the personal property of said Wilbur A. Johnson." The evidence proved that the money belonged to the Pacific Gas & Electric Company, a corporation, by whom Johnson was employed, but was in Johnson's possession at the time of the robbery, and that he was robbed of the same while on his way to deposit the money in the bank. The variance complained of was immaterial. It is sufficient to sustain a charge of robbery if the property feloniously and forcibly taken from the person of another belonged to any person other than the defendant; and under section 956 of the Penal Code an erroneous allegation as to ownership of the property is immaterial, if the offense is otherwise described with sufficient certainty to identify the act of robbery, the identity of the act of robbery being the same no matter upon whom the injury involved in the larceny which is included in the robbery might fall. People v. Anderson, 80 Cal. 205, 22 P. 139; People v. Nelson, 56 Cal. 77; People v. Clark, 106 Cal. 32, 39 P. 53.

The robbery occurred on the sidewalk on December 4, 1924, soon after Johnson had left the company's building on Sutter street and was proceeding toward the bank, accompanied by another employee of said company. Johnson was carrying the money, consisting of currency and silver, and also a parcel containing twenty-three $1,000 bonds, belonging to said company. He had gone only a short distance when he was robbed of the money and bonds by three men, two of whom brandished pistols, and, after striking Johnson on the head, felling him to the sidewalk, fled through an alley, scaled a wall, and entered an automobile, but in climbing the wall dropped the package containing the bonds. After entering the automobile, the robbers followed a circuitous route, and in their flight fired several shots at their pursuers. They finally abandoned their automobile and disappeared. The automobile, it was discovered, was owned by and registered in the name of appellant's wife, Mrs. R. Smith, 272 Faxon avenue, San Francisco. About two hours after the robbery, Mrs. Smith was summoned from her home to a neighbor's telephone, and, after holding a brief conversation over the phone, returned hurriedly to her home, stayed there a few minutes, departed, and did not return. Appellant and his wife were eventually traced to the residence of appellant's mother in Chicago, where they were arrested on December 27, 1924, and placed in the Chicago jail. While in jail there appellant made a full and complete confession, which was afterwards used against him at the trial. In that confession he related the details of the commission of the crime by himself and his two companions, the circumstances showing that it had been carefully planned, and the manner in which he and his wife had made their escape to Chicago. Afterwards, and during the trial, he attempted to repudiate the confession, claiming that the same was obtained through duress and as a result of physical violence inflicted upon him by members of the Chicago police department.

At the trial, Officer William McMahon of the San Francisco police department testified that, following the arrests, he went to Chicago and talked with Mrs. Smith while she was being detained in the Chicago jail. The purport of this conversation he was not allowed to reveal, but he further testified that soon afterwards he held a conversation with appellant regarding which the witness was interrogated as follows:

> "Q. Tell us what was said between you, and tell us who was present. A. There was just the defendant and I present; I asked him for an order to his mother for the $2,000 which I had gained information that he had given his mother.
>
> "Mr. Coghlan (Council for Appellant): I move that be stricken out as hearsay. * * *
>
> "The Court: The last portion may go out; information that he had gained from his mother (doubtless meaning his wife) that may go out, and you may proceed with your answer. A. And he refused to give me the order.
>
> "Q. Did you say anything to him about having any information of money lodged with his mother—deposited with his mother? A. I did.
>
> "Q. What did you tell him, and what did he say to you in answer? A. I told him that his wife told me * * * he had given his mother $2,000, and he said to me, 'If that dame told you that she's crazy.'"

Thereupon counsel for appellant, who had already objected to the witness relating any portion of the statement made by appellant's wife, moved to strike out the answer. After some discussion the court ruled that appellant's objection be sustained, counsel for the people remarking at the time: "Very well. Now then, that matter is stricken out then?" To which the court replied: "Yes, that may go out; the latter portion." The testimony given by Officer McMahon further shows that afterwards he obtained from appellant's mother $1,580 in cash and a written statement signed by her and her husband, reading as follows:

> "January 3, 1925.
>
> "The $1,580 that was turned over to William McMahon at 2849 North Racine avenue, Chicago, was left here at my home by my son William Schmidt (which was appellant's true name) about three weeks ago. At that time there was about $2,000 out of which at various times he took the difference."

The testimony of McMahon further shows that after appellant had been brought back to San Francisco he was asked if he had given any money to his mother or to anybody else in Chicago for safe-keeping, and he replied that he had not; that he was then asked, "Then if your mother says you did she is mistaken?" and he answered that she was; that he (McMahon) then exhibited to the appellant the $1,580 in cash and the written statement obtained by him from appellant's mother and father, and asked appellant how he accounted for them, to which he made no reply. The money and the written statement, after being properly identified, were offered and received in evidence over appellant's objection. Appellant became a witness in his own behalf, and testified, in substance, that he had not participated in the robbery, but was intimately acquainted with James F. Ryan, one of the three men charged with the offense, whom he knew to be an ex-convict, and who at the time of the trial was a fugitive from justice; that Ryan had borrowed Mrs. Smith's automobile on the morning of the robbery, and shortly after the noon hour, which was subsequent to the robbery, Ryan met appellant on the street by telephone appointment, and told him that the automobile had broken down and was to be found at a certain garage; that at the same time Ryan paid to him the sum of $2,500 in cash in liquidation of a gambling debt; that soon afterwards appellant learned of the robbery through the evening newspapers, and, having learned also that his wife's automobile had been used in the perpetration of the crime, became terrified, and with his wife left San Francisco that night for Los Angeles, later going to Chicago. He further testified that when he left San Francisco he had in his possession, besides the $2,500 paid to him by Ryan, the sum of $400. Upon cross-examination he was asked, "And you spent about $900 in Los Angeles for wearing apparel, which would reduce that amount to $2,000, is that right?" His response was, "I guess that is correct; yes." He was then asked, "Did you give to your mother $2,000?" and he answered, "Well, I don't remember the exact amount."

[3] Appellant contends that it was error for the trial court to permit McMahon to relate to the jury the conversation which took place with appellant regarding the statement made by appellant's wife as to the deposit of the money with appellant's mother; that it was in effect allowing appellant's wife to testify against him in violation of section 1322

of the Penal Code and subdivision 1 of section 1881 of the Code of Civil Procedure. The point is without merit. The record shows quite clearly that the testimony complained of was, on appellant's motion, stricken out, and that the jury was instructed at the conclusion of the evidence that it should disregard and discard every impression or idea suggested by questions as to which objections had been sustained, and that it should not consider evidence which had been excluded by the court. The words "the latter portion," which were included in the court's second ruling striking out the objectionable testimony, when fairly interpreted in light of the previous ruling of the court excluding the same testimony, could have referred to no other matter than the information imparted to McMahon by appellant's wife.

[4] Neither was it error, as appellant claims, to admit in evidence the written statement made by appellant's mother and father accompanying the return of the money. For the purpose of showing appellant's passive conduct in the face of an accusatory statement, it was necessary and proper for the prosecution to reveal the contents of the statement. People v. Ong Mon Foo, 182 Cal. 697, 189 P. 690; People v. Ayhens, 16 Cal. App. 618, 117 P. 789.

[5] Moreover, we believe that appellant is not in a position to complain of the admission in evidence of the statements made by his wife and by his mother and father regarding the delivery of the money to his mother, for the reason that, while testifying in his own behalf, in response to a direct question, he did not deny having given the money to his mother, but stated that he was not sure of the amount.

It is our opinion that the record is free from error. The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

78 Cal. App. 302

PEOPLE v. CLARKE. (Cr. 1318.)

(District Court of Appeal, First District, Division 2, California. June 9, 1926.)

1. **Assault and battery ⚷92—Evidence held sufficient to sustain conviction for assault with deadly weapon.**

Evidence *held* sufficient to sustain conviction for assault with deadly weapon.

2. **Assault and battery, ⚷56.**

Prior threats to do bodily harm are not essential element of assault with a deadly weapon.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Charles W. Clarke was convicted of assault with a deadly weapon, and he appeals. Affirmed.

H. D. Perry, A. Q. Lomba, and Hugh K. Forsman, all of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

NOURSE, J. The defendant was convicted following a trial before a jury upon an information charging him with the crime of assault upon the person of Jack Elliott with a deadly weapon. He made a motion for a new trial, which was denied, and from that order and from the judgment which followed the verdict he has appealed upon a typewritten record.

[1] The evidence is that on September 26, 1925, the defendant drove his automobile at a high rate of speed to the home of Elmer Davis in the city of Oakland at about 1 o'clock p. m. while the Davis family, including Jack Elliott, a son-in-law of Elmer Davis, were at their luncheon. The defendant left the motor of his car running and, after kicking in the front door, entered the house carrying a loaded shotgun. As he came toward the kitchen where the members of the family were gathered, they scattered to different parts of the house, leaving Elliott alone in the kitchen. As the defendant came through the hall door into the kitchen carrying the gun, he pointed it directly at Elliott, who, in attempting to escape, fell over a chair and into a pantry. As he did so the defendant demanded that he come out, but before anything else occurred two other members of the Davis family had seized the defendant from behind and taken the gun from his possession. The gun used by the defendant was an automatic shotgun loaded with No. 4 shot and having one shell in the chamber and three in the magazine with the safety off and the gun ready to shoot at the time it was taken from the defendant.

The only explanation of defendant's conduct is that he was the divorced husband of one of the daughters of Elmer Davis, and that he was incensed because he had been required to pay alimony to her, and that he was at the time looking for his former wife for the purpose of doing some injury to her, but that he did not threaten nor intend to assault the complaining witness Elliott.

The evidence which we have recited is all uncontroverted and amply sustains the verdict of guilty. In fact, it would have been impossible for the jury to have justly returned any other verdict. In support of the appeal the appellant insists that the verdict should be overturned because there was no evidence showing that the appellant made any threats against Elliott and because evidence was admitted prejudicial to the appellant relating to threats which he had made

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

against members of the Davis family, and particularly against his former wife.

In relation to the second point, it appears that objections were made to inquiries directed to a witness covering alleged threats against the members of the Davis family and that when these objections were overruled the witness answered that he had not heard any such threats. Later in the course of the trial the same inquiry was directed to another witness under examination and all the testimony covering that subject-matter was received without any objection on the part of the appellant.

[2] As to the first point, the appellant insists that, as he did not have Elliott particularly in mind at the time he called at the house and had not previously made any threats against Elliott, the evidence was insufficient to support the verdict. The answer is, of course, that prior threats to do bodily harm were not an element of the crime of assault with a deadly weapon. The evidence is without conflict that the appellant entered the room in a highly excited manner, pointed a loaded shotgun directly at Elliott, who tumbled into a pantry in his haste to escape the threat which the gun itself carried; that while lying upon the floor of the pantry the appellant ordered him to get out of there, but was stopped from taking any further action by other members of the family.

The whole record discloses without the slightest doubt that the appellant was fairly tried and fairly convicted.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

78 Cal. App. 266

BIG ROCK MUT. WATER CO. v. VALYERMO RANCH CO. et al. (Civ. 5311.)

(District Court of Appeal, First District, Division 1, California. June 2, 1926. Rehearing Denied July 2, 1926. Hearing Denied by Supreme Court July 30, 1926.)

1. Waters and water courses 🔑137.

Occasional suspension or interruption of use of water by placing obstructions, immediately removed by those claiming right of use, is not sufficient to break continuity of exclusive possession so as to toll statute.

2. Waters and water courses 🔑137.

Interruption of adverse use of water under claim of right must be open and upon claim of right, or so notorious as to constitute such claim, in order to toll statute.

3. Judgment 🔑600½.

Judgment in suit to determine water rights *held* not res judicata of rights claimed under adverse user subsequent to judgment.

4. Waters and water courses 🔑152(8).

In suit to quiet title to water, evidence *held* sufficient to show user adverse to plaintiff's claim.

5. Waters and water courses 🔑137.

One complying with essential elements of adverse user of water amounting to prescription for statutory period may acquire permanent right to use water.

6. Waters and water courses 🔑129.

Right to water by adverse user may be acquired as against claimant under prior appropriation, or as riparian owner, purchaser, or one claiming right by prescription itself, or by acquisition by any other method.

7. Waters and water courses 🔑129.

Right of appropriator of water may be lost in whole or in part by adverse possession and user by another amounting to prescription.

8. Waters and water courses 🔑137.

Where notorious, exclusive, and adverse use of water under claim of right has continued for statutory period for commencement of actions for recovery of real property, law will presume grant of right so held.

9. Waters and water courses 🔑129.

Private corporations holding water as public use, as well as public utility corporations holding title to property as public use, can lose water rights by prescription.

10. Adverse possession 🔑8(1).

Where public lands have been devoted to public use, person cannot obtain title thereto by prescription founded on adverse occupancy.

11. Waters and water courses 🔑142—Interest in running water is not equivalent to interest which may be acquired in lands.

Interest in water of stream is not equivalent to interest which may be acquired in lands, because running water cannot be subject of private ownership, right to its use only being subject to acquisition, with no property in corpus of water itself.

12. Waters and water courses 🔑151.

Interest in water of stream is dependent upon user, and may be lost upon cessation of use, in view of Civ. Code, § 1411.

13. Waters and water courses 🔑151.

Right of irrigation district to use waters of running stream may be lost upon cessation of use.

14. Waters and water courses 🔑151.

Right of public and each individual thereof to continue use of water which has been devoted to public use may be lost by abandonment.

15. Waters and water courses 🔑143.

Right in waters acquired by adverse user is limited to amount reasonably necessary for beneficial purpose for which it has been diverted, and no title can be acquired to excess.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Big Rock Mutual Water Company against the Valyermo Ranch Company and others to quiet title to water. Judgment for defendants, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Shenk, J., dissenting.

William T. Kendrick and Victor H. Kendrick, both of Los Angeles, and Kibbey & Stoneman, for appellant.

John C. Packard, of Los Angeles, amicus curiæ.

Haas & Dunnigan, and H. E. Forster, all of Los Angeles, for respondents Valyermo Ranch Co. and others.

C. F. Holland, of Los Angeles, for respondent Lemon.

TYLER, P. J. Action to quiet title to all the water of Big Rock creek, formerly known as Rio Del Lano, a natural nonnavigable stream situated in Los Angeles county. The stream has its source in the Sierra Madre mountains, and, flowing in a northerly direction to the plains below, known as Antelope valley, it passes what is designated in the record as "Sweet Tunnel." The complaint recites that plaintiff is the owner of all the waters of said stream which naturally flow by the head of said tunnel whenever the same does not exceed 2,000 standard miner's inches. Further allegations are to the effect that the defendants and each of them claim an estate or interest and a right to use some of the waters adverse to the plaintiff; that each of them is without any right whatever, as they have no interest in the water; that notwithstanding this fact defendants have entered upon the said stream and diverted large quantities of its water so belonging to plaintiff and appropriated it to their own use and deprived the plaintiff thereof. The prayer of the complaint is that each of them be required to set forth the nature of his claim so that all of the adverse interests of the various defendants may be determined by the action. Answers were duly filed on behalf of the defendants Valyermo Ranch Company, a corporation, Levi F. Noble, R. B. Pallett, and a separate answer was filed on behalf of J. Royal Lemon, successor in interest to one Bryon H. Kent, setting forth the respective interests of these defendants.

The Valyermo Ranch Company, by its answer, in substance alleges that its lands are riparian to the waters of the stream and within the watershed thereof, and that it has an interest in and a right to use said water. It denies that plaintiff was or ever has been entitled to the exclusive or any possession or use thereof as it flows past the said tunnel. It admits that it takes and for many years last past has taken water from said stream through pipe lines for distribution on its lands, and has been using the same to irrigate alfalfa and deciduous fruit trees in an economical way, and that the alfalfa and trees are wholly dependent upon the water so taken for their growth and cultivation; that it has, during the last five years, actually appropriated and taken through the said pipe lines from the point of its diversion at all times during the irrigating season, openly, notoriously, and adversely to all the world and adverse to plaintiff and its stockholders and their predecessors in interest, a minimum of 180 inches of water and as much more up to the capacity of said pipe lines as has been necessary to be applied to its irrigable lands and for the watering of its livestock and for its domestic uses; that the lands owned by it are of a porous character and require for their proper irrigation and for the proper advantages and cultivation of the trees and crops all of the said 180 standard miner's inches of water during the irrigation season, and all of the same have been used for beneficial purposes; that said rights are claimed by the company as the owner of lands riparian to said stream and by virtue of actual appropriation; that said company, as riparian proprietor of land adjacent to said stream, is entitled to take said minimum of 180 inches and upwards to the capacity of said pipe lines at its point of diversion from the waters of said stream, the same to be applied to the uses and purposes set forth. It is then alleged that it is the owner of a minimum of 180 inches of water during the irrigating season and up to a maximum of 225 standard miner's inches or the capacity of its pipe lines. Substantially the same allegations are pleaded on behalf of defendant Robert B. Pallett. On his behalf it is alleged that for more than five years last past he has been the owner and in the possession of certain described lands adjacent and riparian to the stream and within its watershed, all of which lands are up stream and above the lands belonging to plaintiff or its stockholders; that he is now and has been diverting for the period stated, during the summer or irrigating season, a minimum of 150 standard miner's inches of water through an open ditch for the purpose of cultivating fruit trees, cereals, alfalfa, and like crops grown upon his lands; and that his use has been made openly, notoriously, and adversely to all the world under a claim of right, and he prays that said 150 standard miner's inches be awarded him. These defendants then allege that, should they be deprived of the waters so held by them or any part thereof, they will suffer irreparable damage and injury not capable of being measured in terms of money. As a further and separate defense they allege that plaintiff and its stockholders and predecessors in interest have been guilty of laches in not asserting any claim adversely to defendants during many years, and particularly during the five years last past. Estoppel is also pleaded. The answer filed by Byron H. Kent and J. Royal Lemon alleges that Kent has disposed of all of his interest in any lands and all water rights appurtenant thereto, and which are affected by the action, to J. Royal Lemon. This defendant also denies any rights in plaintiff to the waters, and he alleges that for more than seven years prior to November, 1918, he has been the owner of certain described lands riparian to and within the watershed of said stream situated above plaintiff's land, and that all of said land is desert in character and worthless without irrigation; that for seven years prior to the commencement of this action he has been diverting waters from the stream at a certain point through a ditch having a capacity of 100 standard miner's inches for the purpose of irrigating his orchard and alfalfa fields; that he has diverted the water openly, notoriously, and adversely to plaintiff. Laches and estoppel are also pleaded by him as a separate defense. General relief is prayed for by all of these defendants. Defendant Noble simply claims an interest as a stockholder in Valyermo Ranch Company, and his interest in the waters have been acquired by that company.

The issues thus presented were tried without a jury, and judgment was rendered in favor of the defendants, who appeared and answered. Under the judgment each was awarded a specific amount of water. The quantity allowed the Valyermo Ranch Company was 225 standard miner's inches, the defendant R. B. Pallett 170 inches, and J. Royal Lemon 100 miner's inches, and, in addition thereto, each of these defendants was found to be entitled to an additional indefinite amount of water for certain riparian lands described in the complaint, and the remainder of the flow was found to belong to plaintiff. A new trial was asked for, and pending the hearing of the motion the judge who tried the case resigned from office, and his successor heard the application. The motion was denied upon the ground that the time for passing upon the same was insufficient to permit of a proper examination of the voluminous record. The findings and judgment were, however, on motion of defendants, set aside and other findings were made, and another judgment based thereon was entered, and it is from this latter judgment that this appeal is taken.

It is the claim of appellant that the evidence is insufficient in law or in fact to show that plaintiff's title to the waters has in whole or in part been divested from it or its predecessor in interest either by appropriation or by prescription or by reason of the riparian rights of the defendants, except a portion thereof which had been decreed in a former action to belong to one Shoemaker, a predecessor in interest of lands now belonging to defendant Pallett.

[1, 2] So much of the same as is necessary for a discussion of the case shows in substance that in the year 1888 one Carter appropriated certain of the waters of Big Rock creek. Within 60 days after his notice was posted he commenced the construction of a ditch, and diverted water from the stream. The first amount of water taken was 1,250 miner's inches, which was later increased to 4,000. The water so taken was put to a beneficial use. The point of diversion was a short distance north of the tunnel above referred to, but in the year 1890 this point of diversion was changed and a new one made a little further south. On August 22, 1890, Carter conveyed all his rights thus acquired in the waters to the Big Rock irrigation district, which district thereafter took water from the stream and used the same for irrigating the lands within the district. The years from 1895 to 1903 were dry ones, and practically all of the owners of land within the district left the locality because of the drought. The irrigation officers of the district were among the number, their last meeting being held on June 5, 1900, and the district as such did not again function through its board of directors until some 14 years thereafter, when in the year 1914 a new board was appointed by the supervisors of Los Angeles county. The new directors took charge of the defunct district, and during the years 1916–17 employed two zanjeros, who attempted on a few occasions to divide the waters when available among such owners as had remained in the locality. The district continued to be thus pretentiously operated until it was finally abandoned on February 17, 1919, upon petition of a majority of owners of land within the same. At this time, whatever rights as still remained in the district became vested in plaintiff by virtue of a decree of the superior court of Los Angeles county and a commissioner's deed executed by order of said court pursuant to the decree. There is evidence to show that during the years of nonusage by plaintiff's predecessor in interest and prior thereto, the waters of the stream were continuously used by the various defendants openly, notoriously, and under a claim of right, and that they made costly improvements to properly divert the water, running into many thousands of dollars. The use of the waters so made by defendants was without interruption by any one except that the zanjeros employed by the new board of directors at the time the district attempted to again function on a few occasions interfered with the full flow of the waters by breaking and placing obstructions in the ditch, but they never notified any one that such interference was made under a claim of right. The obstructions were, in each instance, immediately removed by defendants, who continued in their use of the waters. Acts of this character do not constitute an interruption of an adverse use of water. An occasional suspension or interruption of such use will not break the continuity of exclusive possession. Interruption, in order to constitute a tolling of the statute, must be open, and either upon a claim of right or so notorious as to consti-

tute such a claim. It must be of such a character as that required to initiate an adverse possession. A clandestine entry will not set the statute in motion, because the owner cannot, under such circumstances, be said to have acquiesced in the wrongful entry. Armstrong v. Payne, 188 Cal. 592, 206 P. 638; 2 Farnum on Waters, § 2; Corp. Jur. p. 96.

[3, 4] The evidence upon the question of adverse use of the waters by the various defendants is voluminous. It shows that, while their respective rights were acquired at different times, they all made a beneficial use of the amount of waters claimed by them adversely, and for a period of time sufficient to acquire a title by prescription and adverse possession. There is also evidence to show that the predecessors in interest of the Valyermo Ranch Company made a beneficial use of the waters about as early as plaintiff's predecessor, and that all of the defendants made such use openly, notoriously, and adversely to all the world after the irrigation district had ceased to function, in the manner and for the period stated. With reference to defendant Pallett, it appears that about two years after the irrigation district originally began to operate, it brought an action against one Shoemaker, Pallett's predecessor in interest, to determine the respective rights of the parties in the water of the stream, and that judgment was had determining these rights. It also appears, however, that after the year 1895, and during the period when the district had ceased to function as such, the judgment was no longer observed either by Shoemaker or Pallett, but, on the contrary, use of the water to the full extent of the ditch used by them was made adversely to the judgment, and such use was never questioned by any one until the commencement of this action. The judgment between the district and Shoemaker, therefore, cannot be held to be res adjudicata as to Pallett or affect any rights he or Shoemaker acquired subsequent to its rendition. There is, therefore no merit in the contention that the evidence is insufficient to show that the various defendants have made use of the waters adverse to plaintiff's claim herein.

[5-13] In general it may be said that a permanent right to the use of the water or a water right may be acquired in the Western states by one who has complied with the essential elements for the statutory period which constitute the adverse user of the water amounting to prescription. This right may be acquired as against one who formerly claimed the water by virtue of a prior appropriation, as a riparian owner, as a purchaser, or as against one who originally claimed the right to the water by prescription itself, or as against one who had acquired the right to the water by any other method. It follows that the rights of an appropriator may be lost in whole or in part by the adverse possession and the user of the water by another amounting to prescription. Where one has complied with all the essentials necessary, and has had the continued, open, notorious, exclusive, uninterrupted, and adverse use and enjoyment of the water under a claim of right for at least the period of time prescribed by the statute of the state where the right is claimed for the commencement of actions for recovery of real property, the law will presume a grant of the right so held and enjoyed. A private corporation holding water as a public use can thus lose its right by prescription, and the rule applies to public utility corporations holding title to property as a public use. A distinction is sought to be drawn by appellant between the ordinary public utility corporation and an irrigation district, it being claimed that as to the latter the property of the district is held by it in trust for the public and subject to the control of the state, and, this being so, it cannot be deprived of its right either by adverse possession, laches, estoppel, or abandonment. In support of this claimed distinction we are cited to numerous authorities to the effect that there can be no adverse holding of lands set apart or reserved to public use which will deprive the public of the right thereto or give title to the adverse claimant or create a title by virtue of the statute of limitations. These cases are extensively cited and reviewed in People v. Kerber, 152 Cal. 731, 93 P. 878, 125 Am. St. Rep. 93. There can be no question that where public lands have been devoted to a public use, persons cannot obtain title thereto by prescription founded on an adverse occupancy. This principle is indisputable and is not here disputed. It has no application, however, to the instant case. The title or interest that one may acquire in the waters of a stream is entirely different to that which may be acquired in lands. Running water, so long as it continues to flow in its natural course, is not and cannot be the subject of a private ownership. A right may be acquired to its use, but this right carries with it no specific property in the corpus of the water itself. One availing himself of the use of such waters has simply the right of usufruct as it passes down the bed of the stream, subject to a reasonable use and consumption for domestic and other purposes. This interest is dependent upon user, and it may be lost when the owner ceases to make avail of the same. Civ. Code, § 1411; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 P. 168. This rule has been applied against a public service corporation, and there is no reason in principle why it should not equally apply against an irrigation district. Both are created to serve the public. Whatever differences may exist between them with reference to the method of their organization of their rights, duties, and liabilities, their purposes are the same. In the case of a public use the beneficiaries do not possess rights to the water which are in the ordinary sense private property. Leavitt v. Las-

sen Irr. Co., 157 Cal. 82, 106 P. 404, 29 L. R. A. (N. S.) 213; Hildreth v. Montecito Creek W. Co., 139 Cal. 22, 72 P. 395. Those holding possession thereof in trust for the beneficiaries cannot continue to hold it as a public use where they have discontinued to perform their public duty which such possession and control imposes. Fellows v. City of Los Angeles, 151 Cal. 52, 90 P. 137.

Our Supreme Court, in dealing with this subject, has said that there is no rule of law which prevents a person who owns land riparian to a stream above a place of diversion of water therefrom by some other person, even a public service corporation for public use, from taking water from the stream and acquiring title thereto by prescription as against such public use. That a public service corporation is no more exempt from this deprivation than any other owner of a water right, and any person, although not a riparian owner, may acquire a prescriptive right as against a public use below by taking water out of the stream which otherwise would run down to the channels of the public service corporation. San Joaquin & Kings River Canal & Irrigation Co. v. Worswick, 187 Cal. 674, 203 P. 999.

[14] As is pointed out in Escondido Mutual Water Co. v. Escondido, 169 Cal. 772, 147 P. 1172, it is to be borne in mind that it is only the use of water which is a public use, and, while it is true that whenever any water has been so devoted to a public use the public and each individual thereof as a part of the public has a right to the continued use of that water, still the use impressed may be lost by abandonment. It would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely as against other appropriators of the right to water therein while failing to apply the same to some useful or beneficial purpose. Smith v. Hawkins, 110 Cal. 127, 42 P. 453. Considering the imperative demand of the use of water, the purveyors of the use, whatever the character of their holding may be, must make avail of the waters or the interest will be lost. The rule applies to all persons alike. It is the use of the water merely to which they may acquire an interest and not to the water itself.

[15] The further claim is made that, assuming the defendants had acquired some water by prescription, they could only acquire the right to so much of the water as was "reasonably necessary" for the lands actually irrigated, and that the evidence shows the amount of waters awarded to them was unnecessary to properly irrigate their lands. There is no question that an acquired right in waters is limited to the amount that is reasonably necessary for the beneficial purpose for which it is diverted, and no title can be acquired to that part of a diversion which is excessive of such needs. In so far as the diversion exceeds such reasonably necessary amount it is contrary to the policy of the law, and is a taking without right and can confer no title no matter for how long continued, it being the policy of this state to require the highest and greatest possible benefit from the waters in the interest of agriculture and other useful and beneficial purposes. Cal. Pastoral, etc., Co. v. Madera Irr. Co., 167 Cal. 78, 138 P. 718.

Upon the subject of what amount was reasonably necessary for the use of the various defendants, there is a decided conflict in the evidence. It appears, however, that the lands in question are porous and gravelly and absorb water very rapidly, in consequence of which it is necessary to distribute large quantities over the surface of the ground so that the roots of the plants can be properly nourished. It also appears that by reason of the porous character of the soil a large percentage of the water makes its way by a subsurface flow back to the creek to the benefit of the lower owners.

There is ample evidence in the record to support the findings as to the amount of water reasonably necessary for the full enjoyment of the beneficial use made by defendants under their three classes of water rights which were put in issue under the pleadings.

Considering our conclusion upon this subject, the question of estoppel and laches raised by respondent becomes unimportant.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 284

ROBINSON v. GODFREY et al. (Civ. 4585.)

(District Court of Appeal, Second District, Division 1, California. June 4, 1926.)

1. Husband and wife 🔑221.

That defendant was wife of another defendant *held* insufficient to warrant making her party, in action for partnership accounting.

2. Pleading 🔑52(2)—Actions for accounting between partners, and for fraud by stockholder against corporation officers, held improperly united, where not separately stated, and both did not affect all parties (Code Civ. Proc. § 427).

Causes of action for fraud by stockholder against corporation officers and for accounting between partners wherein corporation and wife of one of the defendants were named defendants without indicating propriety of their joinder *held* improperly united, under Code Civ. Proc. § 427, because not separately stated, and both actions did not affect all the parties.

3. Appeal and error 🔑901—Plaintiff, declining to amend after demurrer has been sustained, must show complaint was subject to none of specified objections.

A plaintiff, who has declined to amend his complaint after demurrer thereto has been generally sustained, must show, to succeed on appeal, that complaint was sufficient in its entirety and subject to none of the objections specified in the demurrer.

Appeal from Superior Court, Los Angeles county; John M. York, Judge.

Action for damages for fraud and for an accounting by J. W. Robinson against James J. Godfrey and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James M. Robinson and James E. Fenton, of Los Angeles, for appellant.

Paul M. Gregg, of San Luis Obispo, and Paul Vallee and Jerry H. Powell, both of Los Angeles, for respondents.

HOUSER, J. Appeal from a judgment rendered in favor of defendants on the failure of plaintiff to amend his complaint after demurrer sustained thereto. The complaint as set forth in the record on appeal covers approximately 30 pages, and, while it is mechanically divided into 9 paragraphs, the story of the pleader consists in allegations more or less appropriate to several different causes of action without a proper or any attempt being made to separately state them. There are first set forth facts which, with the addition of certain other facts, might form the basis for a suit in equity on several different counts by plaintiff as a stockholder of a corporation against certain defendants for alleged fraud committed by them as officers in the management of the business of the corporation; secondly, purported causes of action in partnership accounting are attempted to be alleged as against defendant Godfrey only; and, thirdly, a similar cause of action as against defendant Godfrey and Warner. One of the named defendants is wholly disconnected from any of the obligations of the complaint, other than that such defendant is alleged to be the wife of one of the other defendants.

Each of defendants James J. Godfrey and Cecille Eyre Godfrey demurred separately to the complaint, but each of such demurrers is identical with the other as to the several objections to the complaint. In brief, they are that the complaint does not state a cause of action; that in several specified particulars there is a misjoinder of parties defendant, that in the manner designated in the demurrer several causes of action have been improperly united; that several causes of action are not separately stated; that in each of 14 specified particulars the complaint is uncertain; likewise unintelligible; likewise ambiguous; and that, as appears on the face of the complaint, the action is barred by each of the provisions of sections 337, 338, 339, and 343 of the Code of Civil Procedure.

[1] The complaint is notable with reference to the wealth of detail and evidentiary matter therein contained, but singularly lacking in allegations of ultimate fact. If (without so deciding) by some liberality of construction it may be conceded that, as to any of the several causes of action which are apparently attempted to be stated, the essential allegations are present, the remaining issues suggested by the demurrer require consideration. As to the objection to the complaint that it contains a misjoinder of parties, on an examination thereof it becomes apparent that, if the intention of the pleader was to confine his cause of action to an accounting between or among partners, the array of facts regarding the activities of the corporation defendant, or of the alleged fraud of defendant Godfrey, was at lest unnecessary; and the joinder in such action of the wife of one of the defendants, with no allegations in the complaint showing any pecuniary interest in her in the settlement of the controversy, was a pure gratuity. No ultimate fact is averred which would indicate the propriety of the joinder in the action for an accounting between or among partners of either the corporation defendant or the wife of one of the defendants. In the prayer of the complaint plaintiff asks for various forms of relief, including the following:

> "For all the relief to which this plaintiff may show himself entitled as an individual under said partnership agreement, and as a stockholder in the defendant's corporation, and for all the relief, both legal and equitable, to which this plaintiff may show himself entitled thereunder. * * *"

While it may be surmised that the "motif" of the pleader was accounting in a partnership, the injection into the complaint of such a vast quantity of matter regarding the alleged fraudulent acts of certain of the defendants as affecting the legal rights of the corporation, with consequent damage thereto, as well as the rights of plaintiff as a stockholder of such corporation, renders an accurate determination of the nature of the action somewhat difficult. If by some stretch of the rules of pleading the complaint be considered as legally stating a cause of action for fraud by a stockholder of a corporation against certain of its officers, with the addition to the complaint of certain allegations of ultimate fact, it is conceivable that the corporation would be a proper or even necessary party defendant. But by assuming that which was apparently intended, and which is indicated by the brief filed for appellant, to wit, that the complaint states both a cause of action for an accounting between or among partners and a cause of action for fraud by a stockholder of the corporation against certain of its managing officers, the question arises as to whether such causes of action have been properly united. The authority for such a joinder which is suggested by counsel herein is found in section 427 of the Code of Civil Procedure by which, in substance, it is provided that a plaintiff may unite several causes of action in the same complaint where the plaintiff's claims arise "out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated. * * *"

[2] While it is possible that a suit for an accounting, as well as one for fraud, is provided for by one or more of "the foregoing subdivisions" of section 427 of the Code of Civil Procedure, the difficulty of joining such actions in the complaint herein is that the statute provides that in order to be so united they must "belong to one only of the classes" mentioned therein, and that they "must affect all the parties to the action, * * * and must be separately stated. * * *" It is clear that the complaint under consideration fails to qualify at least as to two of such requirements, in that the two actions do not "affect all the parties to the action"; nor are such suits separately stated—each of which objections, as heretofore noted, being one of the grounds of demurrer interposed by the defendants herein.

In addition to the foregoing reasons which justified the ruling of the judge of the lower court in sustaining the demurrer to the complaint, the pleading is vulnerable on each of several of the 14 objections specified in the demurrer for its uncertainty, which in the main include the problem of whether the action is one for an accounting, or one for fraud; and if for an accounting, what conditions which were properly averable as ultimate facts were present both at the time of the formation of the partnership and at the time of the commencement of the action, and as to the latter, particularly with reference to the alleged unsettled accounts of the partnership.

[3] It appearing that the complaint was objectionable upon each of several grounds stated in the demurrer, and such demurrer having been generally sustained, with leave to amend the complaint being granted, it became and was the duty of plaintiff either to amend the complaint in such manner as would correct the defects pointed out in the demurrer, or to stand upon his original pleading. Having adopted the latter course, in order that the appeal from the judgment succeed, it must be shown by appellant that the complaint was sufficient in its entirety and properly subject to none of the objections thereto as specified in the demurrer. In the case of Aalwyn v. Cobe, 168 Cal. 165, 173, 142 P. 79, 83, it is said:

"A plaintiff, who has declined to amend his complaint, after a demurrer sustained, which is both general and special, must stand upon his pleading as against both grounds of demurrer."

The same point is decided in Martinovich v. Wooley, 128 Cal. 144, 60 P. 760, in which the language of the syllabus is practically identical with the ruling in the Aalwyn Case. See, also, Du Bois v. Padgham, 18 Cal. App. 298, 123 P. 207; Lapique v. Monroe, 19 Cal. App. 253, 125 P. 760.

It follows that the judgment should be affirmed.

It is so ordered.

We concur: CONREY, P. J.; FINLAYSON, Justice pro tem.

---

78 Cal. App. 298

McHARG v. PICKFORD et al. (Civ. 5571.)

(District Court of Appeal, First District, Division 2, California. June 9, 1926.)

1. Appeal and error ⟹882(6).

Where case was tried as though all allegations of complaint had been put in issue by answer, plaintiff offering evidence in support of such allegations is estopped to assert that they are admitted by answer.

2. Appeal and error ⟹931(3).

Though findings are objectionable as insufficient, appellate court must indulge in every presumption in favor of judgment and assume that, if additional findings had been made, they would favor prevailing party on conflicting evidence.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action for an accounting by William A. Prince against T. H. Pickford and another, in which John R. McHarg, as executor of the last will and testament of William A. Prince, deceased, was substituted as party plaintiff. Judgment for defendants, and plaintiff appeals. Affirmed.

McComb & Hall, of Los Angeles, for appellant.

John Henderson Pelletier and John C. Kleber, both of Los Angeles, for respondents.

LANGDON, P. J. This is an action for an accounting of an alleged partnership business. After the trial of the action, the plaintiff died, and the executor of his last will and testament has been substituted in the record in his place and stead. The original plaintiff, after alleging that he and the defendants were partners in the business of buying and selling real property in Los Angeles, Cal., described certain parcels of land and alleged that they were purchased by the partnership after the last accounting between the parties. These parcels are designated as A, B, and C. It is alleged in the complaint that the defendants have filed actions against the plaintiff with reference to the first two parcels, to re-

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cover plaintiff's pro rata share of amounts paid by defendants in discharging mortgages; that the defendants received and accepted on behalf of and for the benefit of said partnership a deed to parcel C, and, thereafter, without the knowledge or consent of plaintiff, sold said parcel to third parties and received therefor a sum in excess of its cost to the said partnership, and have failed and refused to render an account of said transaction to plaintiff.

Plaintiff alleges that an accounting is necessary between the parties, and prays that the court so order, and that the partnership be dissolved.

The defendants by their several answers clearly were attempting to deny each and every allegation of the complaint. Their attempts violated the rules of logic and of pleading, the answer containing numerous negatives pregnant and denials in the conjunctive. At the trial, plaintiff relied upon this, insisting that the substantial allegations of the complaint had been admitted. The trial court allowed an amended answer to be filed, over the protest of the plaintiff but, even after attention had been focused upon the fallacies of their pleadings, defendants filed amended answers which only partially corrected the errors of the original answers.

While realizing that there is small excuse indeed for these fundamental and repeated breaches of well-settled rules, nevertheless we are disposed to consider cases on their merits and to avoid, if possible, reversing judgments upon technicalities. That course is open to us here, we think, because the defendants made no further objection to the pleadings, but tried the case as though all the allegations of the complaint had been put in issue by the answers. Evidence in support of such allegations was introduced by plaintiff, and evidence in opposition thereto was introduced by defendants without objection.

The trial court found that the parties were never copartners and that they never, as a partnership, purchased any property in the city and county of Los Angeles, Cal., or elsewhere, and that defendants never received a deed to any property for and on behalf of or for the benefit of plaintiff and defendants.

[1] Appellant now contends that the allegations of the complaint are admitted by the answers, which objection, we think, he is estopped to assert here, for the reasons above stated. White v. San Rafael, etc., R. R. Co., 50 Cal. 417; Tevis v. Hicks, 41 Cal. 123; Smith v. Penny, 44 Cal. 161; Horton v. Dominguez, 68 Cal. 642, 10 P. 186. The case relied upon by appellant upon this phase of the case (Ortega v. Cordero, 88 Cal. 221, 26 P. 80) is clearly differentiable from the authorities cited and from the case at bar. The important distinction is mentioned in the case itself in the following language:

> "In the judgment roll of the case at bar there is no bill of exceptions, nor anything to show that any evidence was introduced tending to prove a subsequent or other contract than that alleged in the complaint and not denied in the answer, or tending to show, contrary to the admission of the pleadings, that the deed of January 25, 1889, from plaintiff to defendant, correctly recited the full consideration for the conveyance."

[2] Appellant further contends that the findings are insufficient, in that they do not find upon the ultimate facts set forth in the complaint, but are, in effect, conclusions of law. The findings are subject to the objection made to them, and it is certainly desirable to have them more definite upon each and every matter in issue between the parties. However, we must indulge in every presumption in favor of the judgment, and assume that, if additional findings had been made, they would have been in favor of the defendants upon the conflicting evidence which appears in the record. Smith v. Penny, supra.

Appellant also contends that, even though the evidence shows no partnership, the plaintiff is entitled to relief if the evidence shows a joint venture, and that specific findings should have been made upon facts which would determine the existence of this status. It is urged that the finding that no partnership existed is not inconsistent with the existence of a joint venture. As we have said, the findings should have been more specific, but it is clear from an examination of the transcript that the court could not have found as it did and reached the conclusion evidenced by its judgment unless it accepted the evidence of the defendants as true and rejected the testimony of the plaintiff as to his interest in parcel C described in the complaint. According to the evidence of defendants, plaintiff had no interest whatsoever in the property in question at the time it was sold. According to all the testimony in the record, he had never invested any money at all in it. His claim is merely that defendant Vardaman paid for a two-thirds interest in the property and agreed to "carry" plaintiff for a half interest in said two-thirds interest. The testimony offered by the defendants is to the effect that, when the property was purchased, plaintiff was given the privilege of buying a one-third interest in it, as he had done in other transactions, but that plaintiff did not care for unimproved property and never invested any money in it, and that it was finally understood that he had no interest in this venture, but that it would be financed and owned by the defendants alone.

It becomes apparent, therefore, that, in order to reach its findings and conclusion, the court must have accepted the defendants' account of the matter, and such account is equally inconsistent with a joint venture in which plaintiff had a share as it is with the theory of a copartnership.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

78 Cal. App. 117

CITY OF STOCKTON v. ELLINGWOOD et al. (Civ. 3016.)

(District Court of Appeal, Third District, California. May 22, 1926.)

1. Statutes 🔑85(4)—Statute allowing either party in civil action to move for change of venue, where county or city is plaintiff, but denying plaintiff such right where county or city is defendant, held not unconstitutional as local or special law (Code Civ. Proc. § 394, as amended by St. 1921, p. 573; Const. art. 4, § 25).

Code Civ. Proc. § 394, as amended by St. 1921, p. 573, allowing either party in civil action to move for change of venue, where county or city is plaintiff, but denying plaintiff such right where county or city is defendant, *held* not to violate Const. art. 4, § 25, relative to special laws, since there is reasonable basis for distinction between the two classes of cases.

2. Evidence 🔑5(2).

It is common knowledge that public opinion has been aroused in opposition to undertakings by which municipalities have acquired land in counties other than those in which situated for obtaining water supplies and developing electric power.

3. Constitutional law 🔑48.

It must be presumed that Legislature, in enacting Code Civ. Proc. § 394, as amended by St. 1921, p. 573, determined that justice required that place of trial be changed to neutral county, where county or city was plaintiff.

4. Venue 🔑68.

Burden is on those opposing change of venue to show that both convenience of witnesses and ends of justice would be promoted by denying change, in view of Code Civ. Proc. § 397, subd. 3.

5. Venue 🔑68—Disqualification of county as place for trial, under statute relative to actions in which county or town is party, cannot be overcome by proof of impartiality or convenience alone (Code Civ. Proc. §§ 170, 602, and section 394, as amended by St. 1921, p. 573).

Disqualification of county as place for trial under Code Civ. Proc. § 394, as amended by St. 1921, p. 573, relative to cases in which county or town is party, like implied bias of juror under section 602, or disqualification of judge under section 170, cannot be overcome by proof of impartiality or convenience, since it is based on legislative determination that there is reason to believe that plaintiff cannot have impartial trial in county where action is commenced.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action of eminent domain to condemn land for a reservoir site by the City of Stockton against William Ellingwood and others. From an order granting a change of venue, defendants appeal. Affirmed.

Nutter, Hancock & Rutherford, of Stockton, F. J. Solinsky, of San Francisco, and Joe Huberty, of San Andreas, for appellants.

J. LeRoy Johnson and Thomas S. Louttit, both of Stockton, for respondent.

Jess E. Stephens, W. B. Mathews, and Goudge, Robinson & Hughes, all of Los Angeles, and John J. O'Toole and Robert M. Searls, both of San Francisco, amicus curiæ.

FINCH, P. J. This is one of more than twenty proceedings in eminent domain commenced in the superior court of Calaveras county by the plaintiff, situated in San Joaquin county, to condemn lands in Calaveras county for a reservoir site. On motion of the plaintiff, the court transferred the proceeding to the adjoining county of Amador for trial. The defendants other than Macnider have appealed from the order of transfer.

There is no dispute as to the facts. At the hearing the defendants moved the court, upon affidavit, to deny plaintiff's motion, and to retain the proceeding for trial "in the superior court of Calaveras county for the convenience of witnesses that will be called herein and to promote the ends of justice." The facts stated in the affidavit were not denied. The transfer was made pursuant to the provisions of section 394 of the Code of Civil Procedure. That section provides:

> "An action or proceeding against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action or proceeding is brought by a county, or city and county, in which case it may be tried in any county, or city and county, not a party thereto. Whenever an action or proceeding is brought by a county, city and county, or city, against a resident of another county, city and county, or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of *either party* (the said defendant), transferred for trial to a county, or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides or is doing business or is situated. Whenever an action or proceeding is brought against a county, city and county, or city, in any county, or city and county, other than the defendant, if the defendant is a county, or city and county, or, if the defendant is a city, other than that in which the defendant is situated, the action or proceeding must be, on motion of the said defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, or is doing business, or is situated, and other than the plaintiff county, or city and county, or county in which such plaintiff city is situated, and other than the defendant county, or city and county, or county in which such defendant city is situated."

[1] Appellants contend that section 394 is violative of the provisions of article 4, § 25, of the Constitution, reading as follows:

> "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Third—Regulating the practice of courts of justice. Fourth—Providing for changing the venue in civil or criminal actions."

In Mono Power Co. v. Los Angeles, 33 Cal. App. 675, 677, 166 P. 387, section 394 as it then stood was held to be constitutional. Subsequent to that decision, the section was amended by substituting the words which are italicized in the foregoing quotation for the words therein placed in parenthesis. Stats. 1921, p. 573. Appellants argue that this change renders the section unconstitutional, in that, as amended, it allows "either party in civil actions where the county, city, or city and county is plaintiff to move to change the place of trial; but * * * when the city or city and county or county is a party defendant, only the defendant has a right to move to change the place of trial and the plaintiff in such civil actions is denied the right." In Gridley v. Fellows, 166 Cal. 765, 768, 138 P. 355, 356, in considering the constitutionality of an amendment to section 395 of the Code of Civil Procedure providing for the trial of "an action for injury to person, or property, or for death from wrongful act, or negligence, in the county where the injury occurs, or the injury causing death occurs, or in the county in which the defendants, or some of them, reside at the commencement of the action," it is said:

> "The provision of the amendment of section 395 in question, it is true, applies only to specified classes of cases. But it applies alike in every part of the state to all actions embraced in the classes described. Consequently it is not a local law. It cannot be deemed a special law forbidden by the Constitution if it is addressed to a class or classes based on some natural, intrinsic, or constitutional distinction or difference, reasonable and substantial, between these actions and others not included and sufficient in some reasonable degree to account for or justify the making of the different rule. * * * The presumption is in favor of the legislative action. The court cannot decide that the classification is unjustifiable in reason, unless it can see that the presumption is overcome because no reason exists. The Code itself, in sections 392 and 393, enacted long before the adoption of the present Constitution, made special provisions for the place of trial of actions to recover real property, actions for injuries thereto, actions for partition thereof, actions to foreclose liens thereon, actions to recover penalties or forfeitures, and actions against a public officer. It has never been supposed that these special regulations are unconstitutional discriminations, or that they would be special laws within the constitutional inhibition, if enacted after the adoption of the Constitution of 1879."

[2, 3] It is a part of the current history of the state that a number of municipalities have acquired valuable and, in some instances, extensive areas of land in counties other than those in which such municipalities are situated for the purposes of obtaining adequate water supplies and developing electric power. It is a matter of common knowledge that public opinion in such counties has been aroused at times in hostile opposition to such undertakings. Whether such opposition has been justified or not is beside the question. It must be presumed in favor of the constitutionality of the section that the Legislature determined, upon sufficient investigation, that in a case such as this, in order to avoid any local bias which would probably affect the verdict of a jury, justice requires that the place of trial be changed to a neutral county. It cannot be held that there is no reasonable and substantial basis for such legislative determination or that a like bias would probably exist against an individual plaintiff in an action commenced by him in a county other than that of his residence against a municipality situated therein or against the county itself. As a rule, there is no general public opinion at all respecting the merits of an action brought by an individual against a county or a municipality therein. There being a reasonable basis of distinction between the two classes of cases, the provision for a change of venue in the one class and not in the other cannot be deemed a special law within the constitutional inhibition.

[4, 5] Appellants contend that the court erred in denying their counter motion to retain the case for trial in Calaveras county on the ground of convenience of witnesses. The burden was upon appellants to show, in support of their motion, that both "the convenience of witnesses and the ends of justice would be promoted" by granting their motion. Code Civ. Proc. § 397, subd. 3. They showed merely that the convenience of witnesses would be so promoted. The disqualification of a county under the provisions of section 394, like the implied bias of a juror as defined by section 602, or the disqualification of a judge under the provisions of section 170, cannot be removed or overcome by proof of impartiality or convenience. Section 394 is based upon the legislative determination that there is reason to believe that the plaintiff in an action such as this cannot have an impartial trial in the county in which the action is commenced. If an impartial trial cannot be had therein, it cannot be said that "the ends of justice would be promoted" by retaining the action therein for trial. The convenience of witnesses must yield to the ends of justice.

The order is affirmed.

We concur: HART, J.; PLUMMER, J.

78 Cal. App. 115

CITY AND COUNTY OF SAN FRANCISCO v. SATTAN et al. (Civ. 5228.)

(District Court of Appeal, First District, Division 2, California. May 22, 1926.)

1. Eminent domain 🔑196—Evidence held to support finding that pipe for public water supply was located in manner most compatible with greatest public good and least private injury.

Evidence, in action to condemn right of way for pipe line for public water supply, *held* to support finding that pipe had been located in manner most compatible with greatest public good and least private injury.

2. Evidence 🔑571(7).

Testimony of experts *held* to sustain finding as to value of land condemned for pipe line for public water supply.

3. Eminent domain 🔑205—Evidence held to sustain finding as to damage to land not taken for public pipe line.

Evidence *held* to sustain finding as to damage caused to land not taken in action to condemn right of way for pipe line for public water supply, even if true test is effect of severance on sale value of land not taken.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action of eminent domain by the City and County of San Francisco against Andrew Stephen Sattan and others to condemn a right of way for a pipe line for public water supply. Judgment for plaintiffs, and defendants appealed. Affirmed.

John J. Jones, of San José, for appellants.

George Lull, City Atty., and Robert M. Searls, Sp. Counsel, both of San Francisco, for respondent.

LANGDON, P. J. This appeal is by the defendants from a judgment entered upon a verdict of a jury in an action brought by the plaintiff to condemn a strip of land in which to locate a pipe line needed in connection with the public water supply.

It is contended that the evidence is insufficient to support the finding of the court that the aqueduct has been planned and located in the manner that will be most compatible with the greatest public good and the least private injury; and also that the evidence is insufficient to support the two findings based upon the verdict of the jury as to the value of the parcel of land sought to be condemned and as to the damage caused to the remainder of the tract by reason of the severance. The former amount was fixed by the jury at $4,500 and the latter at $1,000.

[1] Appellants set forth in their brief all the evidence in the record in opposition to the findings made, and the respondent replies by setting out abundant evidence to support the findings under attack. No useful purpose would be served by reviewing it all in this opinion. The construction engineer for the Hetch Hetchy water project explained the necessity of locating the pipe in the manner set forth in the complaint. This was substantiated by the testimony of the first assistant engineer in the same water project, who explained the reasons for such location and also stated that tests had been made in an effort to relocate the pipe line and thus meet the protests and conform to the requests of the defendants, but that these tests had disclosed the undesirability of changing the route.

[2] Upon the issue as to the value of the land the finding of the court is sustained by the testimony not only of real estate dealers in the vicinity, but also of the inheritance tax appraiser and deputy assessor for the county and the agricultural manager for the Spring Valley Water Company, whose business included the management of a very large acreage in that vicinity and other localities.

[3] As to the last question raised, relating to severance damage, the finding of the court is also abundantly sustained by the record. Appellants contend that the true test is the effect of the severance upon the sale value of the balance of the tract. If that be so, the testimony of the witnesses Tuchsen and McGarvey, testifying for the plaintiff, may be said to refer to that point of view and they estimated the depreciation caused by the severance at the figure named in the finding of the court.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

---

78 Cal. App. 108

BURKS v. STEARNS. (Civ. 3078.)

(District Court of Appeal, Third District, California. May 21, 1926.)

1. Automobiles 🔑168(6).

Under Motor Vehicle Act 1919, § 22, subd. (a), evidence that automobile driver approached blind intersection at speed of from 18 to 24 miles per hour, and collided with car reaching intersection first, *held* to warrant recovery.

2. Appeal and error 🔑1010(1).

Appellate court is concluded by findings of trial court on question of fact supported by sufficient testimony.

3. Appeal and error 🔑1170(7).

Under Const. art. 6, § 4½, ruling of trial court on testimony, if error, does not warrant reversal when nonprejudicial, in view of other testimony supporting judgment.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by F. L. R. Burks against O. W. Stearns. Judgment for defendant, and plaintiff appeals. Affirmed.

Gallaher, Simpson & Hays, of Fresno, for appellant.

Chester O. Hansen, of Fresno, for respondent.

PLUMMER, J. Action by plaintiff to recover damages for injuries to his automobile arising from a collision with an automobile owned by the defendant. The defendant interposed a cross-complaint for damages suffered to his automobile. The court awarded judgment for the defendant in the sum of $37 and the plaintiff appeals. The collision involved in this case occurred at a street intersection, and at the time of the collision the Motor Vehicle Act of 1919 (St. 1919, p. 191) was in full force and effect. Section 22, subd. (a), of the Motor Vehicle Act, then provided:

> "That no person shall operate or drive a motor vehicle or other vehicle on any public highway at a greater rate of speed than fifteen miles an hour in approaching any steam, electric or other railway crossing at grade, or in approaching or traversing an intersecting highway, or crossing or intersection of highways, or in approaching or going around corners or curves in the highway, when in any of the foregoing cases the operator's or driver's view of the road or railway traffic is obstructed."

The collision between the respective automobiles occurred on the 14th day of December, 1921, at the intersection of Elm avenue and Jensen avenue in the county of Fresno. At the time of the accident the automobile owned by the plaintiff was being driven on Elm avenue in a southerly direction, and the defendant's automobile was being driven on Jensen avenue in a westerly direction.

[1, 2] On the part of the appellant it is claimed that the intersection was not what is called a "blind intersection." On the part of the respondent testimony was introduced that there was a line of trees on the northeast corner of the intersection of Jensen and Elm avenues which obstructed the view of approaching drivers. The plaintiff testified that he was traveling between 18 and 24 miles an hour. The driver of the plaintiff's car testified that he was driving between 20 and 25 miles an hour. There was also testimony to the effect that as the defendant came into the intersection he was driving at a very low rate of speed, and, after entering the intersection, increased his speed somewhat. The defendant also testified that as he entered the intersection the plaintiff's car was not in sight. The law relating to the right of automobiles entering intersections in force at the time of the collision in this case was as follows:

> "Excepting where controlled by such traffic ordinances or regulations as are permitted under this act the operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right unless such vehicle approaching from the right is further from the point of intersection of their paths than such first named vehicle."

Under the testimony, the court in this case was justified in coming to the conclusion that the defendant had the right of way; that the defendant was nearer the intersection when approaching than was the automobile in which the plaintiff was riding. The fact that the plaintiff was driving at a higher rate of speed than the defendant did not affect the respective rights of the parties or give the plaintiff the right of way over the defendant. This case involves simply a question of fact as to which one of the parties had the right of way at the intersection, and, there being sufficient testimony to support the findings of the trial court, we are concluded by such findings.

[3] Error is also urged on account of the admission in testimony of the statement made by the plaintiff's chauffeur immediately after the accident. We need not consider this matter, because, under the provisions of section 4½ of article 6 of the state Constitution, the ruling of the court in this particular, if admitted to be error, would not warrant a reversal, because the testimony to which we have referred shows the error nonprejudicial, and amply supports the conclusion of the trial court that the plaintiff was responsible for the collision. The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

78 Cal. App. 209

RICH v. McCLURE et al. (Civ. 3030.)

(District Court of Appeal, Third District, California. May 29, 1926. Rehearing Denied June 28, 1926. Hearing Denied by Supreme Court July 26, 1926.)

1. **Evidence 🔑10(2), 25(2).**

Courts take judicial notice of incorporation of cities and of boundaries thereof, in view of St. 1923, p. 103, § 3.

2. **Evidence 🔑48.**

Doctrine of judicial notice is applicable to proceedings before boards and special tribunals.

3. **Waters and water courses 🔑190—Application to appropriate water for municipal purposes is sufficient, without particularly describing boundaries of cities to be served.**

Application for permit to appropriate water for municipal purposes, not setting forth location of cities to be served, gives water commission full information as to place of intended use of water within boundaries of incorporated cities named, as if such boundaries had been particularly described.

4. **Waters and water courses 🔑190.**

Term "adjacent territory," used in application to appropriate water for cities, refers to territory built up outside of, but immediately adjacent to, cities named.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adjacent.]

5. **Waters and water courses 🔑133.**

Under Water Commission Act (St. 1913, p. 1012), § 1a, as added by St. 1923, p. 161, hearing may be held and permit granted to appropriate water, though application therefor is defective.

6. **Waters and water courses 🔑133.**

Under Water Commission Act (St. 1913, p. 1012) §§ 1a, 1d, as added by St. 1923, pp. 161, 163, and sections 7, 16, application to appropriate water may be granted in part, and denied in part.

7. **Waters and water courses 🔑190—Hearing on application to appropriate water for cities and adjacent territory cannot be denied because application is insufficient as to part of places of intended use (Water Commission Act [St. 1913, p. 1012] § 17).**

Hearing on application for permit to appropriate water for use of cities named and adjacent territory, not being defective in describing incorporated cities to be served, cannot be denied because application is insufficient as to part of places of intended use, in view of Water Commission Act, § 17, permitting use of water only to extent allowed.

8. **Waters and water courses 🔑190—Application to appropriate water for municipal purposes need not set forth conduits for conveying water from point of sale to places of intended use (Water Commission Act St. 1913, p. 1012] §§ 1a, 1d, as added by St. 1923, pp. 161, 163, and sections 7, 16).**

Application for permit to appropriate water for municipal purposes, under Water Commission Act, §§ 1a, 1d, as added by St. 1923, pp. 161, 163 and sections 7, 16, setting forth proposed pipe line from point of diversion to point where plaintiff proposed to sell water to be conveyed by purchasers to places of use, *held* not defective in failing to set forth conduits to places of intended use; it being presumed that Water Commission Act, § 16, requiring application to locate proposed works, relates to work to be constructed by applicant, and not by purchasers from him.

9. **Mandamus 🔑3(8).**

Mandamus is proper remedy to compel water commission to hear and act on application to appropriate water; remedy under Water Commission Act (St. 1913, p. 1012) § 1b, as added by St. 1923, p. 162, not being adequate.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by Geary Rich to compel W. F. McClure, Director of Public Works of the State of California, substituted as party defendant in place of A. B. Fletcher, Director of Public Works, and another, to hear and act on application for permit to appropriate water. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied by Supreme Court; Shenk and Curtis, JJ., dissenting.

Spencer Burroughs, of Sacramento, for appellants.

Edward F. Treadwell, of San Francisco, for respondent.

FINCH, P. J. This is an appeal from the judgment herein, requiring the defendants to "proceed to hear and act upon" the plaintiff's "application for a permit to appropriate" 10 second feet of the water in Lindsay slough, a tributary of the Sacramento river, for municipal purposes. The complaint sets out the application in full, including a map, which accompanied and was made a part of the application. The parts of the application material to the questions raised by the appeal are as follows:

> "The use to which the water is to be applied is for municipal purposes. * * * The pipe line to be 24 miles in length, terminating in the existing water supply of Vallejo near Cordelia, in the S. E. ¼ of the N. E. ¼ of Sec. 12, Tp. 4 north, R. 3 west M. D. M. * * * For sale at Cordelia to supply the cities of Vallejo, Benicia, Suisun, Fairfield, and adjacent territory in the county of Solano, having a present population of 25,559. * * * The maps filed herewith only show the pipe line extending to Cordelia, as that is the extent to which applicant intends to construct it, and at that point he will wholesale the water to such of the communities mentioned with which he may be able to negotiate favorable contracts. The applicant has no intention of himself entering into the business of selling water as a public utility, but intends to carry the same to Cordelia, and then sell the same at wholesale, and that is the place of use so far as applicant is concerned."

The map which accompanied the application showed the locations of Lindsay slough, a proposed reservoir adjacent thereto, a proposed pipe line from the reservoir to the point designated in the application near Cordelia, and the cities of Fairfield and Suisun, but did not show the locations of the cities of Benicia and Vallejo, or of the "adjacent territory" referred to in the application, or of any conduit from Cordelia to either of those cities. The answer alleges that the application was rejected and a hearing thereon refused, on the ground that:

> The applicant did not "file a map showing thereon the place or places where it was intended to use the water, and further showing thereon the location of the conduits leading from Cordelia and the pipe line to Cordelia through which the water might be supplied to the place or places of use."

Judgment on the pleadings was entered in favor of the plaintiff, directing:

"That a peremptory writ of mandate issue out of this court, directed to the said defendants, and commanding them to forthwith proceed to hear and act upon the said application."

Appellants fairly summarize the material facts as follows:

> "Respondent filed an application * * * for a permit to appropriate unappropriated waters * * * for municipal purposes. * * * It was for the purpose of supplying the cities of Vallejo, Benicia, Suisun, and Fairfield and adjacent territory in the county of Solano. * * * The map filed with said application showed the pipe line to Cordelia, but did not show either Vallejo or Benicia, or the territory adjacent to Vallejo, Benicia, Suisun, or Fairfield, which it was proposed to serve. The division of water rights held said application defective, in that it did not set forth the intended place of use and the conduits leading thereto, and called upon the applicant to give the names of the cities in the application, * * * and to then sketch upon a map the approximate boundaries of the area or areas within which the water was to be applied to use, and to locate therein the cities which were to be supplied, and also to sketch approximate locations of main conduits from Cordelia through which water might be supplied to these cities and adjacent areas. * * * This the respondent refused and failed to do. * * * Thereupon the division of water rights rejected and canceled said application."

Section 1a of the Water Commission Act (St. 1913, p. 1012, as added by St. 1923, p. 161), provides:

> "The state water commission shall have authority to grant, or to refuse to grant a permit and to reject any application, after hearing; provided, however, that no hearing shall be necessary in order to issue a permit upon an unprotested application or in order to reject a defective application after notice as provided in section 17 of this act, unless the state water commission elects to hold a hearing."

Section 1d, added by St. 1923, p. 163, provides that:

> "The application must be accompanied by such maps, drawings and other data as may be required by the state water commission."

Section 7 provides:

> "For the purpose of carrying out the provisions of this act the state water commission is authorized to pass such necessary rules and regulations as it may from time to time deem advisable."

Section 16 provides, among other requirements:

> "Every application for a permit to appropriate water shall set forth * * * the location and description of the proposed headworks, ditch, canal and other works, * * * and the place where it is intended to use the water."

The rules and regulations adopted by the commission contain the following:

> "Regulation 3. * * * (e) The place of use must be established with reasonable certainty. * * *
>
> "Regulation 4. * * * If municipal use is intended then the name of the municipality to be served should be given providing it is incorporated, and if it is not incorporated then the area to be served may be described in some other suitable manner. * * *
>
> "Regulation 5. Maps in duplicate must be filed in connection with each application, showing * * * the location of the point or points of diversion and the reservoirs and places of use, together with the location of the main conduit and intersecting streams, conduits, and pipe lines."

[1, 2] Vallejo, Benicia, Suisun, and Fairfield are all incorporated cities. Courts take judicial notice of the incorporation of cities and of the boundaries thereof. 10 Cal. Jur. 710; Municipal Corporation Bill, § 3, Stats. 1923, p. 103. Courts take judicial notice of the incorporation of a city "without proof, and even without averment." City of Pasadena v. Stimson, 91 Cal. 238, 256, 27 P. 604, 608. The doctrine of judicial notice is applicable to proceedings before boards and special tribunals. Anderson v. Board of Dental Examiners, 27 Cal. App. 336, 339, 149 P. 1006; Benton v. Industrial Accident Commission (Cal. App.) 240 P. 1021, 1023.

[3, 4] The plaintiff's application, therefore, gave the defendants as full information relative to the place of intended use of the water within the boundaries of the incorporated cities named as if such boundaries had been particularly described, and the only uncertainty in the application relates to the use of the water in the "adjacent territory." Since the water is to be used for municipal purposes, it may be inferred that the term "adjacent territory" refers to built-up territory outside of, but immediately adjacent to, the respective incorporated cities named in the application.

[5-7] Under the liberal provisions of section 1a of the Water Commission Act, a hearing may be held and a permit granted, even though the application therefor be defective. Also the application may be granted in part and denied in part. Section 17 of the act provides:

> "The approval of any application shall give the right to take and use water only to the extent and for the purpose allowed in said approval."

There is no defect in the description of the place of intended use, in so far as the incorporated cities themselves are concerned, and the use of water therein is doubtless the principal use for which the appropriation is sought. No more reason appears for denying plaintiff a hearing, on the mere ground that his application is insufficient as to a part of the places of intended use, than there would be for sustaining a general demurrer because one of several causes of action alleged in a complaint is defectively stated.

[8] Appellants contend that the application should have set forth proposed conduits for conveying the water from Cordelia to the places of intended use. The application sets forth the proposed pipe line from the point of diversion to Cordelia, at which place the plaintiff proposes to sell the water, the purchasers to convey it thence to their respective places of use. It is to be presumed that the provisions of section 16 of the act, requiring an application to set forth "the location and description of the proposed headworks, ditch, canal and other works," relate to the work which the applicant proposes to construct, not to works to be constructed and used by purchasers of the water, and over which the applicant will have no control. For obvious reasons, the places of intended use must be stated, whether that use is to be made by the applicant or by those to whom he may sell the water; but such reasons do not apply to the location and description of the conduits for the conveyance of the water from the place of sale and delivery to the places of use.

[9] Appellants urge that plaintiff was not entitled to a writ of mandate, because he had a plain, speedy, and adequate remedy under the provisions of section 1b of the act as added by St. 1923, p. 162. That section provides that:

> Any interested party "may within thirty days after issuance of a permit or an order refusing to issue a permit and rejecting an application bring an action in the superior court. * * * Said action shall be for a review of the order of the state water commission. Said court shall review all correspondence, maps, data and other records on file with the state water commission which pertain to said application and all evidence taken before said commission and take such additional evidence as it may require or as may be submitted by the parties in interest or the state water commission and shall then render judgment affirming, reversing, or modifying the action of the state water commission."

Respondent contends that such provisions of section 1b are unconstitutional on various grounds, but the contention need not be considered, because the section, if valid, clearly contemplates such an action only after a hearing before the commission, and not in a case where a hearing has been denied. The remedy provided by section 1b would not be adequate in a case such as this. Careaga v. Fernald, 66 Cal. 351, 353, 5 P. 615. Mandamus is the proper remedy. Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

---

78 Cal. App. 122

PEARSON v. JUAREZ et al. (Civ. 5521.)

(District Court of Appeal, First District, Division 2, California. May 24, 1926. Hearing Denied by Supreme Court July 22, 1926.)

Judgment ⚷252(1)—Transfer to plaintiff of personal property appurtenant to garage, in action on agreement for transfer of garage, which expressly provided for accounting as to personal property, held reversible error.

Transfer to plaintiff of all personal property appurtenant to garage, in action on agreement for transfer of garage, which expressly provided for accounting as to personal property, *held* reversible error, though defendants did not demand accounting in pleading, where they were led to believe throughout trial that accounting would be had.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by F. E. Pearson against Roy L. Juarez and another. Judgment for plaintiff, and defendants appeal. Reversed.

Joseph L. Taaffe and Leon Samuels, both of San Francisco, for appellants.

J. J. Dunne and James Walter Scott, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued the defendants upon a written contract, pleading it in hæc verba, and prayed for the recovery of the sum of $6,000 alleged to be due under the terms of the contract, and for other or additional relief in the premises as may be according to law. The defendants answered specifically, pleading fraud and misrepresentation on the part of the plaintiff in the procurement of the contract, and mistake in the execution of the contract, and by way of cross-complaint demanded a cancellation thereof as well as damages for the alleged fraud. At the trial evidence was offered in support of the allegations of the cross-complaint, whereupon the trial court, upon motion of plaintiff, granted a nonsuit against the defendants thereon. At the same time the trial court entered its order in the minutes that an interlocutory decree be granted in favor of the plaintiff as prayed. Thereafter findings of fact and conclusions of law were prepared and filed by the trial court wherein the court with particular care found against the defendants upon all the allegations of their cross-complaint, and found in favor of the plaintiff upon the allegations of his complaint, and then concluded that the plaintiff was entitled to a judgment in the sum of $6,000 specified in the contract, and that the defendant should convey to the plaintiff the Pearson garage, "together with the appurtenances thereof, including book accounts, bills receivable, stock, supplies, equipment, and all other personal property there-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in contained." Judgment followed accordingly for the plaintiff, from which the defendants have appealed upon a typewritten record.

A brief statement of the facts of the case will be sufficient. The three parties were owners in equal proportions of all the shares of stock of a corporation which operated three public garages in the city and county of San Francisco—the Pearson garage, the United States garage and the Pearson annex. On February 25, 1920, the three parties entered into a written agreement, wherein it was stipulated that upon the payment of $6,000 by the appellants to the respondent, he would transfer to appellants all his interest in the United States garage and the Pearson annex, and that at the same time the appellants would transfer to the respondent all their interest in the Pearson garage. Though no provision was made for the disposition of the shares of stock of the corporation, it seems to have been in the contemplation of the parties that they were really acting as partners in a joint adventure, and that they did not regard the corporation as anything more than a name under which they could conveniently conduct their business. It is conceded that by the terms of the agreement the respondent was to take all the interest in the Pearson garage owned or claimed by the two appellants as well as any interest which the corporation may have had therein, and that the same interest in the other two garages was to be transferred to the appellants. The fourth stipulation of the agreement is the one which is of importance to the decision, and we quote it in full:

> "All other matters of difference among said parties, including book accounts, stock, supplies, individual over-drafts or indebtedness, and other matters, shall be equitably adjusted among said parties, according to the facts as they may appear; and to that end, an expert accountant may be employed, at the expense of all of said parties, in equal shares, to state an account or accounts among said parties, so that their respective rights and obligations may satisfactorily appear; said adjustment to be made to March 15, 1920."

It is vigorously insisted by the appellants that by the terms of this agreement an equitable adjustment of all the book accounts, stock, supplies, and other personal property connected with, or situated in, the three garages was to be made in accordance with the respective interests of each party as indicated by his ownership in the corporation. It is also argued that, inasmuch as the trial court. throughout the course of the hearing, refused to hear evidence offered by the appellants covering these outstanding accounts, supplies, and other personal property upon the ground that such evidence was admissible only for the purpose of an accounting, and that such accounting would be ordered at the termination of the hearing, the appellants were therefore prejudicially injured by the entry of the judgment, final in form, which denied them an accounting, and awarded the respondent a recovery far beyond the terms of the contract. It is further argued that by the terms of the judgment the respondent was awarded all the outstanding book accounts, bills receivable, stock, supplies, equipment, and all other personal property connected with the Pearson garage without any evidence whatever to show the value thereof or the value of the book accounts and other personal property connected with the United States garage and the Pearson annex, which were ordered transferred to the appellants, and that by this judgment the court made for the parties a contract which was never within their contemplation at the time of the execution of the written agreement of February 25, 1920.

In support of their argument the appellants cite numerous passages from the reporter's transcript showing that from the beginning to the end of the trial all the parties and the trial court took the position that all matters of accounting were to be submitted to a referee at the termination of the hearing before the trial court, and that at that time an interlocutory decree only would be entered, and a referee would then be appointed. It is also pointed out that all the parties conceded that they were the owners in equal shares of all the property of the corporation which, of course, included the book accounts, bills receivable, and other personal property located in each of the garages which the corporation was conducting. When, therefore, the trial court, without evidence, and without a hearing, ordered the appellants to transfer to the respondent all interest in all book accounts, stock, and other personal property appurtenant to or contained in the Pearson garage, it denied to the appellants their right to an accounting of these respective interests. The respondent's only effort to sustain this proceeding is that the appellants did not in their pleading demand an accounting, but merely prayed that the contract be canceled, and that they have judgment for damages against the respondent upon their cross-complaint. The obvious answer to this is that the contract upon which the suit is based expressly provided for an accounting, and that it was not necessary, therefore, that the appellants demand an accounting in their pleading, but they were justified in relying upon a performance of the contract. It should also be noted in this connection that throughout the complaint it is alleged that the respondent had demanded a performance of the contract in all its terms, including the equitable adjustment of all the differences between the parties as required by the agreement, which relates, of course, to the provisions of paragraph 4 of the agreement above quoted. Thus from the filing of the complaint to the completion of the trial the appellants were led to believe that an accounting would be had. Inasmuch as the undisputed evidence showed that the respondent had collected outstanding accounts belonging to the corporation in a sum over $12,000, for which he had failed to account to the corporation or to the appellants, the prejudice to the appellants in the entry of the final judgment without an accounting is apparent. It is not necessary to consider any of the other errors assigned by appellants.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

78 Cal. App. 184

AMLING et ux. v. BRYAN et al. (Civ. 5174.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1926. Hearing Denied by Supreme Court July 22, 1926.)

1. Appeal and error ⚷846(6).

Where findings in lessor's action in unlawful detainer for subletting premises contrary to lease did not affirmatively show that subletting was for more than one year, any question as to requirement that sublease for more than one year be in writing is not presented on appeal.

2. Landlord and tenant ⚷104—Breach of covenant against assignment and subletting in lease will terminate lease.

Breach of covenant against assignment and subletting in lease will terminate lease, though general rule is that such covenant should be strictly construed.

3. Appeal and error ⚷931(3).

It will be assumed that, if trial court had made finding as to defenses urged for first time on appeal, it would have been against appellants' contentions, since all intendments are in favor of judgment.

4. Landlord and tenant ⚷301(2).

Defendant, in landlord's unlawful detainer action, who was wrongfully in possession as assignee of original lessee, and who remained in possession after three-day notice to quit, *held* liable.

5. Landlord and tenant ⚷301(2).

Original lessee *held* not liable, in landlord's unlawful detainer action, where premises were occupied by codefendant, not as his representative or agent, but "for her own use and benefit."

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Ernest C. Amling and wife against C. T. Bryan and another. Judgment for plaintiffs, and defendants appeal. Reversed in part, affirmed in part.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Frank M. Smith and Henry M. Wilks, both of Los Angeles, for respondents.

HOUSER, J. As shown by the findings of fact herein, it appears that plaintiffs leased certain real property to defendant Bryan; that the lease contained a provision against its assignment or the subletting of the leased premises without the written consent of the lessor being first obtained; that, notwithstanding such provision, and without first obtaining such written consent of the lessor, the lessee executed and delivered an assignment of the lease; also that he sublet the property—all of which conduct on the part of the lessee precipitated an action in unlawful detainer on the part of plaintiffs against the defendants Saxton and Bryan. The trial of the action resulted in a judgment for possession and damages in favor of plaintiffs, and defendants appeal therefrom.

[1] Appellants contend that, in order that any assignment of the lease should be violative of the provisions thereof to which reference has been had, such assignment must have been in writing. That objection, however good in the abstract, is completely disposed of by the finding of fact by the trial court, based upon sufficient evidence, that such assignment was made for a valuable consideration, that it was in writing, and that it was delivered to the assignees thereof.

Appellants also feel aggrieved because of the finding by the trial court that, contrary to the provisions of the lease, the lessee sublet the leased premises without first having obtained the written consent of the lessor so to do, and insist that a sublease for a longer period than one year would necessarily have to be in writing. The finding by the court with reference to such subletting in that regard simply was that, on a designated date, for a fixed consideration per month, the lessee sublet the premises described in the lease to a certain person, and thereupon delivered possession of said premises to him, etc. The term of the sublease is not mentioned in the findings other than that it may be inferred therefrom that it was a month-to-month tenancy. Because it does not affirmatively appear that there was a subletting of the premises for a period longer than one year, it becomes manifest that the point to which appellants refer does not arise in the case.

[2] Appellants also cite authorities and argue to the effect that covenants in a lease against assignment and subletting should be strictly construed. While the general rule is in accordance with such contention, as is clearly stated in one of the cases cited by appellants, it "does not mean that courts must resort to scholastic subtleties to save tenants from the consequences of their deliberate breach of their covenants." DeAngeles v.

Cotta, 62 Cal. App. 691, 217 P. 821. If such a covenant is contained within a lease, and by a preponderance of the evidence it appears in that regard that the lease has been breached, a finding by the trial court to that effect must result in a conclusion of law that the lease has been terminated, with a consequent judgment thereon decreeing a forfeiture.

[3] It is also claimed by appellants that, by acceptance of rent by the lessor from the person to whom the lessee had sublet the premises, the lessor waived a forfeiture, and that by "conduct and conversation the plaintiffs are estopped to declare a forfeiture."

The answer of the defendants to plaintiffs' complaint contained no such defense or defenses; nor is the attention of this court directed to any finding of fact upon which either of such defenses could rest. There was, however, evidence introduced on the trial of the case which would justify findings which would be entirely opposed to facts necessary to support either a defense of waiver or a defense of estoppel. It is a rule that all intendments are in favor of the judgment rendered by the trial court, from which it follows that it must be assumed that, had any finding been made by the trial court with reference to either of the defenses which are now for the first time interposed, such finding would have been against defendants' contentions. It therefore becomes impracticable to consider the evidence which it is suggested by appellants would authorize (although not require) the conclusion for which they contend.

[4, 5] It is next contended that in any event no judgment could stand as against Helen E. Saxton, one of the defendants in the case. The findings of the trial court show that, after notices to quit possession had been served on the subtenant and the defendant Saxton, the subtenant abandoned the possession of the premises, whereupon the defendant Saxton tore down the notice to quit which had been posted on the premises and assumed and continued in possession thereof for a period of about one month thereafter, at which time she in turn abandoned the premises. The court further found:

> "* * * That it is not true that the defendant Helen E. Saxton occupied and possessed the said premises from February 6, 1925, to March 3, 1925, as the representative and agent of said defendant C. T. Bryan and under and by virtue of said power of attorney, but on the contrary said defendant Helen E. Saxton occupied and possessed the premises during said period as assignee of the interests and title therein of defendant C. T. Bryan, and for her own use and benefit. * * *"

It thus appearing that defendant Saxton was wrongfully in possession of the premises "as assignee of the interests and title" of the original lessee, and that on her own account she remained in such possession for a considerable period after the three days' notice to quit had been served upon her, it is apparent that her liability for damages of which appellants complain ensued as a matter of course.

As the judgment is drawn, it runs not only against defendant Saxton, but also against defendant Bryan, the original lessee. In view of the finding of the trial court to which reference has just been had, and the fact that, after service of notice to quit possession defendant Saxton did not occupy the premises "as the representative and agent of said defendant C. T. Bryan, * * * but on the contrary said defendant Helen E. Saxton occupied and possessed the premises * * * for her own use and benefit," it follows that that part of the judgment which awards damages to plaintiffs as against defendant Bryan in the sum of $450 on account of the unlawful detention by him of said premises, must be reversed. Otherwise the judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

---

78 Cal. App. 289

HAMILTON v. FRENCH et al. (Civ. 5570.)

(District Court of Appeal, First District, Division 2, California. June 5, 1926.)

1. Fraud 🔑58(1)—Evidence held to sustain finding of false representations by real estate broker, his salesman, and client.

In action against real estate broker, a salesman employed by him, and a client, with whom plaintiff made exchange of properties, evidence of false representations made by salesman only, but on behalf of all defendants, *held* to sustain finding that representations as alleged were made by defendants.

2. Fraud 🔑58(4).

Reliance on fraudulent representations, inducing exchange of realty, *held* sufficiently established.

3. Appeal and error 🔑996.

On appeal, necessary inferences from findings to support judgment may be drawn.

4. Fraud 🔑66.

Findings as to damages from fraud, inducing exchange of realty, *held* sufficient, though findings contained no arithmetical calculations.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Iva E. Hamilton against J. M. French and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Fredericks & Hanna, of Los Angeles, for appellants.

W. D. Van Nostran, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action to recover damages alleged to have been sustained by plaintiff by reason of the fraud and misrepresentations of the defendants.

The defendant J. M. French is engaged in the real estate business in Los Angeles, Cal., as a duly licensed real estate broker, doing business under the fictitious name of J. M. French Company. The defendant F. H. Russell is a real estate salesman, working in the office of J. M. French Company, and the defendant Weta G. Glassell was one of the clients of this office, and formerly owned certain land in San Diego county about which the misrepresentations are alleged to have been made.

At the time the misrepresentations are alleged to have been made plaintiff was the owner of a certain house and lot in the city of Los Angeles, Cal., which she had listed with the J. M. French Company for sale or exchange at a valuation of $7,500, with the understanding, however, that she would be interested in any offers for the property which would secure her $6,100, the amount it had cost her.

Plaintiff alleged that on or about May 1, 1922, the defendants represented to her that a certain described 40 acres of land in San Diego county owned by defendant Glassell was of the market value of $2,500; that it was composed of black, silt loam, was accessible for farming purposes, and could be readily irrigated from a nearby stream. It is alleged that these representations were made to plaintiff for the purpose of persuading her to exchange her Los Angeles property for the 40 acres in San Diego county at a valuation of $2,500; that she was inexperienced in the value of real estate, and had no knowledge or information concerning the San Diego land or the market value thereof; that she relied upon said representations of defendants, believing them to be true, and, relying wholly thereon, was induced to exchange her Los Angeles property for the San Diego property and a $4,000 note, the purchaser of the Los Angeles property to assume a $1,000 mortgage thereon. Plaintiff further alleges that said representations of the defendants were false and fraudulent; that defendants did not believe them to be true, and made them to plaintiff with the intention of deceiving her and inducing her to exchange the Los Angeles property as aforesaid, and but for said representations plaintiff would not have made the exchange.

Plaintiff further alleged that after the exchange she learned that said representations made by defendants were false and fraudulent; that said San Diego county land was not, and is not, worth more than $50; that it is not good for agricultural purposes; and that it is a rocky mountain side, entirely unfit for farming purposes, and not susceptible of irrigation; and that plaintiff has been damaged by reason of said misrepresentations in the sum of $2,450.

Judgment was given for the plaintiff in the sum of $1,075, together with interest, from which judgment the defendants appeal.

[1] It is contended that the finding that the representations as alleged were made by the defendants is not sustained by the evidence, for the reason that it appears that the representations were actually made by the defendant Russell only. While it is true that Weta G. Glassell and J. M. French did not personally make the false representations to plaintiff, it is beyond dispute that J. M. French Company was acting as agent for defendant Glassell in the exchange of her land, and that defendant Russell was the individual representing J. M. French Company in the transaction. The principals are charged with the fraud of their agent committed on their behalf and in their interest during the course of the employment, of which fraud they accepted the benefits. The defendant J. M. French is not only charged with responsibility for the acts of his agent by virtue of this relationship, but the record discloses that he expressly stated to plaintiff, upon her inquiry, that Mr. Russell was entirely responsible, and was truthful and honest in all his dealings, and that he (French) would trust him more than anybody he knew, and that plaintiff might depend upon anything he said; that the "deal" was a good one for her, and that there was no reason for her to worry about it.

It appears that the objection to this finding is without merit. The transcript evidences the making of the representations repeatedly and urgently by Russell and that he was acting as the agent for the other defendants, and made the representations in the course of his employment; that the plaintiff was entirely inexperienced in business, a widow with small resources, and a family of children to raise, who relied absolutely upon defendants, and told them so, over and over again, pleading with them not to take advantage of her in a transaction which involved all her scanty resources; that the defendants, being fully aware of these facts, and observing her almost childish reliance upon their judgment and honesty, made numerous representations with absolutely no basis of fact, and urged them upon the plaintiff repeatedly until she made the exchange of the property.

[2] Appellants also urge that the record contains no findings that the plaintiff relied upon the representations; that defendants

made them with intent to induce plaintiff to rely upon them; that plaintiff relied solely upon them; that plaintiff acted with prudence in relying upon the representations; that plaintiff was damaged.

[3] It is entirely clear from the evidence and from the findings made that plaintiff relied upon the representations made to her by defendants. While it is not so stated specifically in the findings, they do recite that she was induced to make the exchange by reason of said false representations.

Necessary inferences from findings to support a judgment may be drawn upon appeal. Hulen v. Stuart, 191 Cal. 562, 217 P. 750. With reference to the points made by appellants as to the absence of the other findings mentioned, the recent case last cited is also an answer. Therein it was said:

> "From the facts found, and from the judgment ordered, it is evident, in the light of the entire record, that if more complete findings had been made they would have been adverse to the contentions of the appellant. If that be so, the failure to find further is not a ground for the reversal of the judgment."

[4] It may also be said that with reference to a finding on damages, while the arithmetical calculations have not been made in the findings, all the facts and figures are found which enter into the determination of the amount of damages. It is found that plaintiff's property was reasonably worth $6,100, and was subject to a mortgage of $1,000; that she received in exchange therefor a note for $4,000, and the San Diego land, which was worth not to exceed $50. This would make her damage at least the sum of $1,050. It is also found that plaintiff paid defendants a commission of $375 for acting as her agent in this transaction, which was estimated upon a valuation of $7,500 for her property. The balance of the judgment, $25, was doubtless to cover her refund upon this item, and it would seem that, if any discrepancy occurred in estimating this amount, it is in favor of appellants.

There are no errors in the record calling for a reversal of the judgment, which appears to have done justice between the parties.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

78 Cal. App. 145

ZAHOS et al. v. LOESCHER. (Civ. 3081.)

(District Court of Appeal, Third District, California. May 25, 1926.)

1. Appeal and error 🔑1011(1).

Judgment based on conflicting testimony must be accepted as conclusive on appeal.

2. Landlord and tenant 🔑326(1)—Crop contract held to contemplate payment on basis of total sum paid for 1922 crop, not part payment thereof, plus balance paid for 1921 crop, during 1922.

Contract to farm land for 35 per cent. of gross proceeds of raisins grown thereon in 1922, figured on basis of what raisin company paid growers during such year, *held* to contemplate compensation according to total sum paid for 1922 crop, not partial payment or advance on purchase price thereof, plus balance paid for 1921 crop, during 1922.

3. Appeal and error 🔑1172(1)—Plaintiffs not having proved right to sum awarded, judgment must be reversed in part, though defendant insisted on interpretation entitling them to less than sum to which entitled.

Where plaintiffs did not prove right to full sum awarded them under court's erroneous interpretation of crop contract, judgment must be reversed in part and cause remanded, though defendant insisted on interpretation entitling them to less than sum to which entitled.

4. Costs 🔑241—Costs on appeal will be apportioned equally, where about equal portions of testimony supporting judgment reversing in part and affirming in part are brought up.

Where about equal portions of testimony showing that judgment should be reversed in part and that it should be affirmed in part are brought up, costs on appeal, except that of printing briefs, will be apportioned equally on such disposition being made.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Steve Zahos and another against E. F. Loescher. Judgment for plaintiffs, and defendant appeals. Reversed and remanded in part, and affirmed in part.

N. Lindsay South, of Fresno, for appellant.
Theodore M. Stuart and E. L. Kellas, both of Fresno, for respondents.

PLUMMER, J. Plaintiffs had judgment for the sum of $5,940.93, balance found due by the court for and on account of a certain cropping contract entered into between the plaintiffs and the defendant. From this judgment the defendant appeals. From the record it appears that the defendant owned a vineyard and orchard consisting of about 160 acres, in the county of Fresno, state of California; that the plaintiffs were farm laborers and workers accustomed to work in vineyards, and had worked in that capacity prior to December, 1921; that on or about December 1, 1921, the parties entered into a contract whereby the plaintiffs were to enter upon the premises referred to, take care of, cultivate, and gather all fruits and crops produced upon said premises, perform certain specified labor mentioned in the contract, and receive for their services 35 per cent. of the gross proceeds of the crops raised upon said premises. The controversy in this case arises over the different interpretations sought to be given by the respective parties to the contract entered into between them. After specifying the work to be performed, the contract then takes up the subject of compensation, and is couched in the following language:

> "The party of the first part (being the defendant in this case) agrees to pay to the parties of the second part (plaintiffs in this case) a sum of money equal to an amount of thirty-five per cent. (35%) of the gross proceeds of the crops of raisins grown or produced on the above described premises during the year 1922. Such proceeds are to be figured upon the basis of what the California Associated Raisin Company pay their growers for such varieties of raisins during said year, and thirty-five per cent. (35%) of the gross proceeds of all other crops, including rootings and wood grown or produced on the above described premises during the same year, but in any event settlement is to be made not later than December 1, 1922."

The fact that the California Associated Raisin Company did not fully pay the purchase price of the 1922 crop of raisins during the year 1922, but only made an advance payment on account of said crop in a sum ranging from 3½ to 4½ cents per pound and final payment some time during the following year, time not given nor amount being testified to, gives rise to the controversy over the interpretation of the contract. The plaintiffs, in their complaint, set forth "that by the terms of said agreement, defendant agreed to pay to the plaintiffs a sum of money equal to thirty-five per cent. (35%) of the gross proceeds of all crops produced on said premises during said year of 1922," which, of course, is a correct deduction based upon the contract entered into between the parties. The basis fixed in the contract, however, of determining the value of the gross proceeds is not alleged in the complaint of plaintiffs. The defendant, in view of the fact that the California Associated Raisin Company had only made a partial payment on account of the 1922 contract, after quoting the portion of the contract setting forth that the plaintiffs were to be compensated in a sum equal to 35 per cent. of the gross proceeds of the crop produced on the premises during the year 1922, set forth that "such proceeds are to be figured upon the basis of what the California Associated Raisin Company pay to their growers for such varieties of raisins during said year, and thirty-five per cent. (35%) of the gross proceeds of all other crops, including rootings and wood grown or produced on the above-described premises during the same year; that said sum shall be accepted by the second parties (plaintiffs herein) as and for full compensation for all work and labor performed and materials furnished by them under this agreement," and in this connection it is alleged "that there was grown and produced on said premises during said year 1922 the following varieties of grapes, to-wit: Thompson Seedless, Sultanas, and Malagas; that the California Associated Raisin Company during said year 1922 paid 4¼ cents per pound for extra standard Thompson Seedless raisins, and 4 cents per pound for standard Thompson Seedless raisins, and 4 cents per pound for Sultana raisins, and 3½ cents per pound for substandard Thompson Seedless raisins," which would lead to the inference that that is all the California Associated Raisin Company paid growers for such varieties of raisins raised during the year 1922. As set forth in its answer, the allegations only state about one-half the facts. If the amount paid by the California Associated Raisin Company during the year 1922, considered as a calendar year, is to be deemed the measure by which the compensation owing to the plaintiffs is to be determined, then there should have been set forth the additional truth that the California Associated Raisin Company had also during the same year paid almost an equal amount to growers of said varieties of raisins, even though such payment was made as a final settlement for the 1921 crop. In other words, the defendant, by his pleadings, shows that if the calendar year is to be considered only, one payment made by the California Associated Raisin Company has been alleged, whereas, two payments were made.

The allegations of the plaintiffs' complaint lead to the conclusion that the interpretation of the contract, as first entertained, was that whatever was paid by the association for the 1922 crop was to be the standard by which compensation agreed to be paid the plaintiffs should be measured, but that, by some means or other, the court, in considering the words, "or in any event settlement is to be made not later than December 1, 1922," led to the adoption of the standard of measuring compensation to be awarded the plaintiff by the sum paid by the California Associated Raisin Company during the calendar year 1922, irrespective of whether the payment was made upon the lap-over of the 1921 crop, or the advance payment on the 1922 crop, and considered such payments as the amount paid by the California Associated Raisin Company during the year 1922.

The defendant also sets out certain credits and offsets, and the court found that the defendant was entitled to credits in the sum of $5,656.88, but did not award defendant anything upon his cross-complaint.

Adopting the final payment made by the California Associated Raisin Company on the 1921 crop during the year 1921, and also the advance or first payment on the 1922 crop made by the California Associated Raisin Company, as the basis of figuring the compensation due the plaintiffs, the court found the plaintiffs entitled to $11,597.81 and the defendant entitled to credits in the sum before mentioned of $5,656.88, and awarded plaintiffs judgment for the balance.

[1, 2] Upon this appeal the appellant in-

sists that the court erred in its interpretation of the contract referred to and also in denying the defendant judgment upon his cross-complaint. Upon the cross-complaint it is sufficient to say that the testimony is conflicting, and, being based on a conflict of testimony, nothing else appearing, must be accepted as conclusive on appeal. What the California Associated Raisin Company paid raisin growers for the 1922 crop does not appear in the record. It does appear, however, that the defendant received the gross sum of $28,908.91 for and on account of the crop and all matters included within the terms of the contract entered into between the plaintiffs and the defendant and to the gross proceeds of which the plaintiffs are entitled to a sum of money equaling 35 per cent. If the California Associated Raisin Company paid a like price to the growers of raisins of the kind and variety produced upon the lands belonging to the defendant, then and in that case the figures adopted by the court in going back to the payment on the 1921 crop give to the plaintiffs the sum of $1,479.70 in excess of what they should have been awarded. We come now to the contract itself. We think the following excerpt from the argument of the appellant correctly states the situation:

> "Referring to the situation of the parties when contract was made in December, 1921, defendant owned a valuable vineyard, and plaintiffs desired the opportunity of farming the same, to receive their pay out of 35 per cent. of the proceeds of the crop. Not desiring to take 35 per cent. of what the defendant sold his crops for, because the California Associated Raisin Company paid a big price for the 1921 crop, plaintiffs wanted to be paid according to what the said association paid for the 1922 crop.
>
> "Q. Well, with relation to this phase of the subject, what, if anything, was said about the raisin association, or the property being put in the association? A. Mr. Kellas wrote that clause in the contract regarding settlement, and the reason it was put in the contract was this: That the previous years, that the boys had worked on another ranch, and the crop was sold for less money than what the raisin association paid the growers, plaintiffs wanted to be paid according to what said association paid for the 1922 crop."

The testimony quoted in the argument of the appellant is the testimony of the defendant himself, which shows that all parties had in mind the total sum that should be paid for the year 1922 crop by the California Associated Raisin Company, and not simply a partial payment or an advance on account of a part of the purchase price of that crop. This testimony clearly shows that none of the parties was contemplating that the standard of compensation should be only one-half the purchase price, irrespective of when defendant should pay it. It also appears from the record that the words: "In any event settlement is to be made not later than December 1, 1922," was inserted in the handwriting of the defendant. These words have nothing to do with the standard by which the compensation is to be measured. It is simply a date of settlement. The error in fixing the date of settlement at a time prior to the date upon which the prices paid by the California Associated Raisin Company could be ascertained cannot be allowed to cut the agreed compensation in two, or to admit the interpretation that a part payment on the purchase price of a preceding crop may be used in adding to the compensation. By way of illustration, it appears that there was introduced as an exhibit a copy of the contract used by the California Associated Raisin Company, a reference to which shows that the raisins grown by the members were to be delivered not later than December 1st of each year, and that within six days after receipt of the raisins an additional payment was to be made therefor and final payment during the following year as the same may be determined, after deducting expenses from receipts, etc. The contract also provides that the crop year should be deemed to be from September 1st of one year to August 31st of the succeeding year. This again enforces the conclusion that the parties had in mind the compensation to be paid according to the prices paid for the 1922 crop, and that the desire of the parties to have settlement made by December 1st has nothing to do with the interpretation that should be given to the contract.

[3, 4] While the defendant has insisted upon an interpretation of the contract which would award to the plaintiffs only a little over one-half of the sum to which the record shows they were entitled, it nevertheless is true that the plaintiffs have not proven that they were entitled to much over one-half the sum awarded them, and that the court should have sustained the defendant's objection to the testimony relating to the prices paid by the association on account of the 1921 crop. As to all other matters, we find no error justifying reversal. It follows from what has been said that the judgment must be reversed, in so far as the value fixed upon the several varieties of raisins is concerned, on the ground that the findings in relation to said raisins are not supported by the evidence, and the cause remanded to the trial court to ascertain and determine the value of the crop of raisins raised upon said premises measured by the prices paid by the California Associated Raisin Company for the 1922 crop, irrespective of the date of payment made therefor, and award the plaintiffs said sum; in all other respects the judgment is affirmed, and, it further appearing from an examination of the transcript in this case that the portion of the testimony brought up necessary to show that the judgment should be reversed in part and that the portion brought up necessary to show that the judgment should be affirmed in part are about equal, it is further ordered that the costs on appeal, outside of the cost of printing briefs, shall be apportioned equally to the parties herein, and that the parties shall pay the costs of the preparing and printing respectively of their own briefs.

We concur: FINCH, P. J.; HART, J.

78 Cal. App. 282

COOPS v. COOPS. (Civ. 4827.)

(District Court of Appeal, Second District, Division 1, California. June 4, 1926.)

1. Appeal and error 🔑1011(1).

Appellate court cannot pass on merits of findings based on trial court's consideration of conflicting evidence.

2. Appeal and error 🔑931(1).

Appellate court must assume that trial court was justified in believing testimony of prevailing party.

3. Divorce 🔑184(6).

Judgment of trial court in action for divorce, rendered on conflicting evidence, will not be interfered with on appeal.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Catherine Ellen Coops against Ralph Freeman Coops. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. Homan and A. G. Reily, both of Los Angeles, for appellant.

Jarrott & Jarrott, of Los Angeles, for respondent.

YORK, J. This is an action for divorce, based upon the alleged grounds of extreme cruelty and willful neglect. The extreme cruelty alleged in plaintiff's complaint was of the class known as mental cruelty. The plaintiff alleged in her complaint that the defendant had been guilty of inflicting extreme cruelty on the plaintiff at many times, by conduct of a cruel and inhuman nature, and that it consisted largely of inflicting grievous mental suffering on the plaintiff, and then alleges certain specific instances wherein it is stated that the conduct of the defendant was detrimental to the health of the plaintiff and that of the minor child of the plaintiff and defendant. She alleges that these specific acts impaired their health to such an extent that life for the plaintiff with the defendant was "insupportable and impossible."

[1-3] Plaintiff's appeal is based upon the assumption—an assumption contrary to law—that this court is authorized to pass upon the merits of findings of fact which have resulted from the trial court's consideration of conflicting evidence. Counsel for appellant limit their contention to the proposition that the evidence "was of such a nature as to justify the court in finding for the plaintiff instead of for the defendant." They do not contend, and upon the record it is clear that they could not successfully contend, that the evidence is insufficient to sustain the findings as made. Some of the principal charges made by the plaintiff in her testimony were denied by the defendant in the testimony given by him. Assuming, as we must, that the court was justified in believing the testimony of the defendant, the established facts are insufficient to warrant a divorce upon either one of the alleged causes of action. The court having the parties before it, having heard the evidence and having thus decided the matter, this court will not interfere with its judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

78 Cal. App. 84

JOHNSTON v. JONES, Sheriff. (Civ. 3012.)

(District Court of Appeal, Third District, California. May 20, 1926. Hearing Denied by Supreme Court July 19, 1926.)

1. Sheriffs and constables 🔑87.

Sheriff, after making return on writ, has no further duty to perform relative to garnishment.

2. Mandamus 🔑73(1)—Mandamus will not issue against sheriff to release garnishment on personalty not within his possession (Code Civ. Proc. §§ 671, 1085).

Under Code Civ. Proc. § 1085, authorizing mandamus to compel action enjoined by law on officers, mandamus will not issue against sheriff to release garnishment on personalty not in his possession, though garnishment, under section 671, ceases on filing of stay bond, since no action on part of sheriff can add anything to effect of garnishment.

3. Mandamus 🔑73(1)—Mandamus will issue against sheriff to release attachment on realty dissolved by execution of stay bond in principal action (Code Civ. Proc. § 542, subd. 1, and sections 560, 671; Pol. Code, § 4157).

In view of Code Civ. Proc. § 542, subd. 1, and section 560, relating to attachment on realty, mandamus will issue against sheriff to release of record an attachment dissolved under section 671 by execution of stay bond in principal action, as required of sheriff by Pol. Code, § 4157.

4. Mandamus 🔑73(1)—Court has no power to direct sheriff to release garnishment in an independent suit in mandamus, even though it would have such power in attachment suit on filing of stay bond.

Though court may have inherent power in attachment suit on filing of stay bond to direct sheriff to release garnishment, it does not follow that court has such power in independent suit in mandamus to compel release of garnishment.

5. Mandamus ⟹176—Court cannot dissolve attachment in mandamus suit to which plaintiff in attachment suit is not a party.

In mandamus to compel sheriff to release of record an attachment, to which plaintiff in attachment suit is not a party, court is without power to dissolve or discharge attachment.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Mandamus by Catherine M. Johnston to compel Ellis W. Jones, Sheriff of County of Sacramento, to dismiss attachments and garnishments. Judgment for plaintiff, and defendant appeals. Affirmed in part, and in part reversed.

See, also, 239 P. 862.

Ralph H. Lewis and Berkeley B. Blake, both of Sacramento, for appellant.

Thomas B. Leeper, of Sacramento, for respondent.

FINCH, P. J. Plaintiff brought this action for a writ of mandamus to compel the defendant "to dismiss the attachments and garnishments" issued and levied in an action against plaintiff for the recovery of money. The defendant sheriff executed the writ of attachment in that action "by garnisheeing money" which this plaintiff had on deposit in a certain bank "and also levied said writ of attachment upon real property" belonging to her. Judgment was thereafter entered in said action against this plaintiff as prayed for in the complaint therein. Plaintiff herein appealed from the judgment and filed a good and sufficient undertaking, approved by the judge of the trial court, staying execution pending appeal, and the appeal is still pending. This plaintiff, after the filing and approval of such undertaking, requested the defendant "to release the attachments and garnishments * * * issued in said matter," but the defendant refused. The trial court entered judgment herein in favor of the plaintiff and issued a peremptory writ of mandamus requiring the defendant to release such "attachments or garnishments." The defendant has appealed on the judgment roll alone.

[1, 2] Section 671 of the Code of Civil Procedure provides that a judgment "lien continues for five years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases." In Brun v. Evans (Cal. Sup.) 241 P. 86, it is held that an attachment lien upon real estate ceases upon the filing of a stay bond on appeal. Whether the term "lien," as used in section 671, may be applied to the effect of a garnishment has not been decided. Somewhat similar questions were discussed in Nordstrom v. Corona City Water Co., 155 Cal. 206, 212, 100 P. 242, 132 Am. St. Rep. 81, and Kimball v. Richardson-Kimball Co., 111 Cal. 386, 393, 43 P. 1111. It is unnecessary, however, to decide that question because the sheriff, after making his return, had no further duty to perform relative to such garnishment. The writ of mandamus "may be issued * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." Code Civ. Proc. § 1085. No law has been cited which enjoins a sheriff to release a garnishment. If, under the provisions of section 671, the garnishment in this case ceased upon the filing of the stay bond, no action on the part of the sheriff could add anything to the effect thereof, and information that such undertaking had been filed and approved was as readily ascertainable by the bank as by the sheriff. Had the sheriff held possession of personal property capable of manual delivery, a different question would be presented.

[3] In case of attachment of real property the Legislature has wisely provided a different procedure. In the attachment of real property there must be filed "with the recorder of the county a copy of the writ, together with a description of the property attached and a notice that it is attached." Code Civ. Proc. § 542, subd. 1. Until such attachment is released of record the attachment stands as a cloud upon the title of such real estate. Section 560 of the Code of Civil Procedure provides:

> "An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ."

This section doubtless has reference to a release of record in a proper case. Section 4157 of the Political Code provides:

> "The sheriff must: * * * (7) Release on the record all attachments of real property, when the attachment placed in his hand has been released or discharged."

In Clark v. Superior Court, 37 Cal. App. 732, 174 P. 681, a writ of mandate was issued requiring the sheriff therein mentioned to release of record a writ of attachment which had been dissolved by a judgment in favor of the defendant in the attachment suit. Under the authority of that case, it is the duty of defendant sheriff to release of record the attachment of the real estate referred to herein.

[4] No authority appearing in support of the judgment requiring the defendant to release the garnishment, that part of the judgment must be reversed. Even if it were conceded that in the attachment suit the court had inherent power, upon the filing of the stay bond, to direct the sheriff, as an officer of the court, to release the garnishment, it would not follow that in an independent suit

in mandamus the court has such power. In the one case the sheriff's duty would arise out of the order of the court, but in the other the duty must be one specially enjoined by law.

[5] The judgment also provides:

> "It is therefore ordered, adjudged, and decreed that said attachments or garnishments * * * and any lien created by same are discharged and released by the filing of said undertaking on appeal staying execution in said matter."

It is clear that in a suit for a writ of mandate to compel the sheriff to release of record an attachment, to which proceeding the plaintiff in the attachment suit is not a party, the court is without power to dissolve or discharge the attachment.

In so far as the judgment requires the defendant, in effect, to "release on the record" the attachment of real property, as provided in section 4157 of the Political Code, it is affirmed. In other respects the judgment is reversed, appellant to recover costs of appeal.

We concur: HART, J.; PLUMMER, J.

---

78 Cal. App. 104

WETZEL v. PIUS. (Civ. 3066.)

(District Court of Appeal, Third District, California. May 21, 1926. Hearing Denied by Supreme Court July 19, 1926.)

1. Physicians and surgeons 🔑18(1).

Action for malpractice of physician is based on tort, and not upon contract of employment.

2. Limitation of actions 🔑55(3)—Action for malpractice of physician must be brought within one year of negligent act causing injury; time not being extended by continuance of physician's employment (Code Civ. Proc. § 340, subd. 3).

Under Code Civ. Proc. § 340, subd. 3, action for malpractice of physician must be brought within one year of negligent act causing injury, and time for bringing action cannot be extended on theory that contract of employment continued to within one year of action, and that negligence of physician continued under such contract in failing to correct original mistakes.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge,

Action by Joseph Wetzel against Charles I. Pius for damages for malpractice. Judgment for defendant, and plaintiff appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant.

James M. Allen, of Yreka, and Hartley F. Peart and Charles V. Barfield, both of San Francisco, for respondent.

SHIELDS, Justice pro tem. This is an action for damages against a physician and surgeon for malpractice in negligently setting the femur bone in plaintiff's leg.

In his complaint plaintiff charges that on or about the 17th day of May, 1922, he broke this bone in his right leg and, relying upon the skill of defendant, employed him to attend to the injury and to give him such care and treatment as was usual and necessary in such cases to effect a cure. Continuing plaintiff charges that defendant so negligently and unskillfully conducted himself in attempting to set the leg that the ends of said femur bone were allowed to overlap, and were not properly joined together, through which plaintiff's leg became deformed, and became, and remained, permanently shortened.

The complaint was filed August 16, 1923. A demurrer to this complaint was sustained, apparently upon the ground that the cause of action alleged was barred by subdivision 3 of section 340, Code of Civil Procedure. An amended complaint was thereupon filed, in which the injury to plaintiff and his employment of defendant "to attend to his said injury and give him such care and treatment as was usual and necessary to effect a cure" was alleged as in the first complaint. It was then further alleged that the employment so begun was continued until February, 1923. The amended complaint then repeated the allegation of the original complaint as to the negligent and unskillful setting of the bone by which the ends of the bone were not joined together, but were overlapped; the amended complaint adding that the bones were negligently permitted to so remain until they became knit together in that position.

The amended complaint finally alleged that the defendant should, in the exercise of ordinary care, have reset the bones in plaintiff's leg, but that, in neglect of his duty, during the time he was treating plaintiff for his said injury, he took no steps whatever to reset the bones, but negligently refused to do so, whereby the injury occurred, and the leg became deformed and permanently shortened.

A demurrer was filed to this complaint upon the grounds chiefly, that the complaint was uncertain, in that it did not state the date upon which the femur bone was first improperly set, and that the cause of action alleged was barred by the provisions of subdivision 3 of section 340, Code of Civil Procedure. This demurrer was sustained without leave to amend, and from the judgment for defendant thereupon entered this appeal was taken. The demurrer to the original complaint was, beyond question, correctly sustained. The injury alleged occurred much more than a year before the complaint was filed and the action stated was clearly barred by subdivision 3, § 340, Code of Civil Procedure.

To obviate this objection, the amended complaint alleged a contract of employment extending from the time of the accident and the setting of the bone and continuing until within one year of the filing of the complaint. It was alleged that the contract provided for the setting of the bone and caring for the injury until a cure had been effected. The theory of the amended complaint is that there was a breach of this contract in the failure of the defendant to reset the bone during the term of his employment, and after it became apparent that the injury seemed to require such a remedy. In his amended complaint plaintiff bases his action upon this contract. He states his contention in these words:

> "Our contention is that, plaintiff being entitled to ordinary care and skill during treatment though an operation was improper, if during treatment a condition developed that a physician should with ordinary professional care and skill have discovered and remedied, neglect to do so is actionable, and, if such neglect continued * * * during all the time plaintiff was under * * * treatment, an action may be brought at any time within one year from the time of the patient's discharge for neglect of such duty."

[1, 2] This contention is mistaken. Actions of this character are not based upon the contract of employment; they sound in tort, and are classed as actions ex delicto. In discussing a similar contention, our Supreme Court said:

> "The contract of employment has nothing whatever to do with the liability except to create a duty on the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employee, and under the old system of pleading was always classed as an action ex delicto." Denning v. State, 123 Cal. 316, 55 P. 1000; Marty v. Somers, 35 Cal. App. 182, 169 P. 411; Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 P. 993.

The pleadings in the case of Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17, were substantially as in the case under consideration. Plaintiff in his original complaint, as in this case, charged an ordinary action ex delicto. In an amended complaint he charged a violation of a contract of employment, and sought damages, as here, for a violation of the contract. The court disposed of this contention with terseness and vigor, saying that "the action is clearly one in tort and not in breach of contract." No departure from this rule has ever crept into the California cases. In a recent case, after reviewing the earlier decisions, the rule is decisively reaffirmed in these words:

> "Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions." Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98.

This, of course, does not mean that if some new and different act of negligence should occur during the course of an employment, it could not be made the bias of a separate and independent action. The rule above stated is based upon the theory that, where an act of negligence, as in this case the improper setting of the femur bone, causes damage, the cause of action is complete, and cannot be split up. The original injury remains the sole cause of action, and subsequent acts which merely aggravate the damage already done, or later developments which frequently add new elements of damage, merely attach themselves to the original cause of action, and do not of themselves become independent causes of action, nor do they revive the cause of action for the original injury, if the same has become barred. Furgason v. Bellaire, 197 Iowa, 277, 197 N. W. 13; Coady v. Reins, 1 Mont. 424.

The demurrer was properly sustained, and the judgment is, therefore, affirmed.

We concur: HART, J.; PLUMMER, J.

---

78 Cal. App. 167

PEOPLE v. GORDON. (Cr. 1329.)

(District Court of Appeal, Second District, Division 2, California. May 25, 1926.)

1. Criminal law 🔑1173(2).

Where accused testified three times at great length, refusal to instruct that he was entitled to testify in his own behalf *held* not prejudicial.

2. Criminal law 🔑830.

Accused's requested instructions, not properly stating principles of law pertaining to case *held* properly refused.

3. Criminal law 🔑829(1).

Instructions properly given by court need not be repeated in same or different language at accused's request.

4. Criminal law 🔑1037(1).

Alleged misconduct of district attorney in argument to jury will not be reviewed on appeal, where objection thereto was not made until after recess.

5. Criminal law 🔑1119(4).

Where record shows that accused's counsel expressly waived any objection to alleged misconduct in argument of district attorney, invited by his own previous conduct but does not fully show conduct of accused's counsel, error is not shown.

6. Criminal law ⚷730(3).

Where objection to cross-examination of accused's witnesses, suggesting that person whose statements were repeated by witness was not regarded by persons who knew him as reliable, was sustained, there was no error.

7. Criminal law ⚷956(13).

Affidavit of juror on information received from another juror *held* insufficient to support charge of misconduct by juror.

8. Criminal law ⚷956(13).

Affidavit of misconduct by juror, regularly made and filed, cannot be altered by counsel's mere declaration that affiant intended to say something entirely different than contained in affidavit.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Evans F. Gordon was convicted of murder in the second degree, and he appeals. Affirmed.

Arthur L. Veitch and Stanley E. Tweedy, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Edwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged by information filed by the district attorney of Los Angeles county with the crime of murder, in that he did willfully, unlawfully, and feloniously, and with malice aforethought, kill one Joseph E. De Hart, on or about the 7th day of June, 1925. The jury returned a verdict of murder in the second degree. A motion for new trial was presented, which was denied, and this is an appeal from the ruling last mentioned and from the judgment.

It appears that, on the night of the occurrence in controversy, Gordon, with his wife and child, drove to the De Hart residence on Adams street, in the city of Los Angeles, for the purpose of attempting to collect the value of a window which the defendant claimed to have been broken in his store by the young son of Mrs. De Hart. Gordon went to the house and knocked, a man appeared at the door, Gordon stated his business, and Mrs. De Hart then appeared. The evidence is squarely contradictory as to the cause and manner of the ensuing tragedy. Evidence offered by the people tended to show that Gordon shot De Hart and killed him inside the house, as a result of an argument, but without provocation, and that De Hart was not armed. The defense was that De Hart was shot by Gordon in self-defense. The latter testified that, while talking with Mrs. De Hart concerning his mission, a man stepped near the door, but remained back of Mrs. De Hart; that the man began to curse him, and finally drove him from the house; that as the defendant left he saw that the man had a revolver; that Mrs. De Hart threw up her arm as though to take hold of the man with her, and said, "Oh, my God! Don't kill this man! Don't shoot this man!" and told him that Gordon was all right; that the man came outside, and the defendant, seeing his own life, as he believed, in danger, produced a revolver which he carried for self-protection because he had considerable money on his person, and fired, intending to shoot the man in the shoulder; that Mrs. De Hart then cried, "You shot my husband; you killed my husband," whereupon, after some excited controversy and confusion, the evidence of which is not material to the questions here presented, Gordon returned home, where he left his weapon and later surrendered at the police station.

The prosecution contended that the defendant was inside the house at the time of the shooting, and that it was he who did the cursing, and that Mrs. De Hart had begged the defendant not to shoot "this man,"—her husband.

The first point advanced by appellant involves five requested instructions, each of which it is contended the trial court erroneously refused to give.

[1] By the first it was stated that the jury would have no right to disregard the testimony of the defendant, on the ground alone that he was charged with a crime; that the law presumes a defendant in a criminal case to be innocent until proven guilty; that he may testify in his own behalf, and his testimony should be fairly and impartially considered, together with all the other evidence in the case, and, if from all the other evidence the jury entertains a reasonable doubt, he should be acquitted; that the defendant is presumed to speak the truth, and, unless such presumption be destroyed by other evidence in the case, the jury must find that he did speak the truth.

A perusal of the instructions given reveals that all of the rules and principles of law embodied in the foregoing requested instruction were given in others, with the single exception of the statement that the defendant was entitled to testify in his own behalf. In this case the defendant occupied the witness stand on three occasions and testified at great length. It cannot therefore be said that he was denied such right, or that the jury could possibly infer from the fact that he did so that he exercised a privilege to which he was not lawfully entitled. The failure to advise the jury that the defendant had a right to be a witness could not, under these circumstances, have prejudiced his case.

[2] The four remaining requested instructions which the trial court declined to give were offered for the purpose of charging the jury that, should they find that the posses-

sion of a revolver by the defendant at the time of the shooting comported with certain habits, practices, and conditions to which he had testified, such possession on the date of the alleged offense should not be deemed indicative of malice toward the deceased; that the jury should consider any explanatory evidence of such possession upon a theory which would admit of the defendant's innocence; that one had a legal right to take life in self-defense; and that until proven to the contrary the character for traits of peace and quietude of a defendant on trial for crime must be presumed to be good.

[3] So far as any of these instructions embodied correct statements of the law as applicable to this case, they were fully covered by instructions given. It is unnecessary to incumber this opinion with a more extensive detail of the instructions refused, or to quote at length the many that were given. The jury were definitely and clearly instructed upon every principle of law pertaining to the case which any refused instruction properly suggested. Those which did not properly state the principles contended for were correctly refused. People v. Davis, 135 Cal. 162, 67 P. 59; People v. Doane, 77 Cal. 560, 20 P. 84; People v. Wagner, 29 Cal. App. 363, 155 P. 649. As to the instructions already given, it is a familiar rule that they need not be repeated in the same or different language. People v. Bringhurst, 192 Cal. 748, 221 P. 897; People v. Wolfgang, 192 Cal. 754, 221 P. 907; People v. Loomis, 170 Cal. 347, 149 P. 581; People v. Feld, 149 Cal. 464, 86 P. 1100.

[4, 5] It is strongly urged that the district attorney was guilty of misconduct, in that during his argument to the jury he is said to have brought forth new witnesses and introduced evidence. It is not necessary to consider this matter in detail, since no objection was made by counsel for defendant at the time, although ample opportunity was afforded. The alleged objectionable conduct of the district attorney extended over a considerable period of time, and counsel for the defendant seems to have had no thought of objecting until when, after a recess, he assigned the argument as misconduct. Another decisive reason why, if error was committed, it is not possible to urge it now, is that his counsel expressly waived such objection, as will appear from the following. Defendant's counsel made his first objection upon this assignment of error by saying:

> "The defendant being in court, and the jury present, I desire to reserve an exception to all that portion of the argument of the district attorney beginning at the point where he invited the jury to attend upon his argument while he was engaged with some variety of demonstration on People's Exhibit, the number of which I do not know. * * *
>
> "The Court: The district attorney was simply following the lead set by the attorney for the defendant.
>
> "Mr. Veitch: I realize that, your honor. And so far as he followed it I have no objection."

It thus appears that the defendant is precluded from urging any objection to the conduct of the district attorney in this behalf in so far as it coincides with the example which the trial court indicated had been set by counsel for the defendant. But the transcript does not contain a report of the argument of defendant's counsel; hence this court cannot say to what extent his conduct was exempt from objection under the waiver above mentioned.

It is also claimed that during the trial a member of the jury indicated the existence in her mind of an opinion adverse to the theory of self-defense as advanced and relied upon by the defendant. While a witness was on the stand one of the jurors asked a number of questions. A careful examination of that portion of the transcript discloses nothing which in our opinion indicates that the juror had formed an opinion upon the subject. The net result of the juror's questions was that in response to them the witness indicated that he had not seen a gun upon the occasion of the shooting, but only a gun handle, and that he did not know to whom the object belonged.

[6] Other alleged misconduct of the district attorney is not of such character as to be prejudicial to the rights of the defendant. A witness for the defendant who had related what he heard some one else say was asked questions upon cross-examination suggesting that the person whose statements were repeated was not regarded by those who knew him as reliable. Objection to such questions was properly sustained. Other points of this character do not require consideration.

[7, 8] It is suggested that there was serious misconduct on the part of a member of the jury. An affidavit of one Campbell is to the effect that during the trial of the case the affiant saw Mrs. Elizabeth F. Ruland, one of the jurors, lay her hand upon the shoulder of Mrs. De Hart, widow of the victim of the homicide, and heard the former say, "Never mind; we will fix him." This is denied in an affidavit of Mrs. De Hart. An affidavit was filed by Mrs. Ruland, in which she states that she was informed that another juror, Mrs. De Winstanley, held a conversation with Mrs. De Hart during the trial. Such an affidavit is insufficient, as it has been held that affidavits upon information and belief are not competent evidence to support charges of misconduct. People v. Chin Non, 146 Cal. 561, 566, 80 P. 681. In another affidavit made by the wife of the defendant, it is averred that the affiant saw a juror, whom she was informed and believed was Mrs. Ruland, place her hand upon Mrs. De Hart's shoulder and say something. It was said by counsel for defendant in the argument on motion for new trial, and is repeated in the brief, that the

person intended to be referred to by Mr. Campbell was not Mrs. Ruland, but Mrs. De Winstanley. We need hardly say that an affidavit solemnly made and regularly filed in court cannot be altered by the mere declaration of counsel that the affiant intended to say something entirely different than the statement contained in the affidavit. We cannot say upon this state of facts that the trial court erred in denying the motion for new trial upon this ground.

The judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

78 Cal. App. 163

JONES v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (Civ. 5310.)

(District Court of Appeal, Second District, Division 2, California. May 25, 1926. Hearing Denied by Supreme Court July 22, 1926.)

1. Appeal and error ⊂⊃607(1)—Filing of notice of appeal by defendant from judgment conclusively establishes actual knowledge of its rendition.

Actual knowledge by defendant of rendition of judgment is conclusively established by his filing notice of appeal therefrom.

2. Appeal and error ⊂⊃607(1)—Appearing in open court, calling attention to notice of motion for leave to file request for transcript, and expressing readiness to proceed, held not sufficient application within six months (Code Civ. Proc. §§ 473, 1003).

Defendant's counsel's appearance in open court after filing but not serving motion for order allowing him to file request for transcript under Code Civ. Proc. § 473, and calling attention to notice and stating that he was ready to proceed, *held* not to comply with requirements of such section requiring application to be made within six months, in view of section 1003.

3. Appeal and error ⊂⊃607(1)—Defendant seeking order to file request for transcript must move for particular relief desired as indicated in his notice of motion (Code Civ. Proc. § 473).

Defendant seeking relief under Code Civ. Proc. § 473, from consequences of delayed request for transcript, must move for particular relief desired by orally requesting court to take action indicated in notice of motion.

4. Prohibition ⊂⊃3(2).

Prohibition to prevent judge from settling and certifying reporter's transcript of proceedings is only adequate remedy available, where court grants application not made in time, under Code Civ. Proc. § 473, for leave to request transcript, as order is not appealable.

Application for writ of prohibition by G. H. Jones to be directed to the Superior Court of San Diego County, Hon. W. P. Cary, Judge thereof, and another. Writ granted.

Herbert C. Kelly, of San Diego, for petitioner.

Sloane & Sloane, of San Diego, and A. G. Reily, of Los Angeles, for respondents.

CRAIG, J. Among others, the respondent W. J. Bryant was made a defendant in a suit brought by petitioner in the superior court of San Diego county; later a judgment was rendered in favor of the plaintiff. This was on the 16th day of April, 1925, and it was entered on the following day. On the 27th day of May, 1925, Bryant filed a notice of appeal and request for transcript of proceedings with the county clerk. On October 13, 1925, he, through his counsel, filed a notice stating that on the 19th day of October he would move the court for an order allowing him to file a request for transcript of the proceedings and an order directing the clerk to forward said transcript to the Supreme Court. The notice indicated that the motion would be for relief under section 473 of the Code of Civil Procedure because of mistake, etc., in making a request for transcript more than 10 days after notice of the entry of judgment, and stated that it would be based on two affidavits which were filed with the notice of motion. Bryant's counsel appeared in court at the time designated, called attention to his notice and affidavits, and announced his readiness to present the motion. At that time counsel for petitioner was not present; there was no showing in the record then, and is none now, that he had been served with notice that the motion would be made, and the court requested that counsel for Bryant procure the attendance of counsel on the other side, and stated that when this was done the matter would be taken up. It appears that on the 2d day of December another notice similar to that last mentioned was filed, and on December 21, 1925, pursuant thereto, counsel for petitioner and for respondent Bryant were in court. Thereupon the latter made the motion noticed to be made at that time. No entry was made by the clerk of any proceeding on the 19th of October, but on the 21st day of December the court made the following order, nunc pro tunc:

> "Nunc pro tunc minute entry as of Monday, October 19, 1925, at 10 o'clock a. m. thereof.
>
> "This being the time heretofore noticed for the hearing of the defendant W. J. Bryant's motion for relief under section 473 of the Code of Civil Procedure, comes now the defendant W. J. Bryant herein by counsel A. G. Reily, Esq., and announced that he was ready to present said motion. The plaintiff not appearing and it appearing that counsel for said plaintiff had heretofore notified the court that he desired that no proceedings be had in said cause in his absence, said hearing is continued by the court until such

date as may be agreed upon by and between respective counsel herein."

Also, on the 21st day of December, an additional affidavit was filed in support of the motion for relief. Over objections by petitioner the court granted the application, and this court has been asked to prohibit the superior court from settling and certifying the reporter's transcript of proceedings.

[1] There is some dispute as to whether or not respondent Bryant was, prior to October 14, 1925, served with notice that judgment had been rendered. That he had actual knowledge of the rendition of the judgment is conclusively established by the fact that he filed a notice of appeal therefrom on the 27th day of May, 1925. Fiske v. Gosbey, 168 Cal. 334, 143 P. 611.

[2] It is clear that if respondent Bryant's motion was first made on the 21st of December it was too late, for before that time more than six months had elapsed since his notice that judgment had been rendered. Therefore the jurisdiction of the trial court to grant the relief sought hangs primarily upon the legal effect of what transpired on the 19th day of October. If counsel then made a motion, he was in time; if he did not, he was too late. Regarding the matter most strongly with a view to upholding the action of the trial court, all that can be said is that after having filed, but not having served, the motion for relief under section 473 of the Code of Civil Procedure, counsel for respondent Bryant appeared in open court, called attention to his notice and the affidavit in support of it, and stated that he was ready to proceed. We have no hesitation in saying that this does not measure up to the requirement that application for relief must be made as specified in said section 473 of the Code of Civil Procedure. To make an application is to make a motion. Code Civ. Proc. § 1003. To appear in court and announce one's readiness to make a motion is not the making of the motion any more than would be the service of notice that one will make a motion. That the latter procedure is insufficient is well established. Herrlich v. McDonald, 80 Cal. 472, 22 P. 299; Thomas v. Superior Court, 6 Cal. App. 629, 92 P. 739; Wheelock v. Superior Court, 67 Cal. App. 601, 227 P. 931; In re Morehouse, 176 Cal. 634, 169 P. 365.

[3] The only provision of law under which respondent Bryant might proceed is explicit in its requirement that one who would avail himself of its aid shall not merely direct the court's attention to his presence in court in the proceeding in which he is interested, but shall move for the particular relief desired, that is, orally request that the court take action as indicated in his notice. People v. Ah Sam, 41 Cal. 645; Spencer v. Branham, 109 Cal. 336, 41 P. 1095. There is nothing to the contrary in Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, to which our attention is directed. It is sufficient to distinguish that case from the instant proceeding to quote from the opinion the following:

> "On September 21, 1909, while the court was in session, McMahan appeared and formally moved the court to set aside the order of partial distribution, stating at length the grounds of the motion and filing affidavits in support thereof."

[4] Respondent Bryant is in error in the contention that petitioner's only remedy is by appeal; that an order of the character before us for review is not appealable has been held in a number of cases, among them Kramm v. Stockton Elec. R. Co., 22 Cal. App. 737, 136 P. 523; Id., 22 Cal. App. 761, 136 P. 534; Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497.

Relief has been granted on the theory that it was sanctioned by section 473 of the Code of Civil Procedure, but in excess of the trial court's jurisdiction. Prohibition is the only adequate remedy available for the injured party. Entertaining these views, we do not deem it necessary or profitable to consider other grounds alleged by the petitioner as justification for the issuance of the writ.

It is ordered that a peremptory writ of prohibition issue as prayed.

We concur: FINLAYSON, P. J.; WORKS, J.

78 Cal. App. 262

DOWD v. RUSSELL. (Civ. 3094.)

(District Court of Appeal, Third District, California. June 1, 1926. Hearing Denied by Supreme Court July 30, 1926.)

1. Replevin ⚷72.

Evidence *held* insufficient to support judgment for plaintiff in claim and delivery for automobile.

2. Replevin ⚷8(1).

In claim and delivery, plaintiff can recover only on strength of his own title.

3. Fraudulent conveyances ⚷133.

Transfer by bill of sale without delivery or change of possession is void as against subsequent purchasers, under Civ. Code, § 3440.

4. Automobiles ⚷19—One securing transfer of automobile from former owner on affidavit of lost registration certificate held not innocent purchaser (Motor Vehicle Act [St. 1919, p. 198]).

One securing transfer of automobile, under Motor Vehicle Act, on affidavit of lost registration certificate, which had been dead for three years (St. 1919, p. 198), without consideration or delivery, from one he knew had sold and delivered car to another before latter's promise to transfer it to him as security, was not innocent purchaser.

5. Automobiles ⚿19.

One receiving transfer of automobile with knowledge of prior sale thereof by transferor cannot recover it, after delivery to buyer and transferor's receipt and retention of full sale price, on ground that transferor failed to make statement of transfer to buyer on back of registration certificate as required by St. 1919, p. 200.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Mervyn R. Dowd against George Russell. Judgment for defendant, and plaintiff appeals. Affirmed.

Dowd & Reagh, of San Francisco, for appellant.

J. S. Daly, William S. Howe, and Donald McKisick, all of Sacramento, for respondent.

FINCH, P. J. The plaintiff brought this action in claim and delivery to recover an automobile in defendant's possession and alleged in the complaint to belong to the plaintiff. The defendant answered, denying that the plaintiff was the owner of the automobile, and alleging that the defendant was the owner thereof. Judgment was entered in favor of the defendant, and the plaintiff has appealed. The facts are undisputed.

The plaintiff is an attorney at law, and for several years prior to August 15, 1923, he had been attorney for R. L. Breck, and the latter was indebted to the plaintiff in the sum of $155 for professional services. About the middle of August, 1923, Breck purchased the automobile involved herein from Josephine Lindeberg, the owner thereof. August 25, 1923, "Breck agreed to transfer the automobile to the plaintiff Dowd to secure the indebtedness of $155." No transfer of the machine to Dowd was ever executed by Breck. Breck "drove the said automobile to Truckee, where he used it as a stage between Truckee and Reno from August until December, 1923, without obtaining a new license to operate the machine." December 11, 1923, Breck sold and delivered the automobile to J. H. Batcher and Eugene W. Hunt, and gave them a bill of sale thereof. January 27, 1925, Batcher and Hunt sold and delivered the automobile to John Dickson. February 9, 1925, Dickson "for a good and valuable consideration sold and delivered said automobile to the defendant George Russell. Mr. Russell made no investigation of the condition of the title other than to ask J. S. Daly, who is and was attorney for Dickson if the title was all right, and Mr. Daly informed him that it was. Mr. Russell took a bill of sale from Mr. Dickson covering the purchase, but made no effort to secure a transfer thereof in accordance with the terms of the Motor Vehicle Act. Although appellant, Dowd, secured a promise from Breck in August, 1923, that Breck would cause said automobile to be transferred to Dowd, the car never did come into Dowd's possession until after the commencement of this action. Plaintiff did not ascertain that Josephine Lindeberg was the original owner of the car until October 19, 1924, but, on ascertaining this fact, * * * plaintiff, Dowd. secured a transfer of said automobile to him from Josephine Lindeberg, not on the original certificate, but upon an affidavit that the original was lost, and on the 24th day of December, 1924, filed this transfer in the office of the motor vehicle department." It does not appear whether or not the original certificate was in fact lost. March 6, 1925, "at Dowd's request, his client Breck made an affidavit that the said automobile had not been operated since 1921." Dowd believed that this affidavit stated the truth. "Upon the strength of the affidavit made by Breck, Dowd obtained a registration certificate from the motor vehicle department on the 6th day of March, 1925. This certificate, however, was not signed by Dowd until the date of the trial on or about the 29th day of April, 1925." Plaintiff at no time paid any money whatsoever for the obtaining of certificate or bill of sale from Josephine Lindeberg. It does not appear that the automobile was operated after the transfer from Breck to Batcher and Hunt on the 11th day of December, 1923, and it does not appear that any certificate of registration was issued by the Motor Vehicle Department to any person after the year 1921 until March of 1925."

[1-5] It is clear that the evidence is insufficient to support a judgment in favor of the plaintiff. He must recover, if at all, on the strength of his own title. Breck did not even attempt to transfer title to the plaintiff. If Breck's promise to transfer the automobile to plaintiff be given the effect of a bill of sale, the attempted transfer would be void as against subsequent purchasers, because there was no delivery or change of possession. Civ. Code, § 3440; Davenport v. Alexander, 53 Cal. App. 688, 690, 200 P. 771; Babson v. Salisbury, 46 Cal. App. 521, 523, 189 P. 702. Plaintiff acquired no title from Josephine Lindeberg, because she had none to convey. He is in no sense an innocent purchaser from her. At the time he attempted to acquire a paper title from her he knew that she had sold and delivered the automobile to Breck, because more than a year prior to that time Breck had promised to transfer it to the plaintiff as security. Independent of plaintiff's actual knowledge of such sale, the circumstances surrounding his transaction with Josephine Lindeberg were such as to put him upon inquiry. The paper transfer was based upon an alleged

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

lost certificate of registration which had been dead for three years (Stats. 1919, p. 198), and there was neither consideration for such transfer nor delivery of the automobile. Plaintiff is in no better position than Josephine Lindeberg would be if she were suing to recover the machine. When she sold the automobile to Breck it became her duty to join with him "in a statement of said transfer indorsed upon the reverse side of the certificate of registration of said motor vehicle" for the purpose of filing the same with the motor vehicle department. Stats. 1919, p. 200. After she had sold and delivered the automobile to Breck and had received and was retaining the full selling price thereof, she could not recover the machine upon the ground that she had failed to make the statement required of her by the law. Boles v. Stiles, 188 Cal. 304, 306, 204 P. 848. Since plaintiff received the attempted transfer from Josephine Lindeberg with knowledge of the prior sale made by her and under the circumstances stated, there is no merit in his claim of ownership.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

---

78 Cal. App. 133

BAKER v. CARSTENBROOK. (Civ. 2928.)

(District Court of Appeal, Third District, California. May 24, 1926. Hearing Denied by Supreme Court July 22, 1926.)

1. Fraud ⟹31—Defrauded purchaser may rescind or sue for damages.

One induced to purchase by fraudulent representations may rescind contract and sue at law for consideration parted with, sue in equity to rescind and have full relief therein, or retain what he received and sue at law for damages sustained.

2. Fraud ⟹31—Vendee under executory contract can pay purchase price, retain possession, and recover damages for false representations.

Vendee under executory contract may pay or offer to pay full purchase price, retain possession, and accept such title as seller can give, and recover damages for breach of contract or false representations.

3. Fraud ⟹34.

To sue for damages for deceit, vendee need not rescind contract, restore possession, or return anything received thereunder.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Frank E. Baker against Harry J. Carstenbrook. Judgment for plaintiff, and defendant appeals. Affirmed.

J. E. Ebert and W. P. Rich, both of Marysville, for appellant.

Arthur M. Bundy, of Marysville, for respondent.

PLUMMER, J. Action for fraud and deceit in the sale of real estate. Plaintiff recovered judgment, and defendant appeals.

The record shows that on or about the 28th day of April, 1922, the appellant purported to convey and transfer to the plaintiff by a grant, bargain, and sale deed a certain tract of land situate, lying, and being in the city of Marysville, county of Yuba, state of California, described as follows: The east one-half of block No. 14 of range letter "K" of the said city of Marysville, as the lots, blocks, and ranges are laid down, numbered and designated upon the official recorded map of the said city of Marysville; that the appellant had at that time a certain tract of land inclosed by a fence which the defendant falsely represented to the plaintiff was the land described in the deed, the complaint further alleging that at the time of making such statements and representations the defendant knew the same to be false and that the false statements were made for the purpose of inducing the plaintiff to consummate the deal and enter into the possession of the premises inclosed by the fence hereinbefore referred to; that the defendant at that date was in possession of the premises inclosed by the fence. It further appears from the complaint and also from the transcript that the defendant was not the owner of a considerable portion of the premises inclosed by the fence and that the plaintiff, relying upon the representations made by the defendant as to his ownership, made improvements upon that part of the premises inclosed by the fence aforesaid which did not belong to the defendant and the title to which the defendant could not and did not transfer to the plaintiff by the deed herein referred to. It further appears from the testimony and the findings of the court that the plaintiff made improvements upon the premises altogether of a value of $653 and that the reasonable value of the land which the defendant purported to convey to the plaintiff and which he did not convey was of the value of $100. As a conclusion of law it was determined that the plaintiff was entitled to judgment against the defendant by reason of the facts referred to in the sum of $753.

[1] Only one point is urged as a reason for reversing the judgment of the trial court, to wit, that the action was prosecuted without first surrendering the premises to the defendant or any attempt made by the plaintiff to place the defendant in statu quo before proceeding to file the complaint herein. The appellant cites a number of cases to the effect that before a purchaser can rescind a contract to purchase, as a condition precedent to bringing the action to recover the purchase money or damages, the plaintiff

must place the vendor in statu quo or offer to restore possession of everything of value received by him. We do not need to examine the cases cited by appellant supporting the rule just stated. The law as stated by the appellant is absolutely correct, where an action is brought to rescind, but when the action is not brought to rescind the authorities cited have no application. As stated in 39 Cyc. 1997:

> "One who has been induced by fraudulent representations to become the purchaser of property has, upon the discovery of the fraud, three remedies open to him, either of which he may elect: He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract; he may bring an action in equity to rescind the contract and in that action have full relief; lastly, he may retain what he has received and bring an action at law to recover the damages sustained."

[2] The authorities are also uniform to the effect that under an executory contract a vendee cannot retain both the land and the purchase price, yet that he may pay the full purchase price or offer to do so, retain possession, and accept such title as the seller can give him and rely upon the vendor's personal responsibility to recover whatever damages he may have sustained by reason of the vendor's breach of contract or false representations. These cases are fully considered in the case of Gates v. McLean, 70 Cal. 42, 11 P. 489; Hickman v. Johnson, 36 Cal. App. 342, 178 P. 145; Hines v. Brode, 168 Cal. 507, 143 P. 729. In the principal case, Hines v. Brode, supra, the court considering the remedies available to a plaintiff under such circumstances where a vendee has completely paid the purchase price, states his remedy, as followed in the case at bar:

> "In such a case also the vendee would have his action for damages for the deceit. The alternative to a vendee under such circumstances, and the only other course which he may follow, is that founded upon an affirmance of the contract. Here the vendee is obliged to accept the burden of the contract with its benefits, according to its terms, with the right to a recovery for the fraud based upon the fact that the benefits which he receives are not those which, under the representations of the vendor, he was entitled to receive. This last presents the usual situation in actions of this nature under executed contracts."

[3] An action for damages is based upon an affirmance of the contract and it is not necessary that the vendee in order to maintain such an action should rescind the contract, restore the possession, or return anything which he may have received under the contract. His remedy, as we have stated, where the purchase price has been paid and the vendee has complied with all the terms of the contract, if he so elects, is to bring an action such as is presented here for damages on account of the deceit. In 39 Cyc. 2088, the law is thus stated:

> "An action for damages is based upon and in affirmance of the contract, and it is not necessary that the purchaser, in order to maintain such action, should rescind the contract, restore possession of the premises, return anything that he may have received under the contract, or otherwise place the vendor in statu quo or offer to do so; although the fact that the vendor has not been placed in statu quo may affect the measure of damages."

See, also, 27 R. C. L. 631; Shaw v. Wilkins, 8 Humph. (Tenn.) 647, 49 Am. Dec. 692; Guinn v. Ames, 36 Tex. Civ. App. 613, 83 S. W. 232. Other cases might be cited, but as the rule stated in Cyc. appears to be unquestioned, we deem it unnecessary to cite further authorities. The testimony in this case clearly shows that the defendant did not have title to the particular premises upon which the plaintiff placed the improvements referred to. And also that the defendant knowingly misrepresented to the plaintiff that he had title thereto and the findings of the court that the defendant knowingly and intentionally deceived the plaintiff for the purpose of inducing the plaintiff to purchase the premises is sufficiently sustained by the testimony set forth in the record. The appeal herein is apparently based upon a misconception of the law that the rule as to the restoration or offer to restore the premises, where the action is simply for damages on account of the deceit, is the same as in an action for rescission.

It follows that nothing of merit upon this appeal is presented for our consideration.

The judgment of the trial court is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

78 Cal. App. 347

BACKMAN v. GUADALUPE REALTY CO.

(Civ. 5525.)

(District Court of Appeal, First District, Division 2, California. June 12, 1926.)

1. Appeal and error ⟹1011(1).

Finding of trial court, based on conflicting evidence, must be accepted by appellate court.

2. Brokers ⟹54.

Broker generally performs his part of contract when he produces purchaser able, ready, and willing to buy on terms specified by owner.

3. Brokers ⟹57(2)—Broker, failing to procure exchange according to terms agreed on, held not entitled to commission, where owner effected deal on less favorable terms with party introduced by broker.

Broker, failing to procure exchange of property on terms specified in agreement employing him, *held* not entitled to commission when owner accepted from party introduced by broker terms less favorable than those which broker had agreed to procure.

Appeal from Superior Court, City and County of San Francisco, Edmund P. Mogan, Judge.

Action by G. S. Backman against the Guadalupe Realty Company for money due on a contract of employment as real estate broker. Judgment for plaintiff, and defendant appeals. Reversed.

W. W. Sanderson, of San Francisco, for appellant.

Esmond Schapiro, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from a judgment for plaintiff for $5,000 and interest, upon a written contract of employment as a real estate broker. There are three brokers equally interested in the recovery, Hooper, Wilson, and Schapiro & Co. The plaintiff is an assignee for the purpose of bringing the action. Although Hooper is the person who negotiated the contract and whose name appears alone therein, it was understood at the time by both parties thereto that the other two brokers, Wilson and Schapiro & Co., were equally interested with Hooper.

The transaction out of which the controversy grew was an exchange of real property. The defendants owned an apartment house in San Francisco; the other party to the proposed exchange, O'Rourke, a farm in Colusa county. O'Rourke had been introduced to the city property by the broker Wilson on November 8, 1922. Wilson offered this property to O'Rourke, with incumbrances totaling $75,000, for his ranch, free and clear of incumbrances. The following day O'Rourke called at the office of Schapiro & Co., another real estate broker with whom this apartment house had also been listed for sale. This firm also showed O'Rourke the apartment house, and succeeded in getting him to sign an offer, open for ten days, by which he was to exchange his ranch for the apartment house, subject to an incumbrance of $50,000. This offer was promptly rejected by the defendant.

It so happened that O'Rourke had an intimate friend in San Francisco, Abe Cohen, who was under contract with the defendant to lease its said apartment house. O'Rourke met his friend Cohen, and told him about the apartment house, and Cohen took him to the office of the defendant on the evening of November 9th, and introduced him to the vice president of the defendant company, Mrs. Bories. Before this meeting, however, the defendant had been informed by Wilson of O'Rourke's interest in the apartment house, and had rejected his offer therefor made through Schapiro & Co., so it was not unprepared for his reception. However, after this conference, O'Rourke returned to his home in Colusa without anything having been accomplished in the transaction. Schapiro & Co. did not know who was the owner of the apartment house when they offered it to Mr. O'Rourke. It had recently been sold through Edward J. Hooper, and they went to him for information. He drew up a contract by which he was to act as agent in the transaction and receive a commission of $3,000, which contract was signed by the defendant.

By a supplemental agreement among the three brokers, they agreed to share the commission "irrespective of who closes the deal," but that agreement does not concern us here, because there is no dispute about it or its effect. The agreement for the payment of a commission, which is the contract upon which recovery was had, is the all-important consideration in this case, and we set it forth in full:

"Exchange Agreement.

"This agreement witnesseth: That the undersigned ———, owner of the following firstly described property situate, lying and being in the city and county of San Francisco, state of California, and bounded and particularly described as follows, to wit:

"Lot and improvements situate on the westerly line of Leavenworth street 54.6 feet south of Ellis street, south 83 feet by uniform depth of 56.6 feet to a rear street, and known as No 345 Leavenworth street, subject to a first bank mortgage of $50,000 bearing interest at the rate of 6% per annum and deed of trust for $25,000, for a period of five (5) years, with interest at the rate of 8% per annum, payable in monthly installments of not less than $250 per month; and subject, also to a lease for ten (10) years at a monthly rental of $1,000, also assignment of rents, which we agree to exchange for the following secondly described property owned by ———, situate in county of Colusa, state of California, and bounded and particularly described as follows, to wit: [Here follows a description of the Colusa property.]

"Terms: We hereby agree to exchange the above-described property No. 345 Leavenworth street, San Francisco, Cal., subject to the above-mentioned incumbrances, for the above-described Colusa county property, free and clear of all incumbrances except levies and obligations incurred in the irrigation district in which the 160 acres are included. And the undersigned hereby authorize Edward J. Hooper to act as our agent in negotiating an exchange, and agree that, if he shall secure an acceptance of the above proposition to exchange the above-described property on the above terms, we will within 15 days furnish title insurance or abstract of title certified to date and a grant, bargain and sale deed conveying title to the property first above described; and will allow 15 days for the furnishing of title insurance or abstract of title certified to date and a grant, bargain and sale deed conveying title to the above secondly described property.

"And it is further agreed with the said agent that when he has secured an acceptance in writing of the above proposition that we will then pay to said agent at his office in San Francisco, the sum of three thousand dollars ($3,000) on demand for services rendered; and it is understood that said agent may also act as agent for the owner of the above secondly described property, from whom he may also receive a commission."

The foregoing is followed by provisions which do not concern us upon appeal. The portion of the contract relating to the payment of commissions was modified on the same date by the following agreement:

> "In relation to the proposed exchange of the O'Rourke property situate in the county of Colusa, California, and the Guadalupe Realty Company's property No. 345 Leavenworth street, San Francisco, Cal., we hereby agree to pay to Edward J. Hooper the sum of five thousand ($5,000) dollars on demand, for services rendered, in the event that the O'Rourkes do not pay him a commission in this proposed exchange. The Guadalupe Realty Company is to receive credit for any commission obtained from the O'Rourke end of the transaction.
>
> "The foregoing is subject to the exchange being consummated."

Both of these instruments were signed by the vice president of the Guadalupe Realty Company on its behalf.

A representative of Schapiro & Co. went to Colusa to try to interest Mr. O'Rourke further in the transaction, but without success.

[1] At this point in the narrative there is a conflict in the evidence as to whether or not the brokers abandoned the contract of employment. We should be inclined to say that they did were we trying the facts, but, since there is some evidence which creates a conflict upon that issue, and the trial court has found against the defendant, we must accept that finding, and assume that the brokers were still intent upon fulfilling their contract.

Nothing happened, however, to offer the brokers any encouragement for about a week, when O'Rourke again consulted with his friend Cohen about the matter. Cohen then reopened negotiations with the defendant, directly, upon a different basis. On November 19, 1921, the defendant agreed with Cohen that it would make the exchange of the properties, the ranch to be free and clear of incumbrances, and the apartment house subject to a first mortgage of $50,000, and a second deed of trust for $15,000, and Mr. O'Rourke to pay $2,500 cash upon the completion of the transaction, and $1,000 at the signing of the agreement. The exchange was finally consummated, after negotiations between the principals, by O'Rourke giving his ranch, free of incumbrances, and a diamond ring valued at $1,000, and receiving the apartment house subject to $66,000 in incumbrances, but free from the burden of a lease which it was to carry under the defendant's original offer, under which lease defendant would have received a bonus of $7,500; also linoleums, stair carpets, etc.

[2, 3] It thus appears that by the transaction as finally consummated the defendant received several thousand dollars less than the amount called for under the commission contract.

The question is presented: Under the peculiar terms of the contract in this case for the payment of a commission (under which the plaintiff must recover, if at all), when the principal negotiated and concluded an exchange upon substantially different and less favorable terms than those stated therein, may the plaintiff recover because of the fact that, he, originally, brought the parties together? We think that to answer that question in the affirmative would be to conclude that contracts of this type were not governed by the fundamental rules of contract law. Here we have an express contract, obligating the defendant upon certain terms and conditions, specifying them with certainty, and reiterating that the commission is to be paid if the broker shall secure an acceptance of the above proposition to exchange the property on the above terms. The general rule is that an agent performs his part of such a contract when he produces a purchaser able, ready, and willing to buy upon the terms specified by the owner. Upon a general contract of employment, certainly, the owner may make concessions to a purchaser without loss of the commission to the broker, but there is a distinction, in fact recognized by the authorities, between a general and special contract of employment in a matter of this kind. It appears that, where the broker has undertaken a special task by his contract of employment, and fails to perform it, the fact of having first introduced the buyer and seller will not entitle him to recover. The case of Naylor v. Ashton, 20 Cal. App. 544, 130 P. 181, is directly in point. It is therein stated:

> "In denying the petition for a rehearing we deem it proper to again call attention to the fact that the only employment of the broker evidenced by the writing relied on was to procure an acceptance of the specific offer made by defendant, which the broker never succeeded in doing, either within the ten days allowed for such acceptance or at all. The broker was not employed generally to effect a sale or exchange of defendant's property, but only to procure an acceptance by Mrs. Thompson of the offer to exchange and sell contained in the writing signed by defendant."

The case of Holland v. Flash, 20 Cal. App. 686, 130 P. 32, involves a legal question similar to the one before us. It was there said:

> "We do not construe this agreement as one generally employing or authorizing plaintiff's assignors to act as agents to negotiate or sell this property, or to do any act or thing connected with its negotiation or sale, other than to procure if possible the Atwood exchange upon the terms specified. Failing in that regard, the contract by its terms was at an end, and did not cover or purport to cover any agreement with

reference to subsequent deals, sales, or exchanges."

The case of Jauman v. McCusick, 166 Cal. 517, 137 P. 254, also contains the following pertinent language:

> "Here, however, the defendant's agreement was not simply to pay a commission to the brokers upon their making a sale or exchange of the property. Her agreement was to pay one thousand eight hundred and fifty dollars for their services in securing the particular agreement which was secured. * * * She agreed to pay a commission for securing a specific agreement. Such agreement having been secured, she was liable under the precise terms of her contract."

Our conclusion upon this important phase of the case makes it unnecessary to consider the other objections raised by the appellant, as the matter we have discussed herein is conclusive against the plaintiff's right of recovery under the facts of this case.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

---

78 Cal. App. 111

COUSIN v. MASON et ux. (Civ. 3042.)

(District Court of Appeal, Third District, California. May 21, 1926.)

1. Work and labor 🔑24(1)—Evidence that services were rendered as cook was immaterial variance in action for value of services as keeper under denial of liability for any kind of services (Code Civ. Proc. §§ 469, 470, 471).

Evidence, in action for value of services as keeper of resort, that services were rendered as cook, was not material variance, where defendants denied plaintiff was entitled to compensation for any kind of services, since, under Code Civ. Proc. §§ 469, 470, 471, a variance is immaterial unless adverse party has been misled.

2. Work and labor 🔑28(1).

Evidence, in action for reasonable value of services rendered as keeper of resort, *held* sufficient to sustain judgment for plaintiff.

3. Pleading 🔑430(2)—Objection to variance between pleading and proof can only be raised by objection to testimony or by motion for a nonsuit.

Advantage of variance betwen allegations of complaint and proof tendered can be taken only by objection to admission of testimony or by motion for a nonsuit.

4. Appeal and error 🔑197(1)—Variance between pleading and proof not taken advantage of in trial court is deemed waived on appeal.

Variance between pleading and proof cannot be raised for first time on appeal, since unless advantage is taken of it in trial court it is deemed waived.

5. Work and labor 🔑27(3)—Evidence of agreement to pay stipulated sum for services held admissible in action to recover reasonable value thereof.

In action for reasonable value of services rendered as keepr of resort, evidence of agreement to pay stipulated sum *held* admissible to show reasonable value of services rendered.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action to recover reasonable value of services by M. Cousin against W. S. Mason and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Benjamin C. Jones, of Lakeport, for appellants.

H. E. Witherspoon, of Upper Lake, for respondent.

PLUMMER, J. Plaintiff had judgment for the sum of $475 upon a complaint, the charging part of which is in the following words:

> "That plaintiff rendered services to defendants at their request as keeper and manager of the property commonly known as the 'Brown Mansion,' located in the county of Lake, state of California, from November 1, 1923, to June 13, 1924.
>
> "That said services were reasonably worth $525."

From this judgment the defendants appeal.

The answer of the defendants denied the allegations of the complaint and alleged that during a portion of the year 1923, the plaintiff was employed as a cook at a salary or wage of $150 per month and that all of said salary or wages had been paid. The grounds relied on upon this appeal are that there is no evidence to support the finding that the plaintiff rendered services as alleged in the complaint, and also that there is a fatal variance between the allegations of the complaint and the testimony introduced at the trial. The testimony of the plaintiff was to the effect that he was for a short period of time during the summer season employed as a cook for a salary of $150 per month; that at the close of the summer season he had a talk with the defendants, in which it was agreed that the plaintiff was to remain upon the premises and care for the place. The plaintiff's testimony in this particular is as follows:

> "You remember this is the year 1923 that you spoke of, so as to keep the years straight. As I understand your statement you remained and worked for Mr. and Mrs. Mason during the months of September, October, November, December, of 1923, and January, February, March, April, May, up until June 14, 1924? A. Yes, sir. * * * During the months of July and August I get $150 a month.
>
> "The Court: After that how much did you get? A. After that I talk to Mrs. Mason, I say, 'I go,' she said 'No, Granpa, you stay here,' I say: 'Mrs. Mason, if you want me to stay you have to

pay me. I agree to stay with you for $75 a month, if you want me to, and anything outside I charge you $5 a month more.' She said, 'We like to have a good man like you to care for the house, we have to go to Denver, maybe we have to go Monday, we have to have somebody watch the house,' and I agreed to stay there.

"The Court: For how much? A. $75 a month and $5 to do any kind of work outside."

It further appears from the testimony that the plaintiff had received in payment for the alleged services the sum of $50. The testimony of the defendants was to the effect that the plaintiff was simply allowed to remain at the premises during the period of time in question without any compensation; it being the time when there was little or no business conducted at the summer resort.

The court found that the services were worth the sum mentioned and awarded judgment in favor of the plaintiff. The testimony of the defendants is further to the effect that whatever services the plaintiff rendered were as a cook and not as a keeper of the Brown Mansion and hence a fatal variance between the allegations and the proof.

[1-5] Our attention is called to sections 469, 470, and 471, Code of Civil Procedure, and it is argued that the variance in this case is material; that no application was made to amend the pleadings, and therefore that no judgment based upon the findings can be sustained. Under section 469, Code of Civil Procedure, no variance between the allegations and the proof can be deemed material unless it has actually misled the adverse party to his prejudice. It does not appear from the record that the defendants in this case have been misled. Their defense was that the plaintiff remained upon the premises simply by their permission without any agreement as to compensation for any services of any kind whatsoever to be rendered by him. Whether such services were rendered as keeper or as cook would make no difference to the defense set up by the appellants, because they were insisting that the plaintiff was not entitled to compensation for any kind of services, whether he acted as cook or as keeper of the place. If believed by the trial court, there is sufficient testimony in the record to entitle the plaintiff to the judgment awarded him. We do not need to consider the question of whether there was or was not a variance between the allegations of the complaint and the proof tendered by the plaintiff to support the same for the simple reason that the objection urged by the appellant upon appeal was not called to the attention of the trial court, either by an objection to the admission of testimony or a motion for a nonsuit on the ground of variance. It is well settled that if a defendant desires to take advantage of a variance, it must be done either by objecting to the admission of the testimony or by motion for a nonsuit, and when such action has not been taken in the trial court, the objection is deemed waived and cannot be raised for the first time on appeal. In Cushing v. Pires, 124 Cal. 663, 57 P. 572, the court held as follows (we quote from the syllabus):

> "Where the findings and judgment are supported by the evidence, and it appears that the case was decided correctly upon the merits, objections to a defective complaint, and to a variance between the complaint and the proof, not urged in the court below, and which might have been obviated by an amendment of the complaint, are waived, and cannot be urged upon appeal for the first time."

See, also, Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 P. 692, wherein the court announced this same rule. In Elmore v. Elmore, 114 Cal. 516, 46 P. 458, the manner in which advantage may be taken of a variance between the pleading and the proof is set forth as we have stated herein, to wit, either by an objection to the admission of the testimony or by motion for a nonsuit. In 21 Cal. Jur. 276, the text-writer states the rule in the following language:

> "As a general rule, a variance between pleadings and proofs which might have been obviated by amendment is deemed waived, unless properly objected to at the trial."

And in note No. 7, appended thereto, a long list of cases is cited supporting the rule. While the plaintiff counted upon the reasonable value of the services rendered, the proof tendered by him was to the effect that the price was agreed upon, to wit, $75 per month; but proof of such contract is admissible for the purpose of showing the reasonable value of the services rendered. Naylor v. Adams, 15 Cal. App. 548, 115 P. 335; San Joaquin Light & Power Co. v. Barlow, 43 Cal. App. 241, 184 P. 899; Umphray v. Hufschmidt (Cal. App.) 238 P. 749. The case of Gillin v. Hopkins, 28 Cal. App. 579, 153 P. 724, relied upon by the appellant touching the question of variance, is not in point here. In the Gillin Case the services were to be paid for in shares of stock. The judgment was simply for so much money. The court in that case very properly held that there was a failure of proof and that on the merits of the controversy the plaintiff was not entitled to the judgment rendered. The question in the case at bar is not so much the question of services rendered or to be rendered, but whether the plaintiff was under the agreement entitled to any compensation. In the case of Elmore v. Elmore, 114 Cal. 516, 46 P. 458, the question before the court was whether the defendant was chargeable as a trustee in the handling or acquisition of certain property, and the judgment went off on a question of personal liability, separate and distinct from any trustee relationship. The cases cited by the appellant are not in our opinion parallel with the issues presented in the case at bar and have no bearing thereon.

This disposes of all questions raised on this appeal, and the appeal being, as we think, without merit, the judgment of the trial court is affirmed.

We concur: HART, J.; FINCH, P. J.

78 Cal. App. 127

YOUNG et al. v. BRUERE et al. (Civ. 5562.)

(District Court of Appeal, First District, Division 2, California. May 24, 1926.)

1. Attorney and client 🔑**166(3).**

Evidence *held* to warrant finding that defendants impliedly agreed to pay attorneys reasonable value of legal services performed.

2. Attorney and client 🔑**166(3).**

Where legal services are performed with knowledge and consent of party and not as gratuity, promise will be implied to pay for benefits actually received.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Milton K. Young and another, copartners doing business under the firm name and style of Young & Young, against Charles O. Bruere, Sr., and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

William K. Young, E. H. Mitchell, and L. R. Brigham, all of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondents.

LANGDON, P. J. This appeal is by the defendants from a judgment against them for $1,000, in an action to recover for legal services alleged to have been rendered at the special instance and request of the defendants. This theory was abandoned later, and it is contended by respondents upon appeal that the conduct of appellants, as disclosed by the record, shows their employment of plaintiffs and their implied agreement to pay for services rendered.

[1] The appellants, on the other hand, contend that there is no warrant in the evidence for the finding of the court that they agreed to pay plaintiffs the reasonable value of their services upon demand. This controversy about the facts presents the only problem upon appeal. The evidence, stated most strongly for the respondents, is about as follows: In the year 1922, the plaintiff was the legal representative of John C. Alstrom in his official capacity as administrator of the estate of his deceased son, John Bruere Alstrom. This estate was being probated in Los Angeles county, and was entitled to one-half the assets of the estate of Julia Bruere, deceased, then in process of administration. The defendants in the present action, Charles O. Bruere and Charles O. Bruere, Jr., were also entitled to participate in the distribution of the property of the said estate of Julia Bruere, deceased.

In August, 1922, certain real property belonging to the estate of Julia Bruere, deceased, was sold to Mrs. M. K. Bennett for the sum of $27,500. In the fall of 1922, plaintiff instituted proceedings upon behalf of John C. Alstrom, administrator of the estate of John Bruere Alstrom, deceased, to have the said sale of the property of the Julia Bruere estate set aside upon the ground that the consideration was inadequate. This motion was denied by the superior court and the sale confirmed. While this matter was pending, defendant Charles O. Bruere, Sr., was in communication with plaintiff and interested in the proceedings which affected his interest as well as those of Alstrom.

After the denial of this motion, the Title Insurance Company communicated with plaintiff and stated that it would not pass the title to the property sold to Mrs. Bennett because more than a year had elapsed between the time of sale and the filing of an inventory in the estate. Mr. Young then had a telephone conversation with defendant Bruere, Sr., in which he told him of the report of the title company and also told him that he (Mr. Young) was going to make a motion to set aside the confirmation of the sale. Mr. Young then prepared the necessary papers for his motion, and it was made in the name of John C. Alstrom, administrator of the estate of John Bruere Alstrom, deceased.

On or about January 18, 1923, when this second motion was to be heard in the superior court, Mr. Bruere appeared there, where he met Mr. Young. The motion was continued for one day, and on the following day Mr. Young met defendants down town, and they went with him to the superior court. On the way, the motion was discussed by Mr. Young, who stated that it would be advisable to have another bid made for the property in excess of the amount for which it had previously been sold, and also stated that he had induced a friend of his to make a written bid of $31,500. Mr. Young secured a certified check for $3,150 to be offered to the court in the event this bid was accepted. Upon the hearing the matter was taken under submission, and later the confirmation of the sale was set aside.

After the hearing of this motion, Mr. Young left the courtroom with Mr. Alstrom and defendants, and they had a conversation relative to the certified check for $3,150. Mr. Young stated that, since this bid had not been accepted he would return the check to the bidder, Mr. Bush, and that, since Mr. Bush had furnished the $3,150 necessary to make the bid, he was entitled to some remuneration. One of the persons present suggested that it would be proper to give Mr. Bush $50. Defendant Bruere Sr., told Mr. Alstrom to give Mr. Young $50, and he would return him $25 of this amount when he got the money, thus accepting and recognizing his responsibility in the matter. Mr. Alstrom accordingly gave Mr. Young $50 with which to compensate Mr. Bush. Subsequent to this time Mr. Young saw the defendants "off and on." Mrs. Bennett, the purchaser of the property from the estate of Julia Bruere, deceased, perfected an appeal from the order setting aside the confirmation of the sale. With relation to this appeal Mr. Young had a talk with Mr. Bruere and Mr. Alstrom in his office. There was a discussion about the cost of preparing briefs on appeal, etc. Mr. Bruere then stated that he would not stand in the way of an appeal, but that he did not wish to pay for an appeal to the Supreme Court. Mr. Young advised him to contest the appeal, and gave his opinion that the judgment of the lower court would be affirmed. One of the persons present asked what Mr. Young's fee would be, and in reply to this question Mr. Young stated that his father would have to fix the fee, and, as he was not in town, Mr. Young, Jr., was not prepared to state the fee.

After this conversation plaintiff had several conferences with the attorney for Mrs. Bennett, the purchaser, with reference to a compromise of the controversy and the dismissal of her appeal from the order setting aside the confirmation of the sale. In connection with this compromise, Mr. Alstrom and Mr. Bruere came to Mr. Young's office on March 28, 1923. He told them of his conferences with reference to a settlement and that Mrs. Bennett would accept $2,000 for a quitclaim deed and release of all her interest in the property and dismiss her appeal, and he advised the persons interested in the estate of Julia Bruere to pay this amount to Mrs. Bennett and reimburse themselves from the increased price they would get from the property. "Mr. Bruere thought the idea was all right. I told him to go and get the money. * * * The next morning he came into the office and said they wanted to go through with it, and Mr. Bruere, Jr., and Mr. Bruere, Sr., and Mr. Alstrom came into my office the next morning, March 29, 1923. I told them to go over to the executor of the estate of Julia Bruere * * * and get the necessary documents from the estate that they were heirs to and bring it back to the office and I would put the deal through. They left the office and came back in half an hour, and Mr. Alstrom had a check for $750 and Mr. Bruere, Jr., had a check for $375, and Mr. Bruere, Sr., for $375, which was—they explained that they did not have the additional $500 to make up the necessary $2,000 to put over the compromise, that there wasn't enough cash in the estate, and they endorsed the checks over to me and told me to put it in my account and make the deal, and I said, 'What about the extra $500?' And Mr. Alstrom said, 'I will put up the extra $500, and the Brueres can give me their note or pay me back for their share.' Mr. Alstrom put up his check for $500, which made the sum of $2,000, and I prepared a note for the sum of $275, which was $250, being one-half of the advancement of $500 by Alstrom made on their behalf and $25 in addition, being one-half of the amount Mr. Alstrom paid me for Mr. Bush for putting up that money to make that bid down there, his proportion of the $50 we paid Mr. Bush. So I made out the note for $275, and Mr. Bruere signed it, and they told me to sign the contract for settlement and put the deal over. I said, 'All right.'"

Mr. Young then prepared the agreement of compromise. With relation to it, Mr. Young stated that he was told to prepare this agreement in the presence of the two defendants and Mr. Alstrom, and that one of the three instructed him to prepare the instrument, and the others "acquiesced in it." The instrument was signed by the defendants and Mr. Alstrom.

[2] There is no question about the liability of Mr. Alstrom for legal services rendered on his behalf, and he paid defendants $2,000 therefor, and judgment was accordingly entered in his favor. We are not concerned with his liability upon this appeal. The question presented is as to the liability of defendants Bruere. As against them, the foregoing is the substance of the evidence in favor of plaintiffs' case. We think that such evidence supports the finding of the trial court with reference to defendants' liability. Where legal services are actually performed with the knowledge and consent of the other party and not as a gratuity, a promise will be implied to pay for the benefits actually received. 2 R. C. L. 1046, 1048.

> "The absence of an express promise on a client's part to pay will not, however, prejudice recovery, if the employment is fairly made out from all the attendant circumstances. Acts of recognition or acceptance are in general equivalent to a prior engagement. Thus acquiescence by a client in his attorney's conduct may supply the place of a request to act, provided the case was such that the client might reasonably know that he would be expected to pay for the service." 6 Cal. Jur. 730, 731.

Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied. 6 Cal. Jur. 23; Semi-Tropic, etc., Ass'n v. Johnson, 163 Cal. 639, 642, 126 P. 488; Pixley v. W. P. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

In the several cases relied upon by appellants in support of their position the facts are distinguishable from those in the instant case. In the case of Chicago, etc., Railroad Co.

v. Larned, 26 Ill. 218, the parties sought to be charged had "sat quietly by" and allowed the attorney to conduct a case in which they were jointly interested. In the instant case the defendants took an active part in the conferences and the court proceedings and furnished money to pay Mr. Bush for making a higher bid for the property. They were jointly interested with Mr. Alstrom, and they consulted with the attorney about the matter in its various stages. When Mrs. Bennett appealed from the order setting aside the sale, defendants did not wish to pay legal fees to defend this order upon appeal, but they expressly agreed to negotiate for a compromise, and led the attorney to believe that his negotiations to that end were on their behalf. They confirmed this impression by furnishing money for the compromise and signing the agreement evidencing it.

As said in the case of Davis v. Trimble et al., 76 Ark. 115, 88 S. W. 920, relied upon by appellants, "Each case must stand upon its own peculiar facts."

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

78 Cal. App. 141

PEERLESS INSURANCE & BROKERAGE CO. v. DWYER EQUIPMENT CO., et al. (Civ. 4477.)

(District Court of Appeal, Second District, Division 1, California. May 25, 1926. Hearing Denied by Supreme Court July 22, 1926.)

1. Bailment 🔑18(5)—Where painter of automobile sold it to enforce his lien before statutory period of 20 days had elapsed, buyer acquired no title (Civil Code, §§ 3051, 3052).

Where one who painted automobile sold it under Civil Code, §§ 3051, 3052, to enforce his lien before statutory period of 20 days had elapsed, buyer acquired no title.

2. Pleading 🔑8(11).

In claim and delivery action allegations of ownership or possession are averments of ultimate facts.

3. Replevin 🔑93.

Findings of fact in claim and delivery action, which follow pleadings in statement of ultimate facts, are sufficient.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Peerless Insurance & Brokerage Company against the Dwyer Equipment Company and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

T. Frank Courtney, of Los Angeles, for appellant.

H. H. Harris, of Los Angeles, for respondent.

HOUSER, J. This is an appeal by defendant Dwyer Equipment Company from a judgment rendered against it in an action in claim and delivery.

The basic facts appear to be that, on a conditional sales contract, the plaintiff sold an automobile to one Porter, who left it with one Blake to be painted. The paint job having been completed and no payment having been made therefor, under the then provisions of the law (sections 3051 and 3052 of the Civil Code) Blake proceeded to enforce the lien which he claimed, and thereunder sold the automobile to the defendant Dwyer Equipment Company. The plaintiff company offered reimbursement, which was declined, following which this action was commenced, and which resulted in a judgment for plaintiff as against Dwyer Equipment Company.

Appellant specifies as error that the findings and judgment of the trial court were not supported by the evidence, and that such findings and judgment are contrary to law.

The findings which are attacked are as follows:

> "That plaintiff now is, and at all times in plaintiff's complaint mentioned has been, entitled to the possession of that certain personal property, more particularly described as follows: [Describing the automobile.]
>
> "That it is not true that the defendant Dwyer Equipment Company was ever the owner of the said property or entitled to the possession thereof. * * *"

[1] Attention is especially directed by appellant to that part of such findings which is to the effect that at all times mentioned in the complaint plaintiff was entitled to the possession of the automobile, and that it is not true that the defendant Dwyer Equipment Company was ever the owner of the said property or entitled to the possession thereof.

Section 3052 of the Civil Code, under which the sale of the automobile was authorized for the nonpayment of the paint job, provides in part that:

> "If the person entitled to the lien * * * be not paid the amount due and for which said lien is given, within twenty days after the same shall have become due, then such lienholder may proceed to sell said property. * * *"

In the case of Trumpler v. Bemerly, 39 Cal. 490, it appears that certain estray animals were sold under the provisions of the statute. Stats. 1863, p. 697. Notice of the sale was given for 19 days instead of 20 days, as by the statute was provided. It was held that the proceedings were void and conferred no title upon the purchaser at the sale. The court said in part:

"This statute, as all others prescribing modes by which a party may be divested of his property without his consent, must be strictly construed; and a party claiming to have acquired a right and title to property by virtue of its provisions as against the original owner, must affirmatively allege and prove that the mode prescribed by the statute for the acquisition of such title has, in every particular, been strictly followed (citing authorities)."

In the case of Chase v. Putnam, 117 Cal. 364, 49 P. 204, for the reason that proper notice of a sale was not given, it was held (syllabus) that:

"A sale by the constable of animals taken damage feasant upon the land of the distrainor, without giving the ten days' notice of the sale required by the statute, is void, and the distrainor purchasing at such a sale cannot still retain possession by virtue of his lien. By such a sale, the lien must be deemed to have been waived or lost."

See, also, Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Curran v. Shattuck, 24 Cal. 432; McCarty v. Southern Pacific Co., 148 Cal. 211, 216, 82 P. 615.

On the trial of the action at bar, evidence was introduced, which it must be assumed was accepted by the court as true, to the effect that the paint job had not been completed for the statutory period of 20 days at the time proceedings were commenced by Blake to satisfy his lien. Such being the case, the proceedings for foreclosing the lien were premature, from which it would result that the sale under the foreclosure proceedings was a nullity and had no effect upon plaintiff's right to possession of the automobile, nor vested any title thereto in the purchaser at such sale.

[2, 3] Appellant suggests that the purported findings by the court to which reference has been had, to the effect that plaintiff was entitled to the possession of the automobile, and that the Dwyer Equipment Company was never the owner nor entitled to the possession thereof, do not constitute findings of fact, but are conclusions of law only, and upon which no judgment can be based. Goodman v. Anglo-California Trust Co., 62 Cal. App. 702, 217 P. 1078.

The authorities in this state, if not unanimous, are very generally to the effect that, in an action in claim and delivery, allegations of ownership or possession are averments of ultimate facts, and that findings of fact which follow the pleadings in the statement of ultimate facts are sufficient.

In the case of Fredericks v. Tracy, 98 Cal. 658, 660, 33 P. 750, 751, it is said:

"To sustain this action [claim and delivery] plaintiff must have the right to immediate and exclusive possession at the time of the commencement of his suit. It is a cardinal principle in pleading that ultimate and not probative facts are to be pleaded. The ultimate fact in such an action is, that plaintiff was at the time the action was commenced the owner of, or had some special property in the chattel, coupled with a right to the immediate possession thereof."

In Summerville v. Stockton Milling Co., 142 Cal. 529, 547, 76 P. 243, 250, the court says:

"The action of claim and delivery is primarily an action for possession. The general allegations of ownership or right of possession of the defendant are sufficient, and this form of statement is the better form of pleading"—citing authorities.

See, also, Nudd v. Thompson, 34 Cal. 46; Conner v. Bludworth, 54 Cal. 635; Harris v. Smith, 132 Cal. 316, 64 P. 409; Beggs v. Smith, 26 Cal. App. 532, 147 P. 585; Consolidated Music Co. v. Morrison, 30 Cal. App. 303, 158 P. 342.

The syllabus, which is supported by the text of the opinion (in which authorities are cited), in the case of McCarthy v. Brown. 113 Cal. 15, 45 P. 14, is that:

"Findings should state the ultimate facts pleaded, and not probative facts, and findings which follow the pleadings in the statement of ultimate facts are sufficient."

See, also, Cooley v. Miller & Lux, 156 Cal. 510, 523, 105 P. 981, and cases there cited; Jacobs v. Ludemann, 137 Cal. 176, 69 P. 965.

Additional reasons are suggested by the respondent why the judgment should be affirmed, but, if a correct conclusion has been reached with reference to the question discussed herein, a further consideration of the appeal becomes unnecessary.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

78 Cal. App. 277

PEOPLE v. BARBERA. (Cr. 1312.)

(District Court of Appeal, First District, Division 2, California. June 3, 1926.)

1. Courts ⚿50—**That prosecution for violating Juvenile Court Act should have been heard in another department of superior court was mere irregularity, not available on appeal (Juvenile Court Law, §§ 16, 21 [St. 1915, pp. 1238, 1246]; Const. art. 6, § 6).**

In prosecution under Juvenile Court Law, § 21, that another department of the superior court had been designated under section 16 to hear cases coming under act *held* mere irregularity, not available on appeal, in view of jurisdiction conferred on superior court by Const. art. 6, § 6.

2. Courts ⚿50.

Whether sitting separately or together jurisdiction exercised by individual judges of superior court is that of court under Const. art. 6, § 6, and not of individual.

3. Constitutional law 🔑56.

Where jurisdiction of particular court is defined by Constitution, Legislature cannot by statute restrict or enlarge that jurisdiction.

4. Criminal law 🔑543(2).

Statement of counsel in court when seeking to introduce testimony given at preliminary examination that witnesses were seafaring men, and he was unable to subpœna them, *held* insufficient foundation for reading of their former testimony, in view of Code Civ. Proc. § 1870.

5. Criminal law 🔑695(1)—Testimony on preliminary hearing properly excluded, though no sufficient objection made, when no showing made that witness was deceased or out of jurisdiction (Code Civ. Proc. § 1870).

Under Code Civ. Proc. § 1870, defendant offering testimony given at preliminary examination must show to satisfaction of trial court that witness is either deceased or out of jurisdiction, and where he did not do so, evidence was properly excluded, though prosecution made no sufficient objection.

6. Infants 🔑20.

In prosecution for violation of Juvenile Court Law, § 21 (St. 1915, p. 1246), testimony of minor need not be corroborated by testimony of other witnesses, Pen. Code, § 1108, being inapplicable because dealing with another offense.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Peter Barbera was convicted of violating Juvenile Court Law, § 21, and he appeals. Affirmed.

Joseph J. McShane and David K. Watkins, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

LANGDON, P. J. Defendant appeals from a judgment entered upon a verdict of a jury finding him guilty of a misdemeanor, to wit, a violation of section 21 of the Juvenile Court Law (St. 1915, p. 1225), and also from an order of the trial court denying his motion for a new trial.

[1-3] The first point argued upon the appeal is that the trial court was without jurisdiction. This objection was not made at the trial, and is presented for the first time upon appeal. It is based upon the following facts: The trial was had in department 11 of the superior court, state of California, in and for the city and county of San Francisco, and it is contended that this department and the judge presiding therein are not those designated by the judges of the superior court to hear cases coming under the Juvenile Court Law, in accordance with the provisions of section 16 of said law. Said section 16 provides: "The superior court * * * shall exercise the jurisdiction conferred by this act." As a matter of convenience in procedure, it is also provided that the judges of the superior court, in counties or cities and counties having more than one judge, shall designate, annually, one or more of their number, whose duty it shall be to hear all cases coming under said act.

If it be true that this cause should more properly have been heard in another department of the superior court, the record discloses, at most, an irregularity. Graziani v. Denny, 174 Cal. 176, 179, 162 P. 397; Nickel v. State, 179 Cal. 126, 129, 175 P. 641. Whether sitting separately or together, the judges of the superior court hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court and not the individual, under article 6, § 6, of the Constitution. Graziani v. Denny, supra. Where the jurisdiction of a particular court is defined by the Constitution the Legislature cannot by statute restrict or enlarge that jurisdiction. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35; People v. McKamy, 168 Cal. 531, 143 P. 752. Therefore the Juvenile Court Law could not change the effect of the constitutional enactment, even if it sought to do so, which it distinctly does not, for, after providing for the selection of one or more judges to hear cases under the act, it expressly provides "that nothing in this section contained shall be construed to conflict with article 6, § 6, of the Constitution of the state of California."

We conclude that, at most, the record discloses an irregularity in this matter and not a want of jurisdiction, and that as to such matter the defendant will not be heard to complain for the first time upon appeal. It was said in Re Wolff, 183 Cal. 602, 192 P. 33:

> "Even if there were irregularities or defects in the proceedings under the Juvenile Court Law, the defendant, if he wished to take advantage thereof, or to object to the jurisdiction of the superior court after the information against him is filed, could do so only by presenting his objections in the superior court, and he cannot raise the objections by a proceeding in habeas corpus after conviction."

[4, 5] Error is assigned in the refusal of the trial judge to permit the attorney for defendant to read into the record the testimony of two men given at the preliminary examination. With relation to that matter, the record is largely made up of broken and unintelligible sentences, but it does appear that counsel for defendant stated to the court: "There are two witnesses that testified at the—." Thereupon the district attorney interrupted to ask that the jury be excused if counsel was "going to make some statements as to what transpired at a certain time or what—." Thereupon counsel for defendant stated that he was not going to testify, but was asking permission to read the

testimony of two witnesses who testified in the lower court, saying further: "These witnesses were present, and they were sworn and testified. They are not available now by reason of the fact—." Thereupon the district attorney interrupted, saying: "Just a moment. I am going to object to counsel's statement." The following is an account of the subsequent proceedings:

> "The Court: Counsel knows what foundation he must lay for the reading of a witness' testimony.
>
> "Mr. McShane: I have been unable to subpœna these witnesses by reason of the fact that—
>
> "The Court: And you can't lay the foundation to show that they came under the exception and that their testimony can be read; is that the point?
>
> "Mr. McShane: I am endeavoring to show this, your honor: That they lived at this place and are not there now, and that this event was over a year ago and these men are seafaring men, as they have sworn to be and testified—
>
> "The Court: Just a minute.
>
> "Mr. McShane:—as such, and I cannot locate them. Now they have testified at length and were examined by the district attorney at that time, and for that reason, not being able to locate them, I am unable to subpœna them.
>
> 'The Court: Is this your full showing for the purpose of reading that?
>
> "Mr. McShane: Yes, your honor.
>
> "The Court: Well; of course counsel knows it is not an adequate showing, and the motion will be denied."

It is argued that the people made no sufficient objection to the admission of this testimony. This argument is "beside the mark." The defendant desired to introduce a kind of evidence which could have been received only after the foundation for the same had been laid by a showing that the parties who had originally given the testimony were deceased or out of the jurisdiction. Section 1870, Code Civ. Proc. It was incumbent upon him to make a showing satisfactory to the trial court that either of these preliminary conditions existed before offering the evidence. This he did not do, and the trial court properly denied him the right to read into the record the testimony upon the former hearing.

[6] Objection is made to an instruction of the court to the effect that it is not essential to a conviction of the defendant that the testimony of the minor should have been corroborated by the testimony of other witnesses. Appellant contends that this instruction is a violation of section 1108, Penal Code. That section does not relate to the offense with which the defendant was charged. The Penal Code deals with the offense of "inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of eighteen years, for the purpose of prostitution, or aiding or assisting therein." Section 21 of the Juvenile Court Law deals with a person who commits an act or omits the performance of a duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of section 1 of said law, which designates the type of minors who are amenable to said law. Clearly, the offenses are not the same. In the particular instance we are considering, since the act or omission of defendant caused or tended to cause the minor to become a prostitute, that element of the offense was one entering into the offense defined in section 1108, Penal Code. But there the likeness ends. The Juvenile Court Law deals with persons under 21 years of age, and the Penal Code with persons under 18 years of age; the Penal Code deals with unmarried females of previous chaste character, while no such limitation occurs in the Juvenile Court Law.

It seems, clear, therefore, that the provisions of section 1108 of the Penal Code cannot be extended to a prosecution such as we have before us. Apart from this fact, it is pertinent to point out that the judgment does not stand alone upon the testimony of the minor. It is corroborated by the testimony of the police officers that the girl, a child of 15 years of age, was found at the defendant's hotel, which was a lodging house for men, and where she had no legitimate business. The police officers also testified that upon their entry defendant motioned to the girl to get away and that she attempted to obey him, when she was prevented from doing so by the officers, that upon being questioned she stated facts which constituted the offense charged against the defendant, in his presence, and that he made no denial of them.

There are no other matters which require consideration, and the judgment and order appealed from are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

78 Cal. App. 215

CITY OF SACRAMENTO v. CENTRAL CALIFORNIA TRACTION CO. (Civ. 3049.)

(District Court of Appeal, Third District, California. May 29, 1926. Rehearing Denied June 28, 1926. Hearing Denied by Supreme Court July 28, 1926.)

1. Master and servant 🔑389—In employer's action against third person causing injury to employees, admission of evidence tending to fix employer's liability under Compensation Act held not error, where such matters were stipulated (Workmen's Compensation Act [St. 1917, p. 831], § 26, as amended by St. 1919, p. 910, § 8).

In subrogation suit, under Workmen's Compensation Act, § 26, as amended by St. 1919, p. 910, § 8, by employer against third person causing injury to employees, in which medical, surgical, and hospital expenses, and employees' average weekly wages were stipulated, *held*, that admission of evidence as to amounts paid by employer to injured employees and extent of disability and tending to fix employer's liability under Workmen's Compensation Act was not error.

2. Master and servant 🔑389—Admitting evidence of amounts paid by plaintiff city to injured employees without proof that it was obligated to pay amounts under Compensation Act held not error, in subrogation suit, notwithstanding payment was made under charter (Workmen's Compensation Act [St. 1917, p. 831], § 26, as amended by St. 1919, p. 910, § 8).

In subrogation suit, under Workmen's Compensation Act, § 26, as amended by St. 1919, p. 190, § 8, by city against third person causing injury to employees in fire department, admitting evidence of amounts paid by city to employees without proof that it paid or was obligated to pay such amounts under Compensation Act *held* not error, notwithstanding payment was made under charter provision, and not under Compensation Act.

3. Street railroads 🔑117(24).

Evidence *held* not to show that driver of city fire truck which collided with street car was contributorily negligent as matter of law.

On Petition for Hearing in Supreme Court.

4. Master and servant 🔑389—Instruction, limiting employer's recovery from third person causing injury to amounts recoverable under Workmen's Compensation Act, held not prejudicial (Workmen's Compensation Act [St. 1917, p. 831], § 26, as amended by St. 1919, p. 910, § 8).

Instruction, limiting recovery of city suing third person, under Workmen's Compensation Act, § 26, as amended by St. 1919, p. 910, § 8, for injuries to employees in fire department to amounts recoverable by employees under Workmen's Compensation Act, *held* not prejudicial to third person.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the City of Sacramento against the Central California Traction Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Butler, Van Dyke & Desmond, of Sacramento, for appellant.

Robert L. Shinn, City Atty., and Charles J. Hasman, Deputy City Atty., both of Sacramento, for respondent.

PULLEN, Justice pro tem. This is an action brought to recover moneys paid by the city of Sacramento, a municipal corporation, to city employees injured in the course of their employment by the Central California Traction Company. Judgment was rendered in favor of the city for the amount sued for, and an appeal has been taken to this court from the order denying the motion for a new trial and from the judgment.

On and prior to the 12th day of January, 1921, the city of Sacramento was the owner of a certain unit of fire-fighting equipment, consisting of a motor truck, attached to which was a hook and ladder truck; the entire apparatus measuring 62 feet in length and weighing about 14 tons. This apparatus was operated by a crew of seven men, including a driver who had charge of the motor truck, and a tillerman mounted on the hook and ladder trailer who guided the two wheels of the trailer by means of a tiller wheel, but had no control over the speed or route of the tractor.

On the 12th of January, 1921, some time prior to 9 o'clock in the morning, this equipment was taken by its crew for the purpose of getting a supply of gasoline at a service station about four blocks away. After obtaining the gasoline at the filling station the crew took the equipment on a trial trip to adjust the carbureter. After the carbureter had been satisfactorily adjusted they started to return to their fire house by a circuitous route crossing the intersection of Eighth and O streets.

The defendant was operating an interurban car line between Sacramento and Stockton. Its lines, a double track, running north and south along Eighth street, crossed over the street at the intersection of Eighth and O, at which point an interurban car operated by defendant collided with the motor fire equipment above described, injuring two firemen and damaging the fire apparatus.

The injured firemen brought separate actions against the defendant traction company, alleging that their injuries were caused by the negligent operation of the interurban car. Settlements were effected in their suits and they were not brought to trial. The respondent city of Sacramento brought this action against the traction company to recover damages to its fire equipment, and in addition, after setting up the relation of employer and employee, existing between itself and the two injured firemen, alleged that it had paid certain sums for hospital and physicians' services for the injured men and had become obligated to pay certain sums in addition thereto under the obligation cast upon it by law by virtue of that relationship.

In the settlement of the action against it by the injured firemen the traction company did not obtain the consent of the city to the compromise nor the consent of the court in which all of the actions were pending.

The answer of appellant denied that there was any negligence on its part in the operation of its car causing the collision and consequent damage and set up in addition the defense of contributory negligence on the part of the crew of the fire appartus and especially on the part of the driver.

The testimony indicates that the speed of the fire truck upon entering the intersection was about 5 miles an hour and that the interurban car was going at the rate of 15 to 25 miles per hour. It was stipulated that the damage to the fire apparatus was $3,183.58 and for medical, surgical, and hospital treatment for the employees the sum of $629.15, as well as the amount of the average weekly earnings of the injured employees, and also the period of time over which such injury and incapacity for duty would extend. This stipulation was received by the court, subject to the objection of appellant that the facts therein stipulated to were incompetent, irrelevant, and immaterial. From these stipulated facts the court computed the amount that would have been awarded the injured employees under the provisions of the Compensation Act and instructed the jury that if they found for the plaintiff the plaintiff was entitled to recover in addition to the amount of damages for the truck the stipulated amount expended for medical, surgical, and hospital treatment, and also the stipulated amount representing compensation to the injured employees, which amounts the jury found due, and returned a verdict in the sum of these amounts aggregating $7,786.53.

The first point urged by appellant for reversal is based upon the instruction of the court directing the jury that if they found for plaintiff to find in the specific sums referred to above. It is conceded that if the city can maintain this action it is by reason of the provision of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831) which in section 26, as amended in 1919 (St. 1919, p. 910), provides for what may be called a subrogation suit which may be brought by the employer whenever having become obligated to pay compensation by reason of an injury to an employee within the provisions of the act under such circumstances as to give rise to a liability for the damage resulting.

We are unable to find error in the instruction of the court. The evidence shows that the amounts actually paid by the respondent to the injured employees were in excess of the compensation fixed by the Workmen's Compensation Act. The jury determined from the evidence that appellant was liable and the amount of liability was merely a matter of computation based upon the provisions of the Workmen's Compensation Act and flowed naturally from the fact of liability. If, as a matter of law, the respondent paid or had become obligated to pay such compensation, the damages sustained by the respondent were necessarily the amounts so paid or incurred by the terms of the act. Citing Moreno v. L. A. Transfer Co., 44 Cal. App. 551, 186 P. 800.

The amount of the wages of the injured employees were stipulated, and the amount actually paid was stipulated, which amount was greater than the obligation imposed by the Workmen's Compensation Act, and this left nothing to be done, but to compute the amount which respondent was entitled to recover under the act in the event the jury should find for plaintiff. Any other finding by the jury would have been unsupported by the evidence.

[1] The second specification of error is that the trial court erred in admitting in evidence testimony concerning the amounts paid by respondent to its injured employees or concerning the extent of disability suffered by the employees or in any wise tending to fix the liability of respondent under the Workmen's Compensation Act. If the respondent had offered evidence as to the disability of the injured employees and the amounts actually paid by it as compensation for such injuries, it could not be claimed to have been either incompetent, irrelevant, or immaterial, and would have been admitted by the court, but in this case to obviate the introduction in evidence of numerous witnesses the existence of the facts were stipulated, subject to the objection stated above. The material question was the extent of the payment and the fact of disability, both of which elements were included in the stipulation.

The law has imposed an obligation upon an employer to pay compensation to its injured employees and has given it a right of subrogation as against a tort-feasor who had negligently injured the employee to the extent of the compensation so paid by the employer.

[2] Appellant further claims that the court erred in admitting evidence of the amounts that the respondent had paid to its employees without proof that it had either paid them or had become obligated to pay them by virtue of the provisions of the Compensation Act.

There is a provision in the charter of the city of Sacramento which provides that a city employee who becomes physically disabled by reason of injuries received while in the performance of his duties should be entitled to receive medical, surgical, and hospital treatment, and full pay during the continuance of his disability, or until retired upon pension.

It appears from the evidence that no application had ever been made by the injured employees for payment of disability indemnity under the Workmen's Compensation Act and that the only sums paid out by the respondent have been payments of salaries, hospital and medical expenses and pensions as provided by the city charter. We deem it immaterial, however, out of what particular fund the payments may have been made or in response to what particular demand the moneys were so paid, for the undisputed fact shows that payments were made, and a formal demand or application would have resulted in nothing further than has already been done.

Appellant also criticises numerous instructions given by the court. We have carefully examined the entire testimony, and the instructions taken as a whole clearly declare the law as applicable to the case.

[3] Appellant claims also that, as a matter of law, the driver of the fire truck was guilty of contributory negligence. From the testimony we learn that the fire truck approached the intersection, sounding its siren, at a rate of speed testified by some to be 25 to 30 miles an hour, by others not exceeding 5 miles an hour, and that the interurban car going south on Eighth street was approaching the intersection without a warning signal at a rate of speed of from 10 to 25 miles an hour, and at the same time a street car belonging to appellant was going north on Eighth street at about 15 miles an hour. The street car had entered the intersection and the driver of the fire truck swerved to the north to avoid striking the car and in so doing came directly in the path of the approaching interurban car which struck the truck, throwing it back against the street car, as a result of which the injuries and damages alleged were sustained.

The driver of the truck testified that when about 55 feet from the intersection he looked toward the north or right and could see to the alley a distance of about 160 feet and neither saw nor heard an interurban car; that he looked to the south and saw the street car approaching the intersection and devoted his attention to the approaching street car until struck by the interurban. We cannot agree with appellant that, as a matter of law, the driver of the truck was guilty of contributory negligence.

In view of the foregoing, we are satisfied with the rulings and judgment of the trial court.

The judgment should be and is hereby affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM. In this matter defendant and appellant has within the prescribed period requested this court to reconsider its decision rendered in favor of respondent. Appellant complains that this court has misconstrued certain principles of law pertaining to the measurement of damages.

We have reviewed the decision as filed and the briefs submitted last upon the original hearing and also the brief requesting a rehearing.

Appellant appears to overlook the point that the facts complained of, viz. the employment, the amount of compensation, and the length of time that each employee had suffered injury and the period of time before he would again be physically able to resume his duties, were all stipulated.

Petitioner is correct as to the general principles of law applicable to the case in question. The action is a subrogation suit and the measure of damages in this as in any damage action is the amount which will compensate the injured employees for all the detriment proximately caused by the breach of defendant; but at the trial of this action, instead of plaintiff proving the injuries in the usual manner, it was stipulated that the firemen were employees, that they were injured, and the extent and duration of the injuries, as well as the salaries received at the date of injury, leaving as the only question to be determined that of liability.

It is true that respondent was restricted by the instruction given by the trial court and complained of by appellant which fixed the measure of damages at 65 per cent. of the salaries received. The jury might have assessed a large amount for pain and suffering, but of that appellant cannot complain, and respondent has raised no protest.

We again declare that, in view of the stipulation, it was not error for the trial court to compute the amount of damages based upon the earnings of the employees, for aside from any allowance for pain and suffering, an allowance of either more or less than the stipulated earnings computed by the court would not have been sustained by any evidence in the case.

It is correct that the instruction should not have limited the measure of damages to earnings alone; but appellant, being benefited thereby, cannot be heard to complain.

Petition for rehearing denied.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The petition for a hearing in this court is denied. Such denial, however, should not be taken as an approval of what is said in the opinion indicating that the measure of damages in such cases is the amount fixed by the Workmen's Compensation Act for injuries to be paid by the employer to the employee or his dependents. See Western States, etc., Co. v. Bayside L. Co., 182 Cal. 140, 187 P. 735. Applying the rules which are generally applicable to measure the liability of a tort-feasor, we think that the appellant, under the particular facts of this case, was not prejudiced by the instruction of the court limiting the damages which the respondent might recover to the stipulated amounts.

78 Cal. App. 251

OVERELL v. OVERELL (two cases). (Civ. 5580, 5581.)

(District Court of Appeal, First District, Division 2, California. June 1, 1926. Hearing Denied by Supreme Court July 30, 1926.)

1. Trusts 🔑166(2)—Trustee of corporate stock of furniture company held properly removed, where he used such stock with his own to dominate company for his personal advantage (Civ. Code, § 2228).

Trustee of corporate stock of furniture company *held* properly removed, where he used such stock with his own to dominate company, elected himself president and general manager, raised his own salary, and refused payment of dividends, in view of Civ. Code, § 2228.

2. Trusts 🔑166(1).

Hostility between trustee and cestui que trust, who are in constant personal contact because of employment by same corporation, is ground for former's removal, where his actions are or might be controlled by it.

3. Appeal and error 🔑1071(5).

Where findings are sufficient to support order removing trustee, other findings, though immaterial to decision, *held* not prejudicial.

4. Trusts 🔑315(2).

Trustee, allowed $5,000 for expense of litigation in two suits by cestuis que trust for his removal, *held* not entitled to further allowance on appeal.

Appeals from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Actions by Lawrence V. Overell and by Robert E. Overell against Arthur O. Overell for the removal of the latter as trustee. Judgments for plaintiffs, and defendant appeals. Affirmed.

Bordwell & Mathews and Odell S. McConnell, all of Los Angeles, for appellant.

Joe Crail and Harold C. Morton, both of Los Angeles, for respondents.

LANGDON, P. J. Two companion cases are presented by this appeal, one an action by Lawrence V. Overell and the other by Robert E. Overell, against Arthur O. Overell, to have him removed as trustee under two certain declarations of trust. Under each declaration of trust 375 shares of the capital stock of the J. M. Overell Furniture Company, a corporation, is held in trust. The parties plaintiff are beneficiaries under the trust declarations. The parties plaintiff and the party defendant are brothers. Each declaration of trust is dated October 20, 1920, and made by the mother of the parties, Anna E. Overell, who appointed herself trustee thereunder and designated the defendant as her successor in the event of her death before the expiration of the trust. Mrs. Overell died in 1923, since which time the defendant has acted as trustee under said declarations of trust. Each trust declaration provides that the trustee shall hold the stock with full and complete voting power thereof, paying the entire net income to the beneficiary for a period of ten years, after which time the trust estate shall be transferred to the beneficiary discharged of any and all trusts; and in the event of the death of the beneficiary during the existence of the trust, then said trust property is to be transferred, discharged of any trusts, to his heirs at law.

All the stock of the Overell Furniture Company is owned by the Overell family. The defendant owns 509 shares and holds 750 shares in trust for the plaintiffs in these proceedings, and the remainder of the 2,500 shares is owned by other brothers. The plaintiffs sought the removal of the defendant as trustee and the appointment of another trustee or the termination of the trust, it being contended that the defendant was not a fit and proper person to be trustee of the stock because his personal interests conflicted with his duties as trustee; that the actions of the defendant with relation to the management and voting of plaintiffs' stock were inimical to the best interests of plaintiffs; and that because of the personal antagonism existing between the defendant and the plaintiffs, defendant was not a proper person to act as trustee.

The trial court gave judgment removing Arthur O. Overell as trustee and appointing as trustee the nominee of the plaintiffs. Defendant appeals from this judgment, and contends that the complaint does not state a cause of action for the removal of the trustee, that the findings do not support the judgment, and that the evidence is insufficient to support the findings.

No demurrers were filed to the complaints, and the following is a summary of their allegations: Both of the plaintiffs are employed in the business of the Overell Furniture Company. Robert E. Overell is credit manager, and has been employed in the business for about eight years. Lawrence V. Overell has been employed in various capacities for about three years. The trustee, by reason of being such, has control of a majority of the stock of the corporation and, in addition, dominates and controls another brother, I. R. Overell, so that he controls two-thirds of the stock of this corporation. He became trustee of the stock on January 8, 1923, and at the first stockholders' meeting thereafter, in April, 1923, proceeded to cause the number of directors of the corporation to be reduced from five to three, and changed the by-laws of the corporation so as to permit their amendment at any directors' meeting by a two-thirds vote of the directors. By reducing the number of directors, the defendant eliminated Walter E. Overell from the board of directors. Walter E. Overell had been on the board of directors for several years, was familiar with the business, and the best interests of the business and of the stock belonging to the trust estate required the retention of Walter on the board of directors. The defendant, having chosen a board of directors subject to his domination and having changed the by-laws so they could be amended at any time by two-thirds of this board, and having further adopted a resolution that any person might hold two offices, proceeded to elect himself president and general manager and become in full control of the affairs of the corporation.

It is alleged that the income from the trust estate depends entirely upon dividends declared upon the stock; and that the payment of the same rests entirely with the defendant; that dividends have not been declared for the year 1922 nor for the year 1923, although the earnings of the corporation have been large; that the defendant had the power to increase his salary as he saw fit; that the defendant proposed to cause the capital stock of the Overell Furniture Company to be increased to the extent of $100,000, and was about to take the necessary steps to call a stockholders' meeting and by proper legal action increase the stock to such extent; and that by reason of being the trustee under the trust declaration, he would have sufficient voting power to secure the increase of stock; that there was no necessity for the increase of the capital stock; and that this step was being taken despite the objections of the plaintiffs and for the purpose of compelling them to raise large sums of money to purchase the additional stock, or, in the event of their failure so to do, the defendant would purchase the additional stock, thereby permanently securing the control of the corporation; that only by having the voting power of the trust stock could the defendant increase the capital stock; that plaintiffs would be unable to purchase sufficient of the new stock to retain their proportionate interests in the corporation; that defendant notified the plaintiffs that he proposed to remove the business of the corporation to a new building and refused to discuss the matter with plaintiffs; that this matter was of great importance to said corporation, and therefore to the trust estate consisting of stock in said corporation, and the stock of plaintiffs should be fairly and impartially represented in voting on this question; that defendant, for a period of two years, has taken a hostile, unpleasant, and insulting attitude toward plaintiffs, calling them vile names and stating to them that they were not entitled to any interest in the business nor any stock therein and that defendant attempted to intimidate plaintiffs by telling them that if they were to take any steps to secure control of their stock he would discharge them from their positions; that by reason of the hostility and antagonisms existing between the parties, the defendant would not act for the best interests of the plaintiffs.

The trust declarations provide that the trust may be terminated at any time prior to the expiration of the ten-year period, in the discretion of the trustee. The complaints allege that by reason of the hostile feeling between the defendant and the plaintiffs, the defendant could not exercise a fair and impartial discretion in this matter of terminating the trust.

[1] Appellant urges that the matters complained of are all within the legal rights of the defendant and will not constitute cause for his removal as trustee. We cannot agree with this position. In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. Section 2228, Civ. Code. As long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original cestui que trust. This prohibition operates irrespective of the good faith or bad faith of such dealing. 3 Pomeroy, Eq. Jur. § 1077.

The case of Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669, is one involving a trust of stock in a "family" corporation, and presents many features similar to the case at bar. The defendant trustee was a brother of the complainants, having been appointed trustee under the will of their father. Part of the trust estate consisted of stock in a coal company. We quote from the decision:

> "Defendant is president and treasurer of the company, and he is enabled, without the consent of plaintiffs, to control the election of the board of directors, as he, his mother, his sister that sides with him, and his brother own 4,020 of the shares, while plaintiffs own 1,980. He pays the dividends on the stock to his sisters. * * * He refuses to give his sisters any information in regard to the business of the coal company. * * *

"We think also that the court erred in not removing defendant from the trust for these reasons: First. He occupies antagonistic relations to the coal company property. He owns stock as an individual, as trustee, he holds the stock of his sisters, and he controls the business of the company as its president. He is, indeed, the company, being in full and complete control of it. He elects himself president and treasurer, and fixes and pays his own salary. * * * Defendant's attorneys make this distinction with great clearness between defendant's actions as an officer of the company and his conduct as trustee and complain that plaintiffs cannot or will not see that distinction.

"The argument is that the beneficiaries have no right to inquire into defendant's management of the corporate property, and that, even if they had such right, it is evident 'they together represent too small a fraction of its stock to enable them to exercise control of the business and it is a sufficient answer to all their complaint and criticism that all that has been done represents the will of the majority of those interested in the company.' If that is true, then it is perfectly manifest that the stock of the complaining beneficiaries should be held by some one other than the defendant. This would operate as a slight check, at least, on his management of the company's affairs. The fact that he can control the company without the consent of complainants, instead of being a reason for permitting him to retain the title to their stock with the power to vote it, affords the strongest reason why he should surrender it to some one whose interests are not identical with his. His dual relations to this property are antagonistic, and the court should sever them by removing him from the trusteeship, and by the appointment of some other discreet business man, who, no doubt, will be able to find some legal method of inquiring into the management of the business of the company."

Many features of the instant case are considered in the foregoing quotation; another feature of the instant case is discussed in the case of Pyle v. Pyle, 137 App. Div. 573, 122 N. Y. S. 260 (affirmed 199 N. Y. 538, 92 N. E. 1099), as follows:

"By accepting a salary as president of the corporation, he has placed himself in a position whereby his personal interest may, or has, come directly in conflict with, and to a certain extent antagonistic to, his interest as trustee. It is not necessary to determine that he has acted in bad faith or received from the corporation a sum in excess of what he would have been legally entitled to if he had been selected as president of the corporation had he not been a trustee of an estate holding one-half the capital stock. One-half of the salary paid to him diminishes to that extent what would otherwise be paid to the beneficiaries of the trust which he represents, and to this extent at least he is not in a position to so act that his personal interest does not come in conflict with his interest as trustee. He ought not to have placed himself in such position, and, having done so, ought not to be permitted to act as trustee."

In Matter of Hirsch's Estate, 116 App. Div. 367, 376, 101 N. Y. S. 893, 899, it is said:

"It is not necessary to determine that the appellant acted in bad faith or received from the corporation a sum in excess of what he would have been legally entitled to had he been selected as president and counsel for the company by the stockholders owning stock in their own right. He placed himself in a position where his personal interest and the interest of the beneficiaries for whom he was trustee were to a certain extent antagonistic."

[2] In May v. May, 167 U. S. 310, 17 S. Ct. 824, 42 L. Ed. 179, the court said:

"The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated. [Citing authorities.]"

Also, in McPherson v. Cox, 96 U. S. 404, 419 (24 L. Ed. 746), it is said, "Where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the cestui que trust, and which brings him into constant personal intercourse with the latter," it may be conceded "that the mere existence of strong mutual ill feeling between the parties will, under some circumstances, justify a change by the court."

In the instant case the trustee has discretionary power over the termination of the trust and the declaration of dividends, which constitute the income from the estate. The trustee and beneficiaries are brought into constant personal contact because of the employment by the same corporation.

We quote further from Gartside v. Gartside, supra:

"The second reason why the defendant should be removed from the trusteeship mentioned is the unfriendly and even hostile relations that exist between him and the cestui que trusts. Hostility between the trustee and the cestui que trust is not of itself a sufficient ground of removal, unless it appears that the action of the former is probably controlled or might be controlled by it. Some of the courts make a distinction between hostility growing out of the trustee's fault, or partly out of his fault, and that growing wholly out of the fault of the cestui que trust. Conceding that such distinction is founded in reason, which is not clear to us, however, yet we think the evidence in this case shows conclusively that defendant is not entirely without fault. * * *

"In our opinion the hostility of these parties and the situation and nature of the property and their relations to it make the continuance of defendant as trustee incompatible with the best interests of the beneficiaries, and he should be removed. This position is supported by authority, and, it seems to us, upon principle, too. Perry on Trusts, § 276, and cases cited."

Cases announcing a principle in harmony with the foregoing authority are: Maydwell v. Maydwell, 135 Tenn. 1, 185 S. W. 712, Ann. Cas. 1918B, 1043; Wilson v. Wilson, 145 Mass. 490, 493, 14 N. E. 521, 1 Am. St. Rep. 477; Laughlin v. Wells Bldg. Co., 179 Wis. 56, 190 N. W. 899. The case last cited answers the argument of appellant based upon the fact that the record shows that the beneficiaries of the trust have probably been as disagreeable and inconsiderate in their treatment of the trustee as he has been in his treatment of them, in the following language:

> "We find, however, upon examining the evidence that a state of serious antagonism has arisen between the trustee and the cestuis que trustent. Whether the trustee is more to be blamed for the existence of this antagonism than the cestuis que trustent, we need not determine. * * * While it is true that the mere fact that a quarrel exists between a cestui que trust and the trustee is not ground for the removal of the latter, yet such fact, in connection with other facts and circumstances, may be taken into consideration in determining whether or not a trial court has abused its discretion in removing the trustee. In the case of a trust not coupled with any interest in the trustee, the welfare of the beneficiaries of the trust constitutes the chief matter for consideration."

[3] The attack made by the appellant upon the findings is without merit. It is true that some of the findings are immaterial and unnecessary to the decision, but that fact does not prejudice the appellant. There are in the record findings sufficient to meet the rules of law enunciated in the decisions from which quotations have been made herein which are supported by the evidence. Defendant voted the stock of the beneficiaries to his personal advantage in such matters as his election to the offices of president and general manager, and in increasing his salary and in making changes in the board of directors and in the by-laws of the corporation, all calculated to increase his power and control in the corporation. A very bitter antagonism exists between defendant and plaintiffs, which has gone so far as to be manifested in physical violence upon some occasions. Such conditions tend to make it impossible for the defendant to impartially exercise his discretion in the matter of terminating the trust and in other matters involving the interests of the beneficiaries.

The contention that the findings do not support the judgment is answered by our discussion of the sufficiency of the complaints, as the findings embody, substantially, the allegations of the complaints.

[4] The only other matter requiring consideration is the contention that the appellant should be allowed a reasonable sum for attorney's fees for services rendered on appeal, which sum is suggested as $2,500 in each of the two cases. In exercising discretion in this matter we are impressed by the fact that the trial court has already allowed the trustee $2,500 in each case, or a total of $5,000, to meet any obligation he may be under for the expenses of this litigation. In view of that fact, we are inclined to take the position of the court in the case of Laughlin v. Wells Bldg. Co. supra, wherein it was said:

> "The trial court allowed the plaintiff [the trustee] $1,500 for legal services in this case, allowed him for disbursements actually paid out as trustee, and allowed him to tax statutory disbursements made by him in this action. In view of such allowances, we have reached the conclusion that the plaintiff [the trustee] should have no further allowances for costs, disbursements, or counsel fees upon this appeal."

The judgments are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

199 Cal. 126

JOHNSON v. SOUTHERN PAC. CO. et al.

(S. F. 11816.)

(Supreme Court of California. July 21, 1926.)

1. Commerce ⚷27(3)—Empty cars of oil company being moved to yard where they were to be inspected, after which owners of oil intended to use them in interstate shipments, held not in interstate commerce, within federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665).

Empty, private owned cars being moved to certain yard where they were to be inspected, after which owners of incoming oil, who had leased such cars, intended to ship oil to other states in them, *held* neither vehicles nor parcels of interstate commerce, so as to permit action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) for death of brakeman on train of which they were part, notwithstanding statement as to their intended use by traffic manager of lessor to railroad's car clerk.

2. Master and servant ⚷265(1).

One seeking to recover under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) has burden to show that railroad was engaged in interstate commerce at time of injury.

3. Master and servant ⚷265(1).

In suit under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), there is presumption that railroad, while operating within state, was engaged in intrastate commerce.

4. Commerce ⚷27(3).

To be liable for employee's injury, under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), railroad must have accepted and designated for interstate use one or more units of train on which he worked.

In Bank.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by Effie May Johnson, as administratrix of the estate of Gustave C. Johnson, deceased, against the Southern Pacific Company and others. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Keyes & Erskine, of San Francisco, for appellant.

Ford, Johnson & Bourquin and Henley C. Booth, all of San Francisco, for respondents.

RICHARDS, J. This appeal is prosecuted by the plaintiff from a judgment in defendants' favor after motion for nonsuit made and granted in the trial court. The action is one in which the plaintiff, as administratrix of the estate of Gustave C. Johnson, deceased, and for the benefit of herself as his widow and of his two daughters, seeks to recover damages for injuries resulting in his death through the alleged negligence of the defendants. The deceased, at the time of receiving such injuries and of his death therefrom, was employed by the defendant Southern Pacific Company in the capacity of a switchman and was engaged in moving a train of freight cars westerly from the belt line of the state railroad along King street, in the city of San Francisco, to the Mission Bay yards of the defendant in said city. It is expressly conceded that the collision which caused the death of the decedent occurred through the negligence of another employee of the defendant, and the only question presented in the case upon motion for nonsuit and upon this appeal is as to whether the train of cars upon which the deceased was riding in the course of his employment at the time of his injuries was engaged in interstate or intrastate commerce. If the former, the superior court would have jurisdiction to entertain this action under the provisions of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665); if the latter, the sole original jurisdiction would be in the State Industrial Accident Commission. The case as to the principles of law involved resembles in its main aspects the case of Mappin v. Atchison, Topeka & Santa Fé Ry. Co., 247 P. 911, recently decided by this court, but as to certain of its facts it so far differs from that case as to present the serious question as to whether a different conclusion should not be arrived at upon this appeal. The train of cars upon which the deceased was riding at the time he received his fatal injuries consisted in what is known in railroad parlance as a "drag," embracing a number of freight cars which had been received by the defendant from the belt line railroad and were being transported to its Mission Bay yards. The ultimate destination of most of these cars is immaterial to the present controversy, but as to one or two of their number it is contended that these had been so far definitely committed to interstate commerce as to render the entire train engaged in such commerce under well-established principles of law. Mappin v. Atchison, Topeka & Santa Fé Ry. Co., supra. As to the cars so claimed to be thus committed to interstate commerce, the following are the undisputed facts of the case: A shipment of vegetable oil was in course of ocean transit from Manchuria, consigned to Cook, Swan & Co. of San Francisco, but intended by the latter, its owners, for further shipment by rail to certain eastern customers, with the exception of one carload thereof, which, when transferred from steamer to tank car, was to be sent to Richmond, Cal., and also a portion of a tank carload which was to be delivered to Nason & Co., a San Francisco customer. In order to facilitate these further shipments of said oil, it was necessary that Cook, Swan & Co. should procure the necessary tank cars therefor, and accordingly the said owners of said oil arranged with the Oriental Vegetable Oils Company to lease 25 privately owned tank cars for such purposes, and gave its order to its said lessor to assemble these cars, to route 23 of them east when filled with oil from the steamer, to route one of them to Richmond, and, as to the remaining car, to take it when loaded to its own plant in said city, to draw off some of the oil into barrels for eastern shipment, and to send the remainder in its said car to the aforesaid San Francisco customer of Cook, Swan & Co. Upon receiving the above order the Oriental Vegetable Oils Company began to assemble the required number of oil tank cars by using some cars of its own and by arranging to procure others from other private owners of cars. One of these latter was car 328, belonging to one Victor Labordie, and intended for use in the eastern shipment of said oil. Another car, apparently the property of the Oriental Vegetable Oils Company, was numbered 1075, and it, together with car 328, were ordered to be taken to the Mission Bay yards of the defendant herein, there to await the arrival of the oil-laden steamer which was expected to be at the dock ready for unloading upon the following day. In order that these two cars might be transported from the tracks of the belt line railroad to the Mission Bay yard of the Southern Pacific Company, the traffic manager of the Oriental Vegetable Oils Company applied to the Southern Pacific Company to make such transfer and the latter accordingly issued a bill of lading to the former, which, in substance, recited that it had received from the Oriental Vegetable Oils Company the aforesaid two cars designated and described as "Mty Tank Cars O. V. O. X. 1075, G. R. Y. X. 328," having for their destination "Mission Bay yard, State of California." Nothing further appears upon this bill of lading as to any agreement or understanding between the Oriental Vegetable Oils Company and the Southern Pacific Company as to any further transportation of these two cars or either of them by the latter beyond their stated destination, but there was some evidence of an oral direction that these cars, when assembled with the remainder of the 25 cars engaged to be supplied by the Oriental Vegetable Oils Company to Cook, Swan & Co., in the Mission Bay yard of the Southern Pacific Company, were to be there held awaiting the arrival of the oil-laden steamer at Pier 54. and that when it had there arrived and was ready for unloading these cars were to be taken to said dock in suitable lots for the purpose of being loaded with said oil. There was an intermediate condition to the effect that the cars were to be inspected while in the defendant's said Mission Bay yard, for the purpose of determining whether they were in condition for their intended use and the evidence in the case showed that when thus inspected, after being brought to said yard and after the collision which caused the decedent's injuries and death, car 328 was found to be unfitted for such intended use and it was accordingly discarded. As to car No. 1075, however, the evidence in the case showed that it was found to be fit and that it was taken by the defendant herein to Pier 54 on the day following the decedent's injuries and was there loaded with oil, a portion of which was to be and was in fact delivered to Nason & Co., the San Francisco customer of Cook, Swan & Co., and the remainder of which was to be and was in fact taken to the plant of the Vegetable Oils Company in San Francisco, where it was barreled and reshipped to the eastern customers of Cook, Swan & Co.

[1-4] Upon the basis of the foregoing facts as shown by the undisputed evidence in the case, the trial court, upon motion for nonsuit, concluded that the plaintiff had not sustained her contention that the train of cars upon which the deceased employee of the defendant was riding at the time of the injuries which caused his death were at the time of his said injuries engaged in interstate commerce, so as to confer upon the superior court jurisdiction to entertain this action under the terms of the federal Employers' Liability Act, and hence granted said motion for nonsuit, and thereupon entered judgment in the defendants' favor. We are of the opinion that the trial court was not in error in so doing. The burden was upon the plaintiff in this action to establish the fact that the defendant, at the very time when its employee through its negligence received the injuries which caused his death, was engaged in interstate commerce, the presumption being, in the absence of such proof, that the employer while in the use and operation of its railway within the state was engaged in intrastate commerce. Terry v. Southern Pac. Co., 34 Cal. App. 330, 169 P. 86; Bradbury v. Railway, 149 Iowa, 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684; Osborne, etc., v. Gray, 241 U. S. 16, 36 S. Ct. 486, 60 L. Ed. 865. In the production of such required proof it was necessary for the plaintiff in this case to show that one or more of the units in the train of empty cars, which the defendant was engaged in moving along its tracks at the time of the decedent's injuries, had been definitely accepted and designated by said defendant for interstate uses and was moving at such time along the line of its, or their, destiny. The proofs which the plaintiff tendered in that behalf fell short of sufficiency to support such burden in several essential respects. The two particular freight cars in said train which the plaintiff relied upon as having been devoted to interstate uses were

car 328 and car 1075. Neither of these two cars belonged to the defendant, nor were either of them foreign cars which had been received by the defendant from other railroad lines at points outside of the state laden with interstate freight bound for California points as was the case in Mappin v. Atchison, Topeka & Santa Fé, supra, and which it was the duty of the defendant after unloading to start on their homeward way. The cars in question here were the property of private owners located within this state and such cars, prior to the leasing thereof by Cook Swan & Co., had no inherent interstate quality whatever. Neither had such cars or either of them taken on such quality in so far as the defendant was concerned prior to the time of the collision in which the decedent lost his life. It may be conceded that Cook, Swan & Co., in procuring said cars through its leasing arrangement with Oriental Vegetable Oils Company, intended to devote them, or at least one of them, to the transfer of its cargo of vegetable oil to eastern points, and that such transfer would be interstate commerce; but that would not of itself suffice to cast upon the defendant the burden sought to be imposed upon it in this forum and form of action, since, in order to do so, it was essential to show that the defendant had definitely received and accepted said cars for devotion to such intended interstate uses. It is the carrier and not the owner of the article being transported who must be engaged in interstate commerce at the time the injury to its employee occurs in order to entitle the latter to invoke the jurisdiction of the state courts under the terms of the federal Employers' Liability Act. A very apt and instructive case upon this subject is that of Southern Pacific Co. v. Arizona, 249 U. S. 472, wherein the precise question here under consideration is discussed and decided. The cases cited in support of that decision also consider differing phases of situations resembling that of the case at bar. These, with certain other apposite cases, are the following: Railroad Commission, etc., v. Worthington, 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004; Chicago, M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988; Chicago Junction Ry. Co. v. Ind. Bd., 277 Ill. 512, 115 N. E. 647; Delaware, L. & W. R. Co. v. Peck, 255 F. 261, 166 C. C. A. 431; C. B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941; Minn. & St. L. R. Co. v. Winters, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; Smith v. Interurban Ry. Co., 186 Iowa, 1045, 171 N. W. 134; Oregon R. & N. Co. v. Campbell (C. C.) 180 F. 255; Ill. Cent. R. Co. v. Behrens, 233 U. S. 473, 34 S. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

It is true that in the case of Baltimore, etc., Ry. Co. v. Settle, 260 U. S. 166, 43 S. Ct. 28, 67 L. Ed. 189, and in certain of the cases cited therein, upon which the appellant herein strongly relies, it was held that when the shipper had definitely determined the contents of the carrier's cars to be destined as interstate commerce the carrier could not be permitted to change their quality to that of intrastate traffic by the form of the agreement for carriage, such as by the issuance of local waybills or charging local rates; but the reason underlying this line of decisions is that carriers cannot be permitted, for improper motives, in bad faith, and in an attempt to avoid their responsibilities under the interstate commerce laws to attempt to give to a definite interstate movement of freight an intrastate quality by these forms of subterfuge. No such question is presented in the instant case, nor is it pretended that the waybill of the carrier herein was not issued in good faith as expressing its agreement for the transfer of the cars in question to the destination named therein. The only evidence in this record which looks in any other direction is that furnished by the witness Fontaine, who was traffic manager of the Oriental Vegetable Oils Company, and who informed one Emig, designated in the evidence as "car clerk" of the defendant, that the purpose of the movement of these cars from the belt line railroad to the defendant's Mission Bay yards, and thence later to Pier 54, was that these cars were there to be loaded with a shipment of oil chiefly designed for eastern points. But this volunteered statement of the traffic manager of a concern which, while the lessor of these cars, had no control over their content or destination, could not be binding either upon the owner and shipper of the oil in question or the railroad company in its acceptance of these cars for transportation to the place where they were to be loaded with said oil. The undisputed fact is that the entire control over the content to be placed in said cars and over their destination when loaded therewith remained at all times with the owner of the oil and was not transferred and was not to be transferred to the defendant until such time as these cars received their load of oil at Pier 54, and until the shipper thereof, Cook, Swan & Co., then designated the destination of each of these cars. The only agreement under which the defendant received these cars and was engaged in their transfer to its Mission Bay yards at the time of the decedent's injuries was that contained in the waybill issued by it upon its reception, possession, and ensuing transportation of these cars to the destination named therein. By the express terms of said waybill the defendant received and undertook to transport the two empty cars in question, not as vehicles for the transportation of freight therein or to be placed therein, but as themselves parcels of freight which the defendant contracted to deliver at a stated destination, viz., at its Mission Bay yards within the city of San Francisco. Beyond said destination the defendant did not, by the terms of its written agreement, agree to transport said cars. There is, however, some evidence to the effect that oral instructions had been given over the phone by the traffic manager of the Oriental Vegetable Oils Company to certain agents of the defendant to deliver said cars after their inspection at said yards at Dock 54 when the steamer arrived with its cargo of oil and was ready to unload it, but there is no evidence of any existing agreement or undertaking on the part of the defendant or between it and the owners of the oil content to be placed in said cars by which the defendant had become engaged or bound to transport said cars or either of them to any fixed destination, either within or without the state of California, when they had received their cargo of oil; nor is there any evidence whatever showing that any control over the destination of said cars or either of them beyond that set forth in said waybill, or at most beyond Pier 54, had been invested in the defendant at any time prior to the time of the collision in which the decedent lost his life. On the contrary, the undisputed evidence in the case discloses that the owners of said oil fully retained and fully exercised such control over the ultimate destination of said cars up to and after they had received their content of oil; that car No. 328 failed to pass muster upon its inspection in the defendant's Mission Bay yards and never did reach said pier, receive its load of oil, or go into either interstate or intrastate service, but went into a car shop for repairs; and that, as to car 1075, it was transmitted, after due inspection in the defendant's said yards, to said Pier 54 and was there loaded with oil, but that after being so loaded it was, by the order of the owners of said oil, sent to the premises of Nason & Co., one of their local customers, and was there partly unloaded; and that it was then taken to the oil company's plant in San Francisco where the remainder of its oil content was barreled and then reshipped to an eastern destination, during all of which time and of these several changes of freightage said car No. 1075 remained and continued to be under the sole control, as to its ultimate destination, of the owners of said oil.

From the foregoing undisputed facts, the conclusion would seem to be irresistible that at no time prior to the collision which caused the injuries and death of the decedent had these two cars or either of them taken on the quality of either vehicles or parcels of interstate commerce in so far as the relation of the defendant to them or to their destination was concerned. This being so, it must be further concluded that, as to the train of cars upon which the decedent was employed and was riding at the time of his fatal injuries, the defendant was not in their transportation at the time of such collision engaged in interstate commerce, and, this being so, was not subject to the jurisdiction of the state courts in this form of action for damages to its employee which were the result of such collision.

The defendants' motion for nonsuit was therefore properly granted and the judgment based thereon is accordingly affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LENNON, J.

199 Cal. 155

PEOPLE v. HOFFMAN. (Cr. 2880.)

(Supreme Court of California. July 28, 1926.)

1. Criminal law 🔑1166½(12)—Error, if any, of court's comments on trifling importance of evidence offered for impeachment in admitting it, held not prejudicial, where it was inadmissible.

Error, if any, of trial court in commenting upon its little importance in admitting record of juvenile court, offered by accused for impeachment, showing state's witness had entered plea of guilty to larceny charge, *held* not prejudicial, since record was not admissible in first instance.

2. Witnesses 🔑345(1)—Juvenile court's record held not admissible for impeachment purposes, since no finding of such court could amount to conviction of a felony.

Record of juvenile court, offered for impeachment, *held* inadmissible, since proceedings in such court are not penal, and hence no finding of juvenile court could amount to conviction of a felony.

3. Criminal law 🔑1166½(8)—Denial of challenge for cause on ground juror had opinion accused killed decedent held not prejudicial, where sole issue was whether accused acted in self-defense.

Denial of challenge for cause, directed to juror who stated, on voir dire examination, opinion that accused killed decedent, *held* not prejudicial, notwithstanding accused had exhausted his peremptory challenges, where accused during trial admitted homicide, but urged it was justified.

4. Criminal law 🔑1166½(5)—That juror, whose name was drawn in his absence, was seated without redrawing name, held not prejudicial, where he did not sit in case and method of his excuse was not shown.

Where slip was drawn from jury box, and person named was not in courtroom, that upon return he was seated in place of excused juror without returning name to box *held* not prejudicial, if error, where he did not sit during trial and record was silent as to method by which he was excused.

5. Criminal law 🔑377—Testimony of character witness that he had never heard accused's reputation discussed, and testimony represented his personal opinion, held evidence of good reputation.

That testimony of accused's character witness was stricken when he testified on cross-examination he had never discussed accused's reputation or heard it discussed, and that testimony represented his personal opinion, *held* error, since fact he had not heard subject discussed was some evidence of good reputation, and he may not have recognized distinction between testifying to reputation and to an opinion as to reputation.

6. Criminal law ⚷1168(4)—Error in striking out testimony of accused's character witnesses held not prejudicial, where testimony of other character witnesses was admitted.

Error of court in striking out, on motions of prosecution, testimony of two character witnesses offered by accused, *held* not prejudicial, where accused introduced testimony of seven other character witnesses, and state did not produce an equal number to the contrary.

7. Witnesses ⚷277(2)—Questions whether accused had ever previously had gun trouble and had previously drawn gun on anybody held proper cross-examination in murder prosecution, in view of his direct examination.

Where, in murder prosecution, accused's counsel asked him whether he had had any trouble or difficulty with anybody previously, and, if he had been charged with any offense, questions whether this was first occasion he had any gun trouble with any person and whether he had ever drawn gun on any one before, *held* proper cross-examination.

8. Criminal law ⚷683(1)—That accused had drawn gun on and threatened to kill witness held admissible to rebut his testimony that he had never drawn gun on any one.

Testimony that several years previous to trial accused had drawn gun on witness and threatened to kill him *held* admissible, in murder prosecution, to rebut his testimony that he had led an untroubled life and had never drawn gun on any one.

9. Homicide ⚷338(1)—Admitting testimony that decedent served two years in navy held not prejudicial, if error.

Admission of testimony of decedent's mother that he had served in navy two years *held* not prejudicial, if erroneous under rule that decedent's character is not in issue unless first attacked by defense.

10. Criminal law ⚷1163(1)—To justify reversal, prejudice must affirmatively appear from the record (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, injury or prejudice to justify a reversal cannot be presumed from mere fact of error, but must affirmatively appear from an inspection of the record.

11. Homicide ⚷254.

Evidence *held* sufficient to sustain conviction of murder in the second degree.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

D. B. Hoffman was convicted of murder in the second degree, and he appeals. Affirmed.

Charles E. Scott and Edgar B. Hervey, both of El Centro, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and E. R. Utley, Dist. Atty., and J. E. Simpson, Deputy Dist. Atty., both of El Centro, for the People.

PER CURIAM. The following opinion, prepared by Mr. Justice LAWLOR, is adopted as the opinion and decision of the court:

"The defendant, D. B. Hoffman, was informed against by the district attorney of the county of Imperial for the crime of murder. It was stated in the information, among other things, that the defendant had, on May 29, 1923, murdered John A. Schafer in said county. After trial the defendant was convicted of murder in the second degree. The judgment of conviction was, however, reversed on appeal (195 Cal. 295, 232 P. 974) and a new trial had. The second trial of defendant on the charge likewise resulted in his being convicted of murder in the second degree. From the judgment entered upon this latter conviction, and from an order denying a motion for a new trial, defendant prosecutes this appeal. The evidence produced at the second trial is substantially the same as that produced upon the first trial. This being so, a general statement of the evidence will suffice for a consideration and weighing of the errors asserted to have occurred upon the second trial.

"The homicide was admitted by the appellant, but is claimed to have been in self-defense. At the time of the homicide, the appellant was a rancher in the Imperial Valley, living with his wife on leased premises. One Donald Cornelison had been employed by appellant about the ranch, but left said employ after having worked approximately a day and a half. On the evening of the day that Cornelison left appellant's employ, he (Cornelison), in company with one James H. Shell and the decedent, came in an automobile to appellant's ranch and there engaged in conversation with one of the ranch hands. The trio departed in said automobile about 9 p. m. Shortly thereafter the appellant observed an automobile stopped, with lights out, opposite a field leased by him, and in which stood his thresher and tractor. Appellant, suspecting that the occupants of the parked car were about to steal from his thresher and tractor, drove in his car, accompanied by his wife, in the direction of the other machine. At this point in the narrative the appellant testified, in substance, that upon reaching the parked car he left his automobile and saw two boys proceeding in the direction of the thresher whereupon he called to them to come away from there; that he fired one shot in the air apparently to frighten them; that subsequent to the firing of the shot in the air the decedent, whom he did not at that time recognize, appeared and said, 'What in hell are you doing here?' that appellant's wife left their automobile and inquired of decedent what the boys were doing there, to which he replied, 'None of your damned business'; that decedent approached him with one hand on his right hip pocket and threatened that he would 'get him'; that, as decedent advanced toward him, he (appellant) backed away; that, during the progress of decedent's asserted threatening advance toward him, decedent started to remove his hand from his hip pocket, whereupon appellant shot him; that he believed that decedent had a gun on him; that decedent was about 6 feet from him when he shot him, having advanced approximately 20 feet from the starting place.

"In all material respects, the appellant's narrative of the immediate events leading up to the homicide was corroborated by the testimony of his wife.

"Donald Cornelison, called as a witness for the prosecution, testified to the effect that he and James H. Shell had entered the field containing the thresher and tractor for the purpose of securing a piece of wire with which to repair a broken shock absorber on their car; that decedent was in the car with them when they stopped for this purpose; that while in the field they heard the appellant call to them; that as they were coming from the field he saw the decedent leaning with his right hand on their car and with his left hand on his side; that the appellant turned and fired upon the decedent, who exclaimed, 'I am shot!' that decedent thereupon climbed into appellant's car; that appellant then pointed the gun at the witness and inquired what 'devilment' they were up to; that he told appellant the purpose of their entry into his field; that appellant told him and Shell to take decedent from appellant's car and to a doctor; that they did so; and that decedent, so far as he was aware, did not have a weapon upon his person at the time of the homicide.

"Substantially the same story was told by James H. Shell when called as a witness for the prosecution.

"1. The first assignment of error is that the trial court made certain asserted improper remarks touching the admissibility of a record of the juvenile court, which remarks are said to have been prejudicial to the appellant. It appears that appellant, for the purpose of impeaching the witness Cornelison, offered in evidence a record of the juvenile court which showed that Cornelison had previously entered a plea of guilty in said court to a charge of grand larceny. The trial court, after expressing some doubt as to the admissibility of such a record for impeachment purposes, stated in part: '* * * I don't think it is very important. To save time I think it may be admitted. * * * I do not think it amounts to anything in particular.' Counsel for appellant immediately requested that the foregoing remarks of the court be expunged from the record.

[1, 2] "We are of the opinion that the record of the juvenile court was not admissible in the first instance for purposes of impeachment as the proceedings in such a court are not penal in their character. In re Daedler, 194 Cal. 320, 228 P. 467. This being so, no plea of the minor or finding of the juvenile court based thereon could amount to a conviction of a felony so as to render the record admissible for impeachment purposes. The error then, if any, of the trial court in commenting upon the same, cannot be held to be prejudicial.

[3] "2. It is next urged that the court erred to the prejudice of appellant when it denied a challenge for cause directed at a prospective juror who stated, during his examination on voir dire, that he was of the opinion that the appellant had killed the decedent and that it would require evidence to remove such opinion. At the time this declaration was made by the prospective juror, appellant had exercised all of his peremptory challenges, and his counsel, after stating that, if further peremptory challenges were available, one would be employed to exclude the talesman, challenged the juror for cause. In our view the court did not prejudicially err in denying the challenge for, as already indicated, the appellant during the course of the trial admitted the homicide, but urged that it was justified. It is not shown, therefore, that the juror maintained an opinion upon the sole issue in the case, namely, whether or not appellant had acted in self-defense.

[4] "3. The name of James C. Sharp was drawn from the jury box as a prospective juror, when it was ascertained that he was not, at the time, in the courtroom. The slip bearing his name was thereupon placed upon the clerk's desk and other names withdrawn from the box sufficient to temporarily complete the jury. Subsequently Sharp returned to the courtroom, and, over the objection of appellant that he could not properly be called as a juror without a return of his name to the box and a redrawing therefrom, was seated in the place of an excused juror and examined. He was not among those who finally sat in the case, and nowhere in the record does it appear by what method he was excused. In view of these circumstances, it cannot be held that the procedure by which he was temporarily seated as a juror, even assuming, without deciding, it to have been erroneous, was prejudicial to appellant. The only possible injury that appellant could have suffered would be the use of one of his peremptory challenges to unseat Sharp. But, as the record does not show the method by which he was excused, this court must assume, the burden resting upon appellant to show injury, that he was either excused for cause or upon a peremptory challenge of the prosecution. The contention is therefore without merit.

[5, 6] "4. Hereunder, it is urged that the trial court erred in striking out, on motions of the prosecution, the testimony of George M. Austin and George R. Wade called as character witnesses by the appellant. The proceedings leading up to the orders striking out the testimony of these respective witnesses were somewhat analogous, and may therefore be stated, in substance, as follows: After each of said witnesses had, in response to questions propounded by counsel for the appellant, testified to the good reputation of the appellant for peace and quiet in the community in which he resided, the prosecution, on cross-examination, asked each witness if he had ever discussed appellant's reputation with any one or heard it discussed. These questions were answered in the negative. Thereupon the prosecution inquired of each witness if his testimony represented his personal opinion of the appellant for the enumerated traits. The motions to strike and the orders followed and were apparently based upon the affirmative answers made to his latter question. We are of the opinion that the trial court erred in granting the motions of the prosecution and in ordering the testimony of these respective witnesses stricken out. The fact that neither witness

had heard the subject discussed was some evidence of appellant's good reputation in the community where he resided. People v. Adams, 137 Cal. 580, 70 P. 662. Moreover, the witnesses may not have recognized a possible distinction between testifying as to reputation and testifying to an opinion as to reputation. We are of the opinion, however, that the error was not prejudicial, for the appellant offered and had admitted the testimony of seven other character witnesses. The state did not produce an equal number of witnesses who testified to the contrary. We conclude that the error of the trial court in this respect did not work a miscarriage of justice, and would not, therefore, warrant a reversal of the judgment and order.

[7] "5. While on the witness stand on his own behalf the appellant was interrogated in part by his counsel to the following effect: 'During the 22 years you have been in Imperial county, except for the matter which is the subject of this trial here, have you ever had any trouble or difficulty with anybody whomsoever, other than a matter of such discussion as any one is apt to be subject to? Have you ever been charged with any offense whatsoever?' Appellant responded: 'Never, never in my life.' On cross-examination, and over the objection of appellant's counsel, the prosecution asked the appellant the following questions: 'Q. This is the first occasion you ever had any trouble with a gun with any person, Mr. Hoffman? * * * Q. Did you ever draw a gun on anybody before?' To which questions the appellant respectively answered: 'A. I never used a gun on anybody before;' and, 'A. No, sir; I never drew a gun on anybody.' We find no merit in appellant's contention that the trial court ruled erroneously in each of these instances. The two enumerated questions asked on cross-examination were, in our opinion, clearly within the scope of the direct examination of appellant and therefore proper cross-examination.

[8] "6. Subsequent to the above proceedings and during the production of rebuttal evidence by the prosecution, the state produced a witness who was permitted to testify, over appellant's objection, to the effect that three or four years previous to the trial he had been quail hunting on the appellant's premises when the appellant appeared, holding a 'long gun' pointed at him; that he proceeded toward the appellant but was commanded by the latter to stop, the appellant saying, 'No; don't come any closer, if you do I will kill you.' We are of the view that this rebuttal evidence was properly admitted, for it tended to impeach the testimony given by appellant that he had led an untroubled life and had never drawn a gun on any one. In so holding we are not unmindful of the rules that a witness may not be impeached as to collateral matters, and that proof of character by evidence of general reputation can be met only by evidence of general reputation and not by specific acts. Neither of these rules is, in our opinion, applicable, so as to preclude the introduction of this rebuttal testimony.

[9] "7. Under this assignment of error it is urged that the trial court erred in permitting the mother of the decedent, over appellant's objection, to testify, among other things, that the decedent had served two years in the navy. The Attorney General having in mind the rule that the character of the decedent is not in issue unless it has first been attacked by the defense, readily concedes that the introduction of the evidence complained of hereunder may have been erroneous, but contends that its reception could not have prejudicially affected the appellant. With this latter contention we are in accord. Assuming this testimony to have been improperly admitted, we do not think that the appellant was injured thereby.

"Other contentions urged are without merit.

[10, 11] "In conclusion it may be stated that we are of the opinion that the errors found to have been committed during the trial were not prejudicial to the appellant nor did they influence a verdict of conviction which would not have, but for their commission, been rendered. Since the adoption of section 4½ of article 6 of the Constitution, injury or prejudice cannot be presumed from the mere fact of error. To justify a reversal on appeal, such injury or prejudice must affirmatively appear from an inspection of the record. The evidence here was sufficient to sustain the verdict rendered, and we cannot say upon an examination of the record that a miscarriage of justice has resulted."

The judgment and order appealed from are, and each is hereby, affirmed.

---

199 Cal. 98

In re BAUER'S ESTATE.

BAUER et al. v. BAUER et al.
(L. A. 8683.)

(Supreme Court of California. July 2, 1926.)

1. Executors and administrators 🔑35(17)—Contention that trial court's order denying separate petitions for removal of executors was inadvertently made because of statement that petitions would be heard separately cannot prevail, where petitions were heard together and submitted for decision.

Where trial court stated it would not hear separate petitions, filed by heirs for removal of executors, together, but submitted both matters for decision after full hearing and decided all questions in controversy, contention that order denying both petitions was inadvertently made cannot prevail.

2. Executors and administrators 🔑35(19).

If trial court's order disposing of separate petitions for removal of executors, after stating they would be heard separately, was inadvertently made, party complaining thereof had duty of directing attention thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Emile Bauer, deceased. Petition by Hamilton A. Bauer and others for citation and removal of Lily M. Bauer and another, executors. Order dismissing the citation and denying the petition for removal, and petitioners appeal. Af-

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

firmed. See, also, 239 P. 49, 40 A. L. R. 1457; 256 P. 820.

Hamilton A. Bauer, of San Francisco, and C. Franklin Baxter, of Los Angeles, for appellants.

J. W. Morin and Morin, Newell & Brown, all of Pasadena, for respondents.

LENNON, J. This appeal is by Hamilton A. Bauer and certain other heirs of the estate of Emile Bauer, deceased, and is from certain orders of the probate court made in the course of the administration of the estate of said deceased. The proceedings in which these several orders were made had their inception in the presentation of a petition to said court by Hamilton A. Bauer, a son and heir of said deceased and a legatee and devisee under the latter's last will, wherein said petitioner sought to have a citation issued and served upon Lily M. Bauer and Lloyd C. Bauer, executrix and executor, respectively, of the decedent's last will, requiring them and each of them in their said official capacities to appear and be examined with relation to certain properties of said estate described in said petition which, it was alleged, the said executrix and executor had failed to account for or include in their inventory of said estate, but, on the contrary, had appropriated to their and each of their own use. The petitioner also applied for an order suspending said executrix and executor from their respective offices as such until such time as they should be examined as to said properties and should make an accounting thereof. Upon the filing of said petition a citation was issued in accordance with the prayer thereof returnable at a date fixed therein.

Prior to the return day of said petition of Hamilton A. Bauer certain other of the heirs and legatees of said Emile Bauer, deceased, presented a further petition to said probate court setting forth substantially the same facts as were averred in the former petition and alleging the same misappropriations of the properties described therein by the said Lily M. Bauer and Lloyd C. Bauer and alleging that the latter, in their respective official capacities, have made and are making no effort to recover for the benefit of said estate any portion of said properties which they have individually appropriated to themselves, and further alleging that the said executrix and executor of said estate are proposing to sell certain of the remaining properties of said estate, which have been specifically bequeathed to the petitioners, for the purpose of paying certain debts of said estate, and which sale, if so permitted to be made, will have the effect of depriving the petitioners of their interest therein as such specific legatees. The petitioners prayed that a day be set for a hearing of their said petition; that the sale of said properties of said estate be enjoined; and that the executors be removed from their office as such. These petitioners are represented by Hamilton A. Bauer and by C. F. Baxter as their attorneys.

To the aforesaid petition of Hamilton A. Bauer an answer was presented by Lily M. Bauer and Lloyd C. Bauer, wherein all of the averments of the petition were specifically denied, and wherein particularly the respondents denied that said Emile Bauer, at the time of his death, was the owner of any of the properties set forth in the aforesaid petition of Hamilton A. Bauer, and denying that any property whatever that Emile Bauer owned at the time of his death had been concealed or misappropriated or excluded from the inventory of his estate. Wherefore the respondents prayed that the citation issued upon the filing of the said petition be dismissed and the petition denied.

Upon the return day fixed for the hearing of the aforesaid petition of Hamilton A. Bauer the parties and respondents to both petitions, with their counsel, were in court. Whereupon Hamilton A. Bauer requested that both his own petition and the petition of the other heirs and legatees of said estate, whom he and Mr. Baxter represented, should be heard and determined together. In response to said request the attorney representing respondents objected, upon the ground that no citation had been issued or served upon the respondents on account of the second petition and that they had not answered and were not in court in respect to that matter. The court stated that he would not hear the latter petition at that time, but would determine the two matters, one at a time. The court then proceeded to take testimony apparently upon the issues raised by the first of said petitions and the answer thereto and the matter proceeded through several days of hearing, wherein apparently all of the matters of dispute presented by both petitions were fully gone into; counsel for both sets of petitions appearing and taking part in the controversy and Mr. Baxter, particularly, who represented the second set of petitioners, taking a leading part in the examination of the respondents in both proceedings. The record seems to disclose that the whole subject in controversy was gone into by the trial court without any further question being raised as to the matters presented in the second petition being not in issue. So far as the record discloses, the matters set forth in the petition of the second set of petitioners and which were substantially the same as those averred by Hamilton A. Bauer in the first petition were fully exploited in said hearing and were fully argued by respective counsel. At the conclusion of the taking of the testimony and at the close of the argument the court made the brief order, "Argued and submitted." Whereupon the clerk inquired, "Both matters submitted?" to which the court replied, "Yes; both matters." Thereafter, on April 30, 1924, the trial court made and entered the order or orders which are appealed from herein, wherein it was recited that both petitions had come on for hearing regularly before the court on the 19th day of March, 1924, all of the parties thereto being present in court and represented by counsel, and that testimony, both oral and documentary, had been then offered on behalf of both sets of petitioners and of the respondents, and that thereafter both matters had been argued and submitted to the court for its decision. Whereupon the court proceeded to decide that the citation and restraining order theretofore issued should be and they were thereby dismissed and that the petition for the removal of the executors should be and the same was thereby denied.

No objection was made at the time of the filing thereof to the form of the said order, but this appeal was taken therefrom and from the whole thereof in due course by both sets of petitioners.

[1, 2] It was for the first time urged in the briefs of appellants' counsel, presented in the course of said appeal, that the trial court had never in fact heard the petition for the removal of said executors presented by the second set of petitioners, and that its order denying the prayer of said petition for the removal of said executors had therefore been inadvertently made and that its said order made in that behalf should be reversed for that reason. This contention on the part of appellants is without merit.

Conceding that the record discloses some indisposition on the part of the trial court to hear said petitions together, nevertheless, apparently, it proceeded to do so, and, after an exhaustive examination of the matters in dispute as presented by both petitions in which counsel for both sets of petitioners had fully participated, proceeded to submit both matters for decision, and thereafter and in its order undertook to decide all of the questions in controversy as presented by both petitions. If its order in that respect was inadvertently made, it was the duty of the appellants herein to have directed the attention of the trial court to its inadvertence in that regard and to have said order corrected. But this they did not do, apparently considering that the whole subject had been presented in the evidence and argument before the trial court and had been submitted to it for decision.

The next contention which the appellants make upon this appeal is that the evidence which was presented at said hearing before the trial court was sufficient to have justified the making of an order compelling an accounting by the executor and executrix as to the properties which it was alleged in said petition they had appropriated to their own use and benefit and was also sufficient to have justified the removal of the said executor and executrix for their failure and refusal to make such an accounting. No question is apparently raised upon this appeal as to the jurisdiction of the trial court to hear and determine disputed questions of title with relation to these several properties and the right of Lily M. Bauer and Lloyd C. Bauer as individuals receiving the possession and apparent title to the same prior to the death of the decedent to hold said properties in their individual right. The principal question presented upon the appeal is as to the sufficiency of the evidence to justify the order of the trial court refusing the relief prayed for in each and both of said petitions.

Upon that question there would seem to have been sufficient evidence to sustain the order of the trial court, or, perhaps it might better be said, an insufficient amount of evidence to justify the granting of either or both of said petitions.

It follows that in this case the order of the trial court should be and it is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

199 Cal. 140

In re STIERLEN'S ESTATE.

STIERLEN v. SCOTT. (S. F. 11332.)

(Supreme Court of California. July 26, 1926.)

1. Wills 🔑358.

Appealable judgments and orders, in probate proceedings, enumerated in Code Civ. Proc. § 963, subd. 3, not including order striking out will contest, or count thereof, or order sustaining demurrer to contest, such orders are not appealable.

2. Wills 🔑358.

Judgment in will contest that contestant take nothing, based on order sustaining demurrer to contest, *held* not appealable, under Code Civ. Proc. § 963, subd. 3.

3. Courts 🔑488(1).

Where will contest was transferred from District Court of Appeals, under Const. art. 6, § 4, Supreme Court was not precluded from dismissing appeal, by denial of motion to dismiss by District Court of Appeals.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Application by Rosa Scott, executrix, for the probate of the will of George F. Stierlen, deceased. From a decree against contestant, Emma Stierlen, admitting the will to probate, she appeals. On motion to dismiss the appeal. Appeal dismissed.

Charles F. Hanlon, of San Francisco, for appellant.

Harry K. Wolff and Geo. A. Connolly, both of San Francisco, for respondent.

CURTIS, J. [1] Motion to dismiss appeal. This is a contest for the probate of a document purporting to be the last will and testament of George F. Stierlen, deceased. The executrix and sole devisee named in said document, Rosa Scott, filed a petition asking for the probate thereof as the last will and testament of said deceased. The contestant, Emma Stierlen, the surviving wife of said deceased, filed a contest thereto. In her written contest, which she filed after a voluntary dismissal by her of a prior contest to said will, said contestant set forth in five separate counts five distinct grounds wherein she asserted the invalidity of said document: (1) Failure of execution; (2) unsoundness of mind; (3) undue influence; (4) actual fraud; (5) constructive fraud. The proponent of said will filed a motion to strike out the first count of said contest and a demurrer to the remaining four counts thereof. The court granted said motion and sustained said demurrer without leave to amend. A written order signed by the trial judge was made and filed, striking out said count 1. A written order was also signed and filed, sustaining said demurrer without leave to amend, and judgment was entered that the contestant take nothing by her contest and that proponent recover her costs. Respondent's motion to dismiss said appeal is based upon the ground that the order striking out count 1 of said contest and the order sustaining the demurrer to the last four counts thereof and the judgment following said order are not appealable orders. The judgment and orders in probate proceedings from which an appeal can be taken are set forth and enumerated in subdivision 3 of section 963 of the Code of Civil Procedure.

> "The only appealable orders in probate matters are those designated in subdivision 3 of section 963 of the Code of Civil Procedure." Estate of Edelman, 148 Cal. 233, 82 P. 962, 113 Am. St. Rep. 231.

Neither an order striking out a contest, or a count thereof, nor an order sustaining a demurrer to a contest, is one of the orders enumerated in said subdivision of said section, and consequently neither of them is an appealable order.

[2] Appellant further calls to our attention the fact that, while the probate court made the order sustaining the demurrer to the four last counts of the contest, it followed up said order with a judgment that contestant take nothing by said contest and that proponent recover her costs. But this fact does not in any way assist appellant upon this appeal, as a judgment based upon an order sustaining a demurrer to a contest to the probate of a will is in no better standing, in so far as its being an appealable order is concerned, that an order sustaining such a demurrer, as neither an order sustaining a demurrer nor a judgment entered thereafter and based thereon is listed among the appealable orders enumerated in subdivision 3 of said section 963. It is true that a somewhat different rule applies in ordinary civil actions; that is, after an order is made sustaining a demurrer, which is not an appealable order, is followed by a judgment dismissing the action upon plaintiff's failure to amend after demurrer sustained, an appeal can be taken from said judgment. This, however, is not the rule as to a judgment rendered in a probate proceeding dismissing a contest after the sustaining of a demurrer thereto. Estate of Rawson, 66 Cal. App. 144, 225 P. 474. Neither are the orders appealed from orders made after final judgment, for no final judgment admitting or refusing to admit the will to probate, as far as the record shows, has been made by the probate court. Upon the entry of an order admitting said will to probate an appeal therefrom would lie and in the consideration of said appeal the validity of the orders herein sought to be appealed from would be proper matters for review. Estate of Rawson, supra; Estate of Edelman, supra.

[3] It is contended by appellant that a motion to dismiss this appeal, having originally been made in the District Court of Appeal and denied by said court, has become final, and that it is not within the power of this court to review the same nor to entertain a motion made anew herein to dismiss said appeal. Respondent made said motion to dismiss this appeal in the District Court of Appeal and said court denied the same. No petition for a hearing of this cause has been made to this court by respondent. The appellant, however, filed a petition for a hearing herein, not for the reason that she was dissatisfied with the action of the District Court of Appeal in refusing to grant respondent's motion to dismiss, but for the reason that the ruling of the District Court of Appeal sustaining the action of the probate court in striking out the first count of her contest to the probate of said will was considered by her to have been erroneous.

The petition of appellant was granted and this court made an order transferring said cause to this court for hearing. This was done under the authority of section 4 of article 6 of the Constitution, which provides as follows:

> "The Supreme Court shall have power * * * to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court."
>
> "When such an order is made within the time prescribed in the Constitution, the decision of

the District Court of Appeal is vacated and the matter is transferred to this court for a determination of all the material questions involved therein, to the same extent as if originally instituted in this court." Rockridge Place Co. v. City Council, 178 Cal. 58, 60, 172 P. 1110.

It follows, therefore, that this court is not limited in the action it may now take in the consideration of the motion presented upon this appeal by any decision or order made, or action taken, in this case while the same was pending in said District Court of Appeal. A motion to dismiss an appeal is one of the motions which may properly come before this court, and which this court may be called upon to determine, in any case originally appealed hereto. It therefore has the same right, and it is its duty, to entertain the motion made herein by respondent to dismiss said appeal in all respects as if said cause had never been before said District Court of Appeal.

It is ordered that said appeal be and the same is hereby dismissed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

---

199 Cal. 144

DOWELL v. McLEES, County Clerk.
(S. F. 12174.)

(Supreme Court of California. July 27, 1926.)

1. States ⚷27.

Mandatory duty of Legislature, under Const. art. 4, § 6, to adjust legislative districts after each United States census, can be exercised but once between one census and census following, and, until exercised, assemblymen are to be elected by districts as theretofore established.

2. States ⚷27.

Boundaries of assembly district formed within municipality *held* not changed by consolidation of municipalities under statute, or by annexation of unincorporated territory to municipality under statute (St. 1891, p. 71, St. 1913, p. 577, and St. 1913, p. 594, § 9).

In Bank.

Application by Edward H. Dowell for writ of mandate to be directed to J. B. McLees, County Clerk of the County of San Diego, to compel the printing of petitioner's name on the official ballot to be used in certain precincts as a candidate for member of the assembly for the Seventy-Ninth assembly district. Writ denied.

J. A. Isaacson and E. I. Kendall, both of San Diego, for petitioner.

Chester C. Kemply, Dist. Atty., of San Diego, for respondent.

SHENK, J. This is an application for a writ of mandate to compel the county clerk of San Diego county to print the name of the petitioner as a candidate of the Republican party for the office of member of the assembly, Seventy-Ninth assembly district, upon the ballots to be used in voting precincts numbered 35 to 44, inclusive, 95 to 105, inclusive, and 27 to 34, inclusive within the city of San Diego, at the primary election to be held August 31, 1926.

In 1891 the Legislature divided the state into legislative districts as required by section 6 of article 4 of the Constitution (Stats. 1891, p. 71). The Seventy-Ninth assembly district was therein described as "all that portion of San Diego county situated within the corporate limits of the city of San Diego," and the Eightieth assembly district was described as "all that portion of San Diego county not included in the 79th assembly district." Since 1891 no change in the boundaries of said districts has been made, unless the same has been accomplished, as contended by the petitioner, by reason of the following facts:

On or about the 29th day of December, 1923, the cities of San Diego and East San Diego were consolidated under the provisions of an act to provide for the consolidation of municipal corporations. Stats. 1913, p. 577. By this consolidation proceeding, all of the territory within the former city of East San Diego, and now included within San Diego city precincts numbered 35 to 44, inclusive, and 95 to 105, inclusive, became a part of the city of San Diego.

On or about the 11th day of May, 1925, certain unincorporated territory known as Normal Heights was annexed to the city of San Diego pursuant to an act providing for the annexation of unincorporated territory to municipalities. Stats. 1913, p. 587. By this annexation proceeding all territory now within San Diego city precincts numbered 27 to 34, inclusive, became a part of the city of San Diego.

[1, 2] It is the contention of the petitioner that, by reason of the foregoing consolidation and annexation proceedings, the boundaries of the Seventy-Ninth assembly district were so changed as to include the territory comprising the present San Diego precincts above named. We perceive no merit in the contention. In fixing and readjusting the boundaries of assembly districts, the Legislature acts pursuant to the provisions of section 6 of article 4 of the Constitution. Under that section, which is mandatory and prohibitory, the power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one (Wheeler v. Herbert, 152 Cal. 224, 92 P. 353), and by the terms of the section, until the legislative power is exercised as therein provided, assemblymen shall

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

be elected by the districts as theretofore established.

In section 9 of the Annexation Act (Stats. 1913, p. 594), the Legislature was at pains to provide that "nothing in this act contained shall alter or affect the boundaries of any senatorial or assembly district." There is nothing in the act which purports to affect the boundaries of any senatorial or assembly district, and the terms of said section 9 must be held to mean that no proceedings taken under the act shall alter or affect the boundaries of such districts. The Consolidation Act of 1913 contains no similar provision, but such would be the law, even in the absence of a legislative declaration to that effect. We conclude, following the reasoning and conclusions in Wheeler v. Herbert, supra, that neither the consolidation nor the annexation proceedings referred to had the effect of changing the boundaries of said assembly districts.

The writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; TYLER, Justice pro tem.; FINCH, Justice pro tem.

199 Cal. 163

ERNSER et al. v. WALCOTT et al.

(S. F. 11954.)

(Supreme Court of California. July 30, 1926.)

Municipal corporations 🔑197—Veteran, preferred on eligible list for fire department, held entitled to preference in appointment as long as list was effective, though preference period had expired (Charter of San Francisco, art. 13, § 22, as added by St. 1921, p. 1797).

Charter of San Francisco, art. 13, § 22, as added by St. 1921, p. 1797, providing that war veterans passing examination should be classified ahead of others on eligible list for fire department, such preference to expire in five years, *held* to give veteran placed on list within such period right to preference in appointment as long as such list was in force, though five-year period had expired.

In Bank.

Application for writ of mandate by Nicholas D. Ernser and others against Earle A. Walcott and others, as members of and constituting the Civil Service Commission of the City and County of San Francisco. Peremptory writ granted.

Grover O'Connor, of San Francisco, for petitioners.

John J. O'Toole, City Atty., of San Francisco, for respondents.

Leo A. Cunningham, of San Francisco, amicus curiæ, for Nonveterans.

WASTE, C. J. This application for a writ of mandate involves the question whether or not "veterans" (as defined in section 22 of article 13 of the charter of the city and county of San Francisco), whose names appear on the "current firemen's list" of persons eligible for appointment to positions in the fire department, shall be certified by the respondent civil service commission ahead of nonveterans on the same list.

Appointments to positions in the fire department are subject to the provisions of article 13 of the charter. At the general election held on the 2d of November, 1920, the people of San Francisco added a new provision to article 13, known as section 22. After defining the term "veteran" to mean "any person who has served in the army, the navy or the marine corps of the United States in time of war, or in any expedition of the armed forces of the United States, and received an honorable discharge or certificate of honorable active service," the section provides that the civil service commission "shall by rule establish preference for veterans as follows: In the case of entrance examinations to establish eligible lists in the police and fire departments, veterans who become eligible for appointment by attaining the passing mark established for the examination, and whose service as veterans exceeds three months, shall be classified on such eligible lists in the relative order of the individual ratings attained and ahead of all nonveterans passing such examinations, and shall be eligible for appointment on the basis of such order of standing on such eligible lists. This preference shall expire five years after the ratification of this amendment." Stats. 1921, p. 1797. This amendment became effective by approval of the Legislature on the 21st day of January, 1921.

For the purpose of complying with the charter amendment, the civil service commission in February, 1924, adopted a rule (rule 40, § 8), providing for preference for veterans attaining the passing mark in entrance examinations for firemen and policemen, which follows substantially the language of section 22 of article 13 of the charter, and providing the preference should expire at the close of January 13, 1926. Thereafter the commission held an examination for the position classified as fireman, and rated the standing of the persons participating. On the 9th day of December, 1924, it prepared a list of eligibles made up of all those who had participated in the examination, and whose average standing was not less than the minimum percentage fixed by the commission as the passing mark. It adopted a list of 593 firemen "arranged in the order of excellence of general average percentage as determined by the examination," regardless of whether the successful candidate was or was not a veteran. Nos. 1, 2, and 3 on the list were nonveterans. Nos. 4 and 5 were veterans. No. 6 was a nonveteran. The arrangement continued in that manner through the entire list of 593 successful candidates, each veteran being designated by a "V" before his number on the list. While this arrangement did not amount to a classification of veterans "ahead of all nonveterans passing such examination," it was provided in the resolution adopting the list that "war veterans [should] be preferred over all nonveterans for certification, such preference to be given to the veterans in the order of their standing upon [the] list."

From and after the date of the adoption of such eligible list, and to and until the 21st day of January, 1926, the commission, in response to requisitions made for the names of persons to fill the position of fireman, certified only the names of the veterans on the list and in the order of their standing, save and except where any of the veterans waived or refused to accept appointment, in which event the commission certified the veteran standing next highest on the list. All the veterans on the eligible list of firemen, whose ratings have been higher than the individual ratings attained by the four petitioners here, have either been certified to fill positions in the fire department or have waived or refused appointment to such positions; and the four petitioners are now the four highest veterans on the eligible list.

The fire department has now made four requisitions to the commission, which takes the position that the preference given to veterans on the eligible list, entitling them to appointment before nonveterans, expired on the 21st day of January last, and that it is now compelled by other provisions of the charter of the city and county of San Francisco, and by its own rules, to certify, in response to the requisitions, the highest eligibles on the current list, irrespective of whether such eligibles are veterans or nonveterans. Petitioners have therefore brought this action to compel the respondents to certify them, the four highest veterans on the eligible list, to the fire department for investigation and appointment.

The respondent commission takes the position that section 22 of article 13 of the charter merely granted a preference to veterans by way of a right to be classified as eligible for appointment ahead of nonveterans during a period of five years, which period having expired, the commission contends the veterans are no longer entitled to such preference. The petitioners admit that section 22 does not require or permit the civil service commission to give any preference to veterans in examinations given after the expiration of five years, but contend that, the commission having established an eligible list during the five-year period, such lists remains in full force for two years after its adoption, and that during such two-year period the commission must continue to certify eligibles in the order of their standing as determined when the list was adopted. Having been classified ahead of nonveterans when the list was made up, petitioners insist that they still occupy that favorable position, and that they and other veterans will continue to be entitled to certification, in answer to requisitions from the fire department during the full period of two years from the date of the present current firemen's list, sometime in December, 1924.

Considerable argument has been advanced by opposing counsel as to the correct grammatical construction to be given to the words and phrasing of section 22 of article 13 of the charter, and our attention has been directed to various rules of construction and procedure adopted by the respondent commission. We have read the section giving the "preference" to veterans in the light of its relation to other sections of article 13, which are as they were when section 22 was adopted. From the situation thus presented, regarded in the light of the reasons behind the adoption of the section, we are inclined to the view that it was the intention of the framers of the amendment to the charter to provide that for a period of five years, veterans who became eligible by examination for appointment in the fire department were entitled to be placed on a preferred list ahead of all nonveterans, to be certified as required by the demands of the department, within the effective period of such list, not exceeding the two-year period within which the civil service commission cannot remove the name of a candidate. See Mann v. Tracy, 185 Cal. 272, 278, 196 P. 484.

Our attention has been called to rule 40, § 8 of the civil service commission's rules, adopted February 19, 1924, which provides:

> "Veterans, with over three months' service, who attained the passing mark in entrance examinations for firemen and policemen, shall take rank on eligible lists in the order of their individual rating, and ahead of all nonveterans passing such examinations. This preference shall expire at the close of January 13th, 1926."

But we find nothing in the rule providing that appointments shall not be made after the five-year period, from the eligibles on the list created before that period expired. Petitioners have cited Cook v. Civil Service Commission, 160 Cal. 598, 600, 117 P. 662, in which it was held, citing section 10 of article 13 of the charter, that the commission cannot properly set aside its action after it has declared a list of eligibles, except that it may strike off the names of candidates after they have remained thereon more than two years. respondents and amicus curiæ argue that the case is not in point, for the reason that the commission is not in any way changing or altering its eligible list, but is merely acting in accord with a charter provision which has terminated a preference previously held by the veterans over nonveterans.

If all right to preference, both in the matter of being placed at the head of the eligible list and of being considered for certification for appointment ahead of nonveterans, ceased at the end of five years, we see no good reason why the commission should not, at the end of that time, disregard the preferential rating of veterans and thereafter certify veterans and nonveterans as it is now attempting to do. We are of the opinion, however, that when the preference created by section 22 in favor of veterans attached by reason of examination, rating, and listing ahead of nonveterans, during the five-year period, it carried with it the further right of certification, for appointment on requisition, for the full period during which the eligible list of the commission remains in force.

Let a peremptory writ of mandate issue, directing the respondents, as members of and constituting the civil service commission of the city and county of San Francisco, to certify to the board of fire commissioners of the city and county of San Francisco, in response to the requisitions referred to in the petition herein, the names of these petitioners, respectively, according to the individual ratings attained by them on examination.

We concur: RICHARDS, J.; SEAWELL J.; CURTIS, J; SHENK, J.; LENNON, J.

199 Cal. 119

In re GUNTHER'S ESTATE.

HEWITT v. CUTTEN.

(S. F. 11828.)

(Supreme Court of California. July 16, 1926.)

1. **Wills** ⚷324(2).

Evidence *held* insufficient to take to jury question of unsoundness of testator's mind in suit to revoke probate of will.

2. **Wills** ⚷52(1)—**In suit to revoke probate of will on ground that testator was of unsound mind, contestant has burden of proof.**

In suit to revoke probate of will on ground that testator was of unsound mind, contestant has burden of proof; there being presumption that testator was of sound mind.

3. **Wills** ⚷324(2).

Evidence *held* insufficient to take to jury question of testator's insane delusion with respect to contestant in suit to revoke probate of will.

4. **Wills** ⚷55(3).

To prove insane delusion in suit to revoke probate of will, there must not only be no evidence in favor of its truth, but clearest evidence to contrary must be produced.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

In the matter of the estate of Friedrick Robert Gunther, also known as Robert Gunther, deceased. Petition by Leland Gunther Hewitt, by D. A. Mace, his guardian ad litem, against Charles P. Cutten, as executor, and others, for revocation of the probate of the will. Judgment for defendants, and contestant appeals. Affirmed.

Fletcher A. Cutler, of Palo Alto, for appellant.

H. C. Nelson, of Eureka, and James W. Henderson, of San Jose, for respondents.

RICHARDS, J. This appeal is from a judgment of the superior court of the county of Humboldt refusing to revoke the probate of the last will and testament of Friedrick Robert Gunther, entered upon granting the motion for nonsuit upon the hearing of appellant's petition for the revocation of the probate of said will.

Friedrick Robert Gunther, also known as Robert Gunther, died on the 19th day of May, 1924, at the city of Eureka, county of Humboldt, of which city he was a resident for many years, and in which county and elsewhere he left property, both real and personal, of considerable value. He left a last will and testament which had been executed by him on August 25, 1923, which was in due course admitted to probate in said court on the 19th day of June, 1924. Thereafter, and on July 31, 1924, Leland Gunther Hewitt, a minor, then of the age of 19 years, appearing by his guardian ad litem, filed his petition in said court for the revocation of said will, alleging that the decedent was unmarried during his life, and at the time of his death left surviving him as his only relative and heir at law the said minor, who was the son of a daughter of a brother of said deceased. Two grounds of contest were urged by said petitioner for the revocation of said will; the first being that said decedent was not at the time of the execution of his said will of sound mind, and was not competent to make a will; second, that at the time said decedent executed his said last will and testament he was laboring under a certain insane delusion with respect to said petitioner, and that as a result thereof he had made no provision for said petitioner in said will, but, on the contrary, had expressly refrained from so doing. The executor of said will, Charles P. Cutten, and two legatees named therein, E. L. French and Mrs. W. H. Mathews, appeared separately, although by the same counsel, and by their respective answers put in issue the averments of said petition with relation to the deceased's unsoundness of mind and of the existence of the alleged insane delusion at the time of the execution of said will. The issues thus presented came on for trial, and were heard before said court, on the 8th day of June, 1925; the said hearing occupying several days. At the conclusion of the petitioner's case, the respondent made a motion for nonsuit upon each of the said grounds of contest, based upon the insufficiency of the proof offered by the petitioner in support thereof. The court granted said motion, and thereupon entered its judgment, refusing to revoke the probate of said will. The petitioner moved for a new trial, and upon the denial thereof has taken and prosecutes this appeal.

The sole questions presented upon this appeal relate to the sufficiency of the evidence offered on behalf of said petitioner as presenting a sufficient case to go to the jury. Upon the issue of the alleged unsoundness of mind of said decedent, the petitioner presented three witnesses; namely, A. Hanney, Mrs. Edith Rochat, and the petitioner, Leland G. Hewitt. The witness A. Hanney testified that he had known the decedent from the year 1920 up to the time of his death; that he had seen him nearly every day while he was living in a cabin which he had rented from said decedent, up to July, 1921, when the deceased had gone to San Francisco, where he remained for 3 or 4 months, after which he had gone to live with Mr. French in Eureka. The witness saw him there once a month when he went to pay his rent; seeing him about as frequently after the deceased had gone to live at the home of Mrs. Edith Rochat in the summer of 1923. The witness did not see the testator at all during the months of August, September, October, or November, 1923, but saw him at intervals after that time when he went to pay his rent to him up to a month before he died. The evidence of this witness shows that the deceased during the time he knew him had gradually become physically weakened with his advancing years, and that he had a number of physical ailments which not infrequently accompany old age, and that upon certain specific occasions, of which the witness gave details, he had displayed a certain forgetfulness and lack of memory, but that upon other occasions, both before and after these specific instances, the mind of the decedent had been clear and his memory good, and that the witness, in the capacity of the tenant of the deceased, had continued to transact business with the latter both before and after the date of the execution of his will, and up to within a month of the time of his death. This witness did not see the testator during the period preceding the date of the execution of his will for several weeks and after the execution for more than 3 months, and his testimony, with the exception of that portion therof which deals with the physical condition of the decedent and with his occasional lapses of memory, sheds no light whatever upon the capacity of the decedent to make and execute his will on August 25, 1923, or as to his soundness of mind at and for a considerable period before and after said date.

As to the testimony of the contestant, Leland Gunther Hewitt, it may be dismissed as to the first ground of contest with the statement that he had not seen the testator at all since July, 1922, when he paid him a brief visit, during which the testator talked rationally to him, and readily remembered a former visit which he had paid him during earlier months in the same year. His testimony, therefore, could cast no light upon the capacity of the testator to make or execute his will at the date thereof in August, 1923.

The remaining witness offered by the contestant was Mrs. Edith Rochat, who testified that she had not known the deceased prior to August 3, 1923, when he was brought to her house by Mr. French, and when arrangements were consummated by which he made his home with her thereafter up to the time of his death. This witness testified to the weakness and rather distressed physical condition of the deceased when he first came to live with her, and also testified to her treatment of his disorders, and to the fact that his physical system responded to her treatment in so far as it was possible, considering his advanced years. This witness gave testimony in considerable detail, both upon direct and cross-examination, with relation to the decedent's physical infirmities, and also with relation to his mental habitudes; but, aside from this, she gave no evidence whatever which could be of any possible aid to the contestant in so far as it related to the decedent's mental capacity during the period of his residence with her, and particularly during the period preceding, including, and succeeding the time of the making and execution of his said will. On the contrary, this witness, upon her cross-examination, went fully and in detail into the precise circumstances attending the execution of said will and particularly embracing his direction to the attorney who prepared said will with respect to the condition of his properties and with relation to his intended disposition thereof. Upon these subjects this witness offered the most positive evidence as to the soundness of the decedent's mind as to this perfect knowledge of the state of his business affairs and as to his thorough understanding and explicit directions as to the objects of his bounty and contents of his will. The foregoing was the state of the evidence as to his first alleged ground of contest when the contestant closed his case.

As to the second alleged ground of contest, namely, the alleged insane delusion of the testator with relation to the contestant as reflected in the terms of his said will, it appears therefrom that the testator in his said will assigned as his reason for making no provision for the contestant in his said will the following:

> "Seventh. My closest relative is Leland Gunther Hewitt, who is a son of Martha Gunther Hewitt. I have purposely made no provision for him in this will for the reason that I have heretofore given property to him of which he has made bad use. Because of the manner in which

he handled this property it is my belief that anything which I might give him by this will would be used unwisely, and it is my desire and intention, so far as I am able to do so, to leave my property to persons who will care for the same and make good use of it. It is for that reason that I have made no provision for Leland Gunther Hewitt by this will."

It is asserted by the petitioner as his second ground of contest that the foregoing statements of the testator in his said will were entirely untrue, and amounted to an insane delusion on his part with relation to the same and to the contestant. In support of this ground of contest, the contestant became his own witness, and undertook to testify upon his direct examination that the relation between himself and the testator had been at all times friendly; that the testator had never at any time given him any property other than that of certain occasional presents of money, and that he had never handled any property which he had received from said decedent unwisely. Upon the cross-examination of said contestant the facts were brought out, however, that at one time, when the contestant was quite young, the testator had deeded some property to the father of the contestant in trust for him, and that the taxes on this property had been allowed to go delinquent, and that it had been sold for such delinquent taxes, and that later a bank had obtained a judgment against the contestant and his father upon a note signed by both, and that the property had been sold upon execution. It is true that the contestant testified that he had never heard of the deed from the decedent to his father in trust for him or of the sale of said property for delinquent taxes or upon such execution. But it nowhere appears from his evidence or from that proffered on his behalf that the foregoing facts had not been brought to the attention of the testator prior to the time when he executed his said will and when he embraced therein his foregoing statement as to his reason for making no provision for the contestant therein.

[1, 2] With respect to the law of the case, it may be said as to the appellant's first ground of contest that the evidence, when viewed in the light of the authorities, must be held entirely insufficient to justify the trial court in sending that branch of the case to the jury. The recent decisions of this court in cases quite similar to the instant case, in so far as they relate to the physical condition and soundness of mind of aged testators, leave no doubt as to the correctness of the ruling of the trial court in granting the motion for nonsuit herein. The requirement, as clearly stated in these decisions, that the presumption that a person is of sound mind, and that the burden is always upon the contestant of the will of such person to show affirmatively that the testator was of unsound mind at the time of the execution of his said will, has been wholly unsatisfied by the evidence offered by the contestant in the instant case, for, while it does appear that the testator was old and feeble physically, and that he was suffering from many of the infirmities of old age, and was approaching the term of his life at the time of the making of his will, the evidence wholly fails to show that with respect to his mental condition before and at the time of and after the date of the execution of said will he was not in a mental condition to fully understand the condition of his properties and the nature and consequences of his act. The cases above referred to are: Estate of Dole, 147 Cal. 188, 81 P. 534; Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Dow, 181 Cal. 106, 183 P. 794; Estate of Casarott, 184 Cal. 73, 192 P. 1085; Estate of Perkins (Cal. Sup.) 235 P. 45.

[3, 4] With respect to the alleged insane delusion of the testator and of the law applicable thereto, it may be said that, while it may be conceded that the testator was not altogether justified in the opinion as expressed in his said will that the contestant had received and had not made proper use of properties which had theretofore been given him by the testator, it cannot be said that his mistaken understanding, if it be such, upon that subject amounted to an insane delusion, since it appears from the evidence that there was some basis of fact underlying the testator's belief upon that subject. An insane delusion is not only one which is error, but one in favor of the truth of which there is not only no evidence, but regarding which there is the clearest evidence to the contrary. It is a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of his belief or knowledge of any fact which would in reason or in probability furnish evidence in its support. The law upon this subject has been very fully and ably set forth in Estate of Scott, 128 Cal. 57, 60 P. 527; Estate of Allen, 177 Cal. 668, 171 P. 686; Estate of Russell, 189 Cal. 759, 210 P. 249; Estate of Perkins (Cal. Sup.) 235 P. 45; Estate of Shay (Cal. Sup.) 237 P. 1079, and cases cited. It follows from these authorities as applied to the facts of this case that the contestant herein furnished no sufficient evidence of an insane delusion on the part of said testator as would have served to justify the trial court in denying the respondent's motion for a nonsuit upon that ground also.

It follows that the judgment herein must be, and the same is hereby, affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

199 Cal. 135

In re KIRBY'S ESTATE. (S. F. 11810.)

(Supreme Court of California. July 26, 1926.)

1. Wills 🔑525—Beneficiary held entitled to one-third of testator's "estate," after payment of debts and expenses, under will directing that he receive one-third of proceeds of sale of all of testator's estate.

Under will directing sale of all of testator's estate, one-third of proceeds of such sale to go to certain beneficiary, such beneficiary *held* entitled to one-third of estate rather than one-third of proceeds of sale; "estate" being residue in hands of executrix after payment of decedent's debts and expenses of administration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate.]

2. Wills 🔑525.

"Proceeds" of sale of testator's mortgaged real estate within gift of one-third of proceeds *held* selling price less amount of mortgage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proceeds.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Emma L. O'Neil Kirby, deceased. From a decree of distribution directing certain payment to Patrick Mulligan, Maud Junkins, executrix and residuary legatee, appeals. Reversed, with directions.

Tobin & Tobin, William B. Ryder, and Olin L. Berry, all of San Francisco, for appellant Maud Junkins, as executrix.

John J. O'Toole, of San Francisco, for respondent.

CURTIS, J. Emma L. O'Neil Kirby died on the 5th day of May, 1924, leaving a last will and testament which was duly admitted to probate in the superior court of the city and county of San Francisco. A portion of the third paragraph of said will reads as follows:

> "3. I hereby direct that all of the estate of which I may die seized or possessed be sold as soon as possible after my death. The proceeds of said sale I hereby devise and bequeath as follows: (1) One-third (⅓) thereof to Rev. Patrick Mulligan of St. Joseph's Church, San Francisco, California, to do with as he sees fit."

Then follows a bequest of $500 to Jessie Weigmore, a second bequest of $500 to Rev. Patrick Mulligan "for masses for the repose of my soul and the souls of the members of my family," a bequest of $300 to Abbie Bone, and finally all the rest and residue of the estate to Maud Junkins, whom the testatrix appointed executrix of her will. At the time of her death the estate consisted of the sum of $20 in money and a parcel of improved real property situated in the city and county of San Francisco, which was subject to a mortgage given to secure the payment of a promissory note for $2,100. During the administration of the estate the executrix, prior to the sale of said real property, collected $869.50 in rents therefrom. The real property was sold by said executrix for $9,000, and after deducting the amount of the mortgage the estate received therefrom the sum of $6,900. The total amount of money, therefore, which came into the hands of said executrix, was the sum of $7,789.50. The debts of said deceased and the expenses of administration amounted to $1,814.12, which, deducted from the total amount of money received by said executrix, left for distribution the sum of $5,975.38. This amount was distributed by the probate court as follows:

To Rev. Patrick Mulligan....................	$3,000 00
To Mrs. Jessie Weigmore....................	500 00
To Rev. Patrick Mulligan for masses for the repose of the soul of said deceased and for the repose of the souls of the members of her family	500 00
To Abbie Bone..................................	300 00
To Maud Jenkins, the remainder............	1,675 38
Total	$5,975 38

[1, 2] From the decree of distribution, Maud Junkins, the residuary legatee, has appealed. The claim of the appellant is that under the terms of said will Rev. Patrick Mulligan, aside from the sum of $500 bequeathed to him for masses for the repose of the soul of said deceased and the members of her family, is entitled only to one-third of the estate of said deceased after the payment of the claims against said estate and the expenses of administration, which would be one-third of $5,975.38, or the sum of $1,991.80, instead of the sum of $3,000, the amount distributed to him by the probate court. The solution of this question involves the proper construction of that portion of the third paragraph of said will above set out. By this portion of the will it will be noted that the testatrix directed that all of her estate be sold, and the Rev. Patrick Mulligan was bequeathed one-third of the proceeds of said sale. Did the testatrix by this provision of her will intend to bequeath to Rev. Patrick Mulligan one-third of the gross proceeds of the sale of the property of said estate, or did she intend to bequeath to him one-third of the net proceeds of the sale of said property after the payment of the mortgage thereon, or did she intend to bequeath to him one-third of her estate after the payment of all her debts and the expenses of administration? We think it quite obvious that she did not intend to beqeath to Rev. Patrick Mulligan one-third of the gross proceeds of said sale. All the proceeds received from the sale of

said property was the amount of its selling price less the amount of the mortgage then a lien upon said property. The amount due on the mortgage in all probability and, if the usual practice governing transactions of this nature were followed in making said sale, never actually came into the hands of the executrix, but was paid over to the mortgagee at the time of the sale, and only the net proceeds of said sale was received by the executrix, in which event only the amount actually received by the estate could be considered as the proceeds of the sale. But had the full purchase price of said real property actually been paid to said executrix and had she thereupon paid to the mortgagee from said proceeds the amount of the mortgage, the result thereof would have been the same. The proceeds of said sale would have been the amount remaining in the hands of the executrix from the selling price of said real property after the payment of said mortgage lien thereon. No purchaser of said real property would have paid to the executrix the full purchase price which he was paying for said property until said mortgage debt had been paid and said mortgage satisfied and discharged. We are satisfied that it was not the intention of said testatrix to give to Rev. Patrick Mulligan one-third of the gross proceeds of said sale.

The next question that presents itself is: Did the testatrix by the above provision of her will intend to bequeath to Rev. Patrick Mulligan one-third of the proceeds of that portion of the property of her estate as might be sold and converted into money, or did she intend that he should receive one-third of her estate after the payment of all just claims against it? That the testatrix had in mind her whole estate is apparent from the wording of this paragraph of her will. She directs her executrix to sell all of the estate of which she died seized or possessed as soon as possible after her death. She then proceeds to dispose of the proceeds of said sale, evidently dealing with said proceeds as her entire estate. She bequeaths one-third thereof to Rev. Patrick Mulligan and the remainder to others of her acquaintance. She makes no mention of her debts or of expenses of administration. It must be presumed, however, that she knew she had certain debts and that there would be expenses incurred in the settlement of her estate. It must also be assumed that she knew that these must be paid before any of such proceeds of said sale or any of her estate could be distributed to her legatees. It is apparent, therefore, that in the making of the said bequests she did so with the knowledge that it would be necessary for her executrix to pay the debts of the estate and the expenses of administration before her legatees could be paid the respective sums of money bequeathed to them, and that her intention was that such bequests would become effective only as to the amount of her estate remaining in the hands of her executrix after the payment of all just and legal claims against the same. That under a proper construction of said will, Rev. Patrick Mulligan would receive one-third of the estate of said deceased and not one-third of the proceeds of the sale of the property thereof, we think, might be more apparent if we consider its provisions in the connection with a slightly different set of facts. Let us suppose that said testatrix had sold said real property herself prior to her death and had collected the purchase price thereof, and that all of the estate coming into the hands of said executrix consisted of money. Could it reasonably be claimed that because there was no property to be sold by said executrix, and consequently she received no proceeds from any sale made by her, that the bequest to Rev. Patrick Mulligan would fail entirely? We think not. On the other hand, we believe that under such a set of facts it would be most reasonable to hold that it was the intention of said testatrix, by the above provisions of her will, that Rev. Patrick Mulligan should receive one-third of the estate left by her rather than to limit him to one-third of the proceeds of the sale of property, and as there was no property to be sold, to deny him any right to participate in the distribution of said estate. We will also suppose another set of facts. Instead of there being only $20 in money left by testatrix, suppose that there had been $10,000 in money left by her. Could it be seriously contended in such a case that the bequest to Rev. Patrick Mulligan was limited simply to the proceeds of the property of the estate which might be sold and that he was not to participate to any extent in the money left by said deceased? We think not. The provision of said will that all the property of the estate of said deceased be sold, and that one-third of the proceeds of said sale be given to Rev. Patrick Mulligan, would, in our opinion, have carried with it one-third of all her estate, notwithstanding the fact that a portion thereof was money which had come into the hands of said executrix from sources other than through a sale of property belonging to her said estate. In other words, we think it was the clear intention of said testatrix to bequeath to Rev. Patrick Mulligan one-third of her estate rather than one-third of the proceeds of the sale of the property of said estate. By one-third of the estate, we, of course, mean one-third of the residue remaining in the hands of said executrix after the payment of the debts of said deceased and the expenses of administration.

Under this construction of the above paragraph of the last will and testament of said deceased, the question of whether the bequest to Rev. Patrick Mulligan was a specific bequest or not becomes immaterial. If the bequest to him, as we have so held, was one-third of the estate of said deceased, then all he would be entitled to under the will would be one-third of the money belonging to the estate after the payments of the debts and expenses of administration. By the terms of the decree of distribution there was distributed to him an excess of said amount, and to this extent said decree is erroneous.

For this reason said decree is reversed, with direction to the trial court to enter an order and decree of distribution in accordance with the views herein expressed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

199 Cal. 113

In re KING'S ESTATE.

PRITCHARD v. KING.

(S. F. 11556.)

(Supreme Court of California. July 14, 1926.)

1. Executors and administrators ⚷314(3)—Application filed in probate court, asserting right to decedent's entire estate as surviving partner, held to require no action by administratrix before petitioning for distribution.

Application filed in probate court, wherein decedent's alleged partner asserted that entire estate was partnership property, to which she was entitled, and demanded delivery, *held* not a creditor's "claim," since right asserted was that of stranger to estate, and administratrix' failure to act thereon did not impede right to petition for distribution when estate was otherwise in condition.

2. Executors and administrators ⚷435—Probate court lacks jurisdiction to determine claims to estate in course of administration asserted by stranger to estate.

Probate court has no jurisdiction to determine adverse claims to properties of an estate in course of administration before it when asserted by stranger to estate.

3. Executors and administrators ⚷314(11)—Applicant held not entitled to have claim to decedent's entire estate as his surviving partner determined on administratrix' petition for distribution and prior to distribution (Code Civ. Proc. § 1664).

Alleged surviving partner *held* not entitled to present and have determined her claim to entire estate of decedent, on ground that it was partnership property, on administratrix' petition for distribution and prior to distribution thereof, notwithstanding Code Civ. Proc. § 1664, since she was an adverse claimant.

4. Executors and administrators ⚷314(3)—Provision for petition to court to declare to whom distribution should be made, held applicable to right claimed in privity with estate (Code Civ. Proc. § 1664).

Code Civ. Proc. § 1664, providing that any one claiming to be entitled to distribution of an estate may petition court to declare rights of all persons and to whom distribution should be made, *held* applicable only to determination of rights claimed in privity with the estate.

5. Executors and administrators ⚷314(3)—Adverse claimant to estate, not instituting action to determine claim prior to time for distribution of estate, held not entitled to have distribution delayed.

Alleged surviving partner of deceased *held* not entitled on application therefor, made on day set for hearing on petition for distribution, to have distribution delayed until she might litigate asserted right to receive entire assets, since prior thereto she should have instituted action in proper court to determine claim.

6. Executors and administrators ⚷314(3).

Distribution cannot be delayed to await determination of prospective litigation by adverse claimants when estate is otherwise ready for distribution.

In Bank.

Appeal from Superior Court, Alameda County; George E. Samuels, Judge.

Petition by Hazel Hubbard King, as administratrix of estate of Fred G. King, for distribution. From a decree directing final distribution, Sadie E. Pritchard, claimant, appeals. Affirmed.

C. Franklin Baxter, of Los Angeles, and Hamilton A. Bauer, of San Francisco, for appellant.

George Clark Sargent, of San Francisco (Charles J. Heggerty, of San Francisco, of counsel), for respondent.

RICHARDS, J. This appeal is from a decree of distribution made and entered in the above-named estate. The appeal is taken by one Sadie E. Pritchard, who claims to be a surviving partner of the decedent, and who sought to assert her right as such in the course of the proceedings in the probate court for the administration of said estate, and by seeking to have set aside to her therein and upon the distribution thereof the entire property of said estate. The following are the facts of the case as disclosed by the record upon appeal: Fred G. King died on December 11, 1920, and letters of administration upon his estate were thereafter and in due course issued to his surviving widow on January 4, 1921. Notice to creditors was thereafter duly published and a decree establishing due notice to creditors entered on December 7, 1921. On May 2, 1921, the appellant presented and filed in the probate court a document entitled "Notice of sale surviving partner," wherein the appellant proceeded to set forth that she was, between the years 1891 and 1920 and up to the date of the death of said decedent, his equal partner in all his various deals and business enterprises, and that all of his estate was partnership property, and that she was entitled to have the possession of all of said property delivered to her as such partner by the administratrix of said estate, and she thereby demanded such delivery and an accounting as to the business of said partnership. The administratrix apparently took no action with reference to the claim and demand of the appellant as set forth in said document; nor did the appellant, so far as this record discloses, take any further action thereon until the time arrived for the final distribution of said estate and until the administratrix, in September, 1924, presented her final account and petitioned for such distribution. Notice of the hearing upon said last-named petition having been duly given, the appellant herein again appeared and filed another document, wherein she again asserted and set forth substantially the same facts with regard to her partnership relation to said decedent and her right as such partner to the whole of the property of said estate as the assets of such partnership, and prayed that the said court "ascertain and declare the rights of your petitioner and all persons to said estate and all their interests therein and to whom distribution thereof should be made and make a distribution thereof accordingly." The hearing upon the petition for distribution of said estate came on regularly before said court on the 5th day of November, 1924, and on said date and at the time of said hearing the appellant again appeared and filed another document entitled "Protest to the distribution and final account," wherein she again reasserted and repeated her previous averments with relation to said partnership and to the properties of said estate, and objected to the distribution of said estate to the heirs of said decedent as prayed for in the petition for distribution, and added thereto a prayer that the distribution of the estate be held in abeyance until such time as would enable her to establish her contention with relation to the properties of said estate. The probate court apparently disregarded each and all of these several petitions and protests on the part of said appellant and proceeded to make and enter its decree of distribution of said estate to the widow of said decedent and to his son and daughter, who were shown to be his heirs. This appeal is from said decree of distribution.

The appellant makes three contentions upon this appeal: First, that she was entitled to have her first application filed herein acted upon by the administratrix as a "claim" against said estate, and that, in the absence of such action upon her said "claim," said estate was not in condition for distribution at the time of the making and entry of the decree therefor, from which this appeal is taken; second, that the appellant was entitled to have her said claim to the properties of said estate as the surviving partner of said decedent considered and determined under the provisions of section 1664 of the Code of Civil Procedure and prior to the distribution of said estate; third, that the appellant was entitled to have the distribution of said estate delayed in accordance with her prayer therefor until such time as she could have litigated and determined her claim to the properties of said estate as the surviving partner of said decedent.

[1, 2] With respect to the first of these contentions, we find it to be without merit. An examination of the document first presented by the appellant herein in the course of the administration of said estate discloses that it is in no sense a creditor's claim against said estate, since the sole right which the appellant asserted therein was that of a hostile claimant to the whole of the properties of said estate as the surviving partner of the decedent, King. She thus placed herself in the position of a stranger to said estate, seeking to have her claim to the ownership of the whole of the properties of said decedent litigated and determined in the probate court and in the course of the administration of said estate. That the probate court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate has been fully determined in numerous decisions by this court. Theller v. Such, 57 Cal. 447; Bath v. Valdez, 70 Cal. 350, 11 P. 724; Barnard v. Wilson, 74 Cal. 512, 16 P. 307; Estate of Ryder, 141 Cal. 366, 74 P. 993; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981. This being so, the administratrix of said estate had cast upon her no duty to take any action whatever upon the asserted right of the appellant to have delivered over to her the properties of said estate, and it follows that her failure to take such action in no way impeded the right of said administratrix when said estate was otherwise in a condition for distribution to present her petition for the distribution thereof.

[3, 4] With regard to the second contention of the appellant herein, that upon the presentation of said petition for distribution she was entitled to present and have determined her aforesaid claim to the ownership and possession of the entire properties of said estate, under the provisions of section 1664 of the Code of Civil Procedure, we are of the opinion that this contention has also no merit. It is true that section 1664 of said Code provides that any person claiming to be an heir of the deceased or entitled to distribution in whole or in any part of an estate in course of administration may file a petition "praying the court to ascertain and declare the rights of all persons to said estate and all interests therein and to whom distribution thereof should be made," and that such persons may set forth therein "their respective claims of heirship, ownership or interest in said estate"; and that after notice given as provided in said section the court shall "acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate and

the title and ownership of said property." The foregoing provisions of said section, however, and the proceedings which are referred to therein for the determination of the issues provided for in said section, have been uniformly held by this court to have application only to the determination of rights claimed in privity with said estate and to have no application to the rights or titles of persons claiming adversely thereto. In re Burton, 93 Cal. 459, 29 P. 36; In re Blythe, 112 Cal. 689, 45 P. 6; McDonald v. McCoy, 121 Cal. 55, 53 P. 421; More v. More, 133 Cal. 489, 65 P. 1044, 66 P. 76; Whalen v. Smith, 163 Cal. 360, 125 P. 904, Ann. Cas. 1913E, 1319.

[5, 6] With respect to the third and final contention of the appellant herein to the effect that she was entitled upon her application therefor, made upon the day set for the hearing upon the petition for distribution, to have the distribution of said estate delayed until such time as she might require to have litigated and determined her adverse claim as surviving partner of said decedent, we find no semblance of merit in said contention. If said appellant had or has any right as surviving partner of said decedent to receive and administer the properties of said estate as the assets of said alleged partnership, it was clearly her duty long prior to the time for the proper distribution of said estate to have instituted an action in a court of law or equity for the determination of her said claims, and doubtless upon the institution of such action and upon a proper showing made therein she would have been accorded the right to have the distribution of the properties of the estate of her deceased partner reasonably delayed in order that her aforesaid claims might in a proper forum be determined. The appellant, however, herein has made no showing of this sort, and it has been fully determined that the distribution of estates cannot be delayed in order to await the determination of prospective litigation by adverse claimants to the properties or any portion thereof of an estate when the same is otherwise ready for distribution. Estate of Ross, 180 Cal. 643, 182 P. 755.

The decree appealed from is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

---

199 Cal. 147

McFARLAND v. SPENGLER. (L. A. 9011.)

(Supreme Court of California. July 28, 1926.)

1. Elections 🔑181—Right of voting for person whose name is not printed on ballot held limited to writing name in blank space provided therefor (Pol. Code, §§ 1196, 1197, 1203–1206, 4480, and section 1211, subd. 1).

Under provisions relating to voter's privilege of voting for person whose name is not printed on the ballot, Pol. Code, §§ 1196, 1197, 1203–1206, and section 1211, subd. 1, when construed together pursuant to section 4480, the privilege is limited to writing the name in the blank space provided for the purpose.

2. Elections 🔑180(1)—Legal requirements prescribing manner of voting must be complied with, though voter's intention may be determined (Direct Primary Law, § 18).

Where statutes prescribe manner of voting, such requirements must be complied with, notwithstanding provision in Direct Primary Law, § 18, that no ballot shall be rejected for technical error not rendering it impossible to determine voter's choice.

3. Elections 🔑182—Vote evidenced by sticker held not validated by provision that an unauthorized mark shall not invalidate ballot unless for identification (Pol. Code, § 1211, subd. 4).

Pol. Code, § 1211, subd. 4, providing that no unauthorized mark upon a ballot shall invalidate such ballot unless placed thereon for purpose of identifying ballot, does not validate vote indicated by use of sticker, though not used as means of identification.

4. Elections 🔑182—Use of stickers held not "writing" in of name, and was unauthorized and illegal (Pol. Code, §§ 16, 17, 1196, 1197, 1203–1206, and 1211, subd. 1).

Use of stickers on which was printed name of person whose name was not on printed ballot, and which were pasted on ballot by voters, *held* unauthorized, under Pol. Code, §§ 1196, 1197, 1203–1206, and 1211, subd. 1, requiring "writing" in of name, notwithstanding sections 16 and 17, providing that "writing includes printing."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Write—Writing.]

In Bank.

Appeal from Superior Court, Kern County; T. A. Norton, Judge.

Action contesting election by J. B. McFarland, contestant, against Gus Spengler, contestee. Judgment for contestant, and contestee appeals. Affirmed.

Emmons & Aldrich and Dorsey & Campbell, all of Bakersfield, for appellant.

Alfred Siemon, Paul F. Garber, and Claflin & Lambert, all of Bakersfield, for respondent.

SHENK, J. This is an election contest. In 1924 J. B. McFarland, the contestant and respondent, and Gus Spengler, the contestee and appellant, were rival candidates for the office of member of the board of supervisors of Kern county. At the primary election in August, McFarland received the greater number of votes. By reason thereof he won and Spengler lost the right to have his name printed on the official ballot to be used at the general election in November (Stats. 1921, p. 1218). Spengler, however, continued to be a candidate for the same office at the general election. He organized and carried on what is called a "sticker" campaign. He caused slips of paper to be prepared, on one side of which his name was printed in the same sized type used in printing the names of candidates on the ballot, and on the other side of which was mucilage, to enable the voter to paste the slip upon the official ballot. These stickers were circulated among the electors, with the request that they be used at the general election by pasting the same on the official ballot in such way that they would cover the blank space left upon the ballot to permit electors to write in the name of a person other than McFarland for whom they might desire to vote for that office. It developed as a result of the campaign that 701 sticker ballots were cast for Spengler, which, when counted with other ballots on which the name of Spengler was written in the usual way, gave Spengler a majority of 90 votes. Without counting the sticker votes McFarland received a majority. On the contest, the trial court rejected the 701 sticker votes and declared McFarland elected. From a judgment to that effect Spengler has appealed. The only question for determination on the appeal is whether the use of stickers, employed as above indicated, is authorized by the laws of this state.

Prior to 1891 there appears to have been no lawful authorization for *writing in* the name of a person not found upon the ballot. In that year, section 1196 of the Political Code was amended so as to provide for blank spaces on the ballot, and further providing:

> "Nothing in this Code contained shall prevent any voter from *writing* upon his ballot the name of any person for whom he desires to vote for any office, and such vote shall be counted the same as if *printed* upon the ballot, and marked as voted." Stats. 1891, p. 170.

Thereafter, other sections of the Code were amended so as to conform to the same plan. In 1903, section 1197, providing the form of the ballot and the instructions to voters, was amended so as to require the ballot to contain in the instructions to voters the following: "To vote for a person not on the ballot, *write* the name of such person, under the title of the office, in the blank column" provided for that purpose. Stats. 1903, p. 147. Prior to 1919, section 1203 imposed upon the election officers the duty to see that the stamps and ink pads were in the voting booths and in condition for proper use. In 1919 that section was amended so as to provide that no "supplies or conveniences shall be furnished other than the ink pads and stamps by which a cross (X) may be made as herein provided for," and a provision was inserted that "nothing herein contained shall prevent an elector from using a pencil for the purpose of *writing in* on the ballot the name of any candidate for whom he desires to vote." Stats. 1919, p. 320. Section 1204, in order to prevent voters from marking their ballots contrary to law, provides that it shall be the duty of an election officer, at the time the ballot is delivered to the voter, to state to him, orally and distinctly, so that it may be heard by the bystanders, "that he must mark the ballot with the stamp provided by law or it will not be counted." Stats. 1913, p. 1169. Section 1205 provides how the voter shall prepare his ballot. It is there stated that the elector may also "vote for a candidate or person whose name is not printed on the ballot by *writing* a name for such office in the blank space left therefor," in which case the vote "shall be counted for the person whose name is so *written.*" Section 1206 also provides that boards of election shall not furnish for use in the voting booth "any other or additional means or method by which a ballot may be marked than the ink pads and rubber stamps," and contains the proviso that "nothing herein contained shall prevent an elector from using a pencil for the purpose of *writing in* on the ballot the name of any candidate for whom he desires to vote." Stats. 1919, p. 320. Subdivision 1 of section 1211 provides that "any ballot which is not marked by the elector as provided by law shall be void," and "any name *written* upon a ballot shall be counted for such name for the office under which it is *written;* provided it is *written* in the blank space therefor, whether or not a cross (X) is stamped, or made with pen or pencil, in the voting square after the name so *written.*" In quoting from the Code sections, italics have been supplied.

[1] The foregoing provisions of the Political Code relate to the same subject, and must be read together. Pol. Code, § 4480. They relate to the voter's privilege of voting for a candidate or person whose name is not printed on the ballot, and, when read together and compared, they qualify the right to vote for such a candidate or person by prescribing the method, which is by *writing* the name in the blank space provided for that purpose. The use of the words "writing" and "writing in" and "written" as applied to voting for a person whose name is not on the official ballot, is a clear evidence of intention on the part of the Legislature to exclude other methods not specifically authorized. It has been held, and may well be said to be the general rule, that:

> "If a statute so provides, but not otherwise, the electors may use printed pasters for the insertion of names not upon the ballot instead of writing them in the space reserved for their reception." 15 Cyc. 356, and cases cited.

Whether the laws of this state authorize the use of stickers has not been directly presented or passed upon by this court, but sufficient attention has been called to the subject to indicate that, if the Legislature intended that stickers were to be used, they should be specially authorized by statute. Section 1204 as adopted in 1872 contained the provision that, if upon any ballot a name had been erased and another substituted therefor in any other manner than by the use of a lead pencil or common writing ink, the substituted name must be rejected. Concerning this provision, the Code commission said:

> "This section is intended to prevent the use of nitrate of silver, or any other chemical substance which may be written over a name and not be distinguishable until time brings out the impression; also to prevent the use of pasters, the use of which is subject to two objections: First, their liability to come off; second, their liability to be fraudulently taken off." Pol. Code, Annotated, 1874 (1st Ed.) vol. 1, p. 282.

This note of the Code commission was favorably commented upon in Rutledge v. Crawford, 91 Cal. 526, 27 P. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212. In Russell v. McDowell, 83 Cal. 70, 23 P. 183, the court was considering the validity of certain ballots upon which the name of a candidate for sheriff had been printed without authority. In the course of the opinion the court said:

> "The general object of the law was, of course, to give effect to the real intention of the voter—to secure the counting of his ballot in favor of the candidates of his choice—and it contained many specific provisions to that end. But the general rule for ascertaining the intention of the voter was to read his ballot as printed or written, and be guided by that. To this rule there were no exceptions, save those expressly provided for. One of these, contained in section 1204 of the Political Code, related to *pasters*—a fraud of the same kind, though clumsier and more easily detected than spurious tickets. It is surprising that the Legislature did not from the beginning deal with names fraudulently *printed* on tickets exactly as it dealt with names fraudulently *pasted* on tickets."

And it has been held that the provisions of section 1205 as to the manner of voting are mandatory. Sweetser v. Pacheco, 172 Cal. 137, 155 P. 639.

The foregoing comment of the Code commission to the effect that section 1204 was intended to prevent the use of pasters and the comments of this court in the cases above cited to the same effect have been a part of the legislative and judicial history of the state for over 40 years. Such being the case, it is significant that the Legislature has not so amended the election laws as to specifically authorize the use of stickers if it was intended that they should be used. In the absence of a change in the law so as to authorize them, we conclude that it was never the intention of the Legislature to permit that method of voting.

[2] Appellant attempts to justify the use of stickers by reference to the rule laid down in section 18 of the Direct Primary Law that:

> "No ballot shall be rejected for any technical error which does not render it impossible to determine the voter's choice." Stats. 1911, p. 785.

In Castagnetto v. Superior Court, 189 Cal. 673, 209 P. 548, relied upon by the appellant, it was held that a primary election ballot marked with a pencil cross was not invalid under said section. But special attention was called in that case to the fact that the general election law did not permit such a marking of the ballot and that the provisions of said section 1205 were mandatory. Assuming, however, that a general election ballot marked with a pencil cross would be valid, it would not follow that the pasting of a paper on the ballot would satisfy the statutory requirement that the name be *written* on the ballot by the voter. True, the intention of the voter must be ascertained, but it is not enough to find out generally the voter's intention. Such intention must be expressed in the manner prescribed by law. People v. Town of Sausalito, 106 Cal. 500, 39 P. 937. When the method of expressing the voter's intention is prescribed by authority of law, such method becomes a matter of substance. 10 Cal. Jur. 78, and cases cited. In other words, the right to express one's choice of a candidate at the polls is not unrestricted. It is subject to reasonable regulation in the interest of secrecy and uniformity of the ballot and the fairness of the vote, etc. Spier v. Baker, 120 Cal. 370, 52 P. 659, 41 L. R. A. 196.

> "It appears to be the universal rule in all states which have adopted the so-called Australian system, as said by the Supreme Court of Iowa in Whittam v. Zahorik, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317, 'whether a ballot should be counted does not depend solely upon the power to ascertain and declare the choice of the voter, but also upon the expression of that choice in the manner provided by the statute.' To put it in another way, as was said in Vallier v. Brakke, 7 S. D. at page 354, 64 N. W. at page 184: 'The statute having prescribed the manner in which the elector may designate by marks upon his ballot the candidate for whom he intends to vote, and declared the effect of such marks, neither the judges of election nor the courts are authorized to go beyond those marks in order to ascertain the voter's intention.'" Pleasant Grove U. S. Dis. v. Algeo, 61 Cal. App. 660, 215 P. 726.

See, also, Covina Union High School Dis. v. McClellan, 67 Cal. App. 640, 228 P. 409.

[3] Subdivision 4 of section 1211 provides:

> "No mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot."

The appellant contends that this Code provision is full justification for holding the sticker votes valid and counting them in his favor. It may be assumed that the stickers were not placed on the ballots by the voters for the purpose of identifying the same. With that assumption the stickers would not invalidate the whole of said ballots, but the

Code provision does not purport to validate an unauthorized vote shown on a valid ballot. The objection to the ballots offered in evidence by the appellant was that they did not disclose a valid vote for Spengler, and the objection was sustained on that ground, and not on the ground that said ballots were invalid in their entirety.

[4] Appellant again seeks to justify the use of stickers by reference to sections 16 and 17 of the Political Code, where, in defining words and phrases, it is provided that "writing includes printing and typewriting." It is argued that, as the sticker contained printing, the pasting thereof on the ballot is equivalent to writing the name on the ballot. This is a non sequitur. The Code provisions plainly require that the impression made on the ballot by writing the name of the candidate in the blank space shall be manually accomplished by the elector while in the voting booth.

Appellant strongly relies on the case of Snortum v. Homme, 106 Minn. 464, 119 N. W. 59, where it was held that the words "write" or "written," when applied to the statutory right of the voter to write other names on the ballot in the blank space under the printed names, included "any mode of representing the words or letters" as provided by the laws of Minnesota, and it was there decided that an elector, before going into the booth, could provide himself with, and later use in marking his ballot, a printed or typewritten paster or sticker. It does not appear that the laws of Minnesota contained the restrictions which are embodied in our Political Code with reference to the supplies and conveniences which may be furnished to the voters. The Supreme Court of Illinois, however, has reached the opposite conclusion on statutory provisions similar to our own, and based on what is deemed the better reasoning. Fletcher v. Wall, 172 Ill. 426, 50 N. E. 230, 40 L. R. A. 617; McSorley v. Schroeder, 196 Ill. 99, 63 N. E. 697. In the latter case the court very pertinently said:

> "It is manifest that, if pasters may be resorted to by one candidate, they may be by all, and the official ballot might become but little more than a convenient card upon which to paste private tickets printed and circulated in secret. The use of such tickets would revive the evils sought to be guarded against by ballot law."

An examination of the authorities in other jurisdictions shows that the clear weight of authority is to the effect that, if the statute so provides, but not otherwise, stickers may be used. If authorized by statute, the use thereof would necessarily be accompanied by reasonable statutory regulations to guard against any abuses that might otherwise attend the exercise of the right. Since there is no such authorization in this state, it follows that the trial court was correct in excluding the sticker ballots involved herein.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.

CURTIS, J., being disqualified, does not participate in the foregoing opinion.

78 Cal. App. 305

REEDER v. FINDERUP. (Civ. 5612.)

(District Court of Appeal, First District, Division 2, California. June 10, 1926. On Petition for Rehearing June 29, 1926. Hearing Denied by Supreme Court August 9, 1926.)

1. Corporations 🔑170—Maker of note, given to corporation in payment of stock, under corporation's agreement to deliver shares, became stockholder at once.

Where defendant gave note to corporation in payment of stock, under agreement of corporation to deliver shares to him, he became a stockholder, since agreement to deliver was sufficient consideration for note.

2. Bankruptcy 🔑290—Failure of consideration subsequent to bankruptcy adjudication held no defense to suit by trustee of bankrupt corporation on note given to pay for shares.

Where defendant gave note to corporation in payment of shares, under corporation's agreement to deliver shares, and corporation held stock as security, inability to deliver certificate when corporation thereafter became bankrupt was no defense to suit on note by trustee in bankruptcy, since rights of parties date from bankruptcy adjudication.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action upon a promissory note by J. K. Reeder, as trustee in bankruptcy of California Tractors, Inc., against Walter Finderup. Judgment for defendant, and plaintiff appeals. Reversed with directions.

Milton M. Dearing and Robert M. Thomas, both of Fresno, for appellant.

Harris & Hayhurst, of Fresno, for respondent.

NOURSE, J. Plaintiff sued as trustee in bankruptcy of California Tractors, Inc., an insolvent corporation, to recover upon a promissory note executed by defendant in favor of the corporation, and given to cover payment of balance on the purchase of stock of the corporation. The cause was tried on an agreed statement of facts, and judgment went for the defendant. Findings were waived, and the plaintiff presents this appeal from the judgment on the roll and a bill of exceptions containing the statement of facts.

The note upon which the suit is based was executed February 2, 1922, by the defendant. He agreed to pay the corporation $300 ninety days after date, with interest at 7 per cent. and a reasonable attorney's fee if suit were brought for collection. In the statement of facts it was agreed "that on said 2d day of February, 1922, defendant agreed to buy from said corporation, and said corporation agreed to sell to defendant, 5 shares of the capital stock of said corporation for the sum of $500, to wit, at the rate of $100 per share; that thereupon, and on said date, defendant paid said corporation, for said stock, the sum of $200 lawful money of the United States, and made, executed, and delivered to said corporation the promissory note sued on in this action, for the amount of the balance of said sum of $500 to be paid for said shares of stock; that said promissory note was in words and figures as set forth in paragraph II of plaintiff's complaint in this action; that, at the time of said transaction, said corporation held a permit from the commissioner of corporations of the state of California, authorizing it to sell its said stock for cash, lawful money of the United States, or in exchange for 25 per cent. cash and the subscriber's promissory note or notes for the balance thereof, with interest, if any, and that said permit provided, among other things, that all certificates issued to subscribers in exchange for cash and promissory notes should be held by the company as a pledge for the principal amount of said note or notes and interest thereon, if any; that defendant has never paid said promissory note or the interest thereon, or any part thereof, and has never offered so to do, and said corporation has never delivered to defendant the certificates for said shares of stock, and has never tendered or offered delivery thereof to him, and that plaintiff has not delivered or tendered delivery of said certificates to defendant; that no certificate for said stock has ever been made out or entered on the stock book of said corporation, and defendant has not demanded delivery of said certificates, either from said corporation or from plaintiff."

It was further stipulated that, if judgment should be given in favor of the plaintiff herein, it should be in the principal sum of $300 "for interest thereon at the rate of 7 per cent. per annum from February 2, 1922, compounded May 3, 1922, for $75 attorney's fees and for $8.50 costs."

The only defense tendered before the trial court was that there was a failure of consideration, in that the corporation was, because of its insolvency, unable to deliver the stock, and that there had been no delivery or tender before suit was brought. In support of the judgment, the defendant argues that he was neither a stockholder nor a subscriber, but that he had merely "agreed to purchase" the stock, and hence was not liable as either. The answer is in the statement of facts—on February 2, 1922, the defendant agreed to buy 5 shares of the stock of the corporation for the sum of $500, and "that thereupon and on said date defendant paid said corporation *for said stock* the sum of $200, * * * and made, executed, and delivered to said corporation the promissory note sued on in this action for the amount of the balance of said sum of $500 to be paid for said shares of stock."

Thus the agreement to purchase was consummated on the same day by the payment of $200 of the purchase price thereof in cash, and the delivery of the note for the balance, and the defendant thereupon became a stockholder. The certificate evidencing the sale to defendant was held by the corporation as security for the note under an order of the state commissioner of corporations. This transaction took place on February 2, 1922; the suit was filed on January 15, 1925. If the defendant did not have actual notice of the order under which his stock certificate was held by the corporation as security for his note, his failure to demand that it be issued over a period of three years forces the inference that he fully assented to the arrangement. However, the actual issuance of the certificate of stock is of no importance. The certificate is merely evidence of ownership—proof that the party is a stockholder and proof that he is the owner of the stock. But proof of both of these facts can be made without a certificate. Mitchell v. Beckman, 64 Cal. 117, 121, 28 P. 110, 111. In the case cited, the court used language particularly appropriate here:

> "When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration"—citing cases.

[1, 2] It is upon this contract between the corporation and the defendant that this action is based, and the question arises, Is the failure to deliver or tender the certificate a defense to this action? The defendant pleaded in his answer that the note was given in payment of the balance for the stock under the agreement of the corporation to deliver the 5 shares to him, and that the corporation had been unable to make delivery since June 2, 1924, the date of the adjudication of bankruptcy. The agreement of the corporation was, of course, a sufficient consideration for the note, and the note was good as "payment" for the stock. Pacific Trust Co. v. Dorsey, 72 Cal. 55, 57, 12 P. 49. The rights of the parties in this suit date from the adjudication of bankruptcy, and, if the consideration was good at that time—a fact that is admitted because not denied—the subsequent failure of consideration is not a defense to a suit by the trustee.

The judgment must be reversed, and, as findings were waived and the statement of facts is sufficient to cover a judgment for the plaintiff, a new trial is not necessary.

It is therefore ordered that the judgment be reversed, with directions to the trial court to enter judgment for the plaintiff as prayed in accordance with the stipulation of facts on file.

We concur: LANGDON, P. J.; STURTEVANT, J.

On Petition for Rehearing.

PER CURIAM. The respondent has asked for a rehearing of the judgment in the above-entitled cause, rendered by this court on June 10, 1926. In his petition he criticizes the language of the opinion to the effect that he had pleaded in his answer that the note in suit was "given in payment" for the balance of the stock. We had previously given a full statement of the transaction taken from the agreed statement of facts upon which the cause was tried. From this it appeared that the stock was *sold* for $200 cash and the promissory note for the balance, in accordance with the permit of the commissioner of corporations. The language of the opinion criticized was merely our legal conclusion of the effect of the pleading.

We are satisfied from the facts stated that the sale was complete when the note was given and that the liability to the creditors of the corporation dated from that time.

Rehearing denied.

---

78 Cal. App. 334

ORANGE COVE WATER CO. v. SAMPSON et al. (Civ. 3060.)

(District Court of Appeal, Third District, California. June 11, 1926.)

1. Vendor and purchaser ⚷54.

Vendees under contract for sale of realty, based on adequate consideration, acquire equitable title to property.

2. Vendor and purchaser ⚷54—Equitable title of vendees under contract of sale held not destroyed by subsequent agreement in no way affecting rights of vendor.

Equitable title of vendees under contract of sale *held* not destroyed by subsequent agreement, making no change in terms of contract in any way affecting rights of vendor, but amounting only to agreement between vendees respecting their interests in land.

3. Vendor and purchaser ⚷54, 191—Vendee, not in default under contract of sale, remains equitable owner with right of possession as against all others at time of subsequent conveyance of right of way over land.

Vendee, not in default under contract of sale which was not superseded by new contract, *held* to remain equitable owner of land, with right of possession, to exclusion of all others at time of subsequent deed by grantor conveying right of way over land to plaintiff.

4. Vendor and purchaser ⚷54—Vendee under contract of sale is trustee of purchase money for vendor who holds land in trust for vendee as security for purchase price.

Vendee, at time of making contract of sale, is treated as trustee of purchase money for ven-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

dor who holds land in trust for purchaser as security for payment of purchase price until conveyance of legal title to vendee is finally made.

5. Vendor and purchaser 🔑208.

Vendor cannot burden with an easement land previously conveyed to vendee not in default under contract of sale.

6. Easements 🔑42.

Land conveyed by vendor under contract of sale does not fall under general provisions of subsequent deed by vendor conveying right of way over land then owned by him.

7. Easements 🔑36(3).

Evidence *held* to show intention not to include land previously sold in vendor's deed, conveying right of way over lands owned by vendor.

8. Escrows 🔑8(1)—Deed deposited in escrow, to be delivered on full compliance with conditions of contract of sale, held of no legal effect until such compliance.

Deed conveying lands embraced within contract of sale, deposited in escrow, to be delivered on full compliance with conditions of contract, *held* of no legal effect until conditions were complied with.

9. Vendor and purchaser 🔑54—Depositing of deed in escrow until compliance with conditions of contract of sale held not necessary to vesting of equitable title in vendee.

Depositing of deed in escrow until full compliance of conditions in contract of sale *held* not necessary to vesting of equitable title in vendees who acquired interest in lands solely through contract and not through deed.

10. Vendor and purchaser 🔑232(8)—Recording of deed to right of way prior to recording of deed to land previously sold held not available to vendee of right of way having knowledge of equitable owners of land (Civ. Code, § 19).

In action to quiet title to right of way conveyed subsequent to contract of sale of land, recording of deed to right of way prior to recording of deed to land is of no avail to vendee of right of way having actual knowledge of equitable owners of land in actual possession thereof, in view of Civ. Code, § 19.

11. Estoppel 🔑118—Defendants held not estopped by conduct from denying right of plaintiff to right of way for pipe line.

Evidence *held* to show that defendants were not estopped by conduct from denying right of plaintiff to right of way for pipe line other than that already granted.

12. Waters and water courses 🔑242.

Under deed conveying right of way for existing water pipe line pursuant to agreement, it is assumed that intention was to limit right to use land to right expressly granted.

13. Estoppel 🔑60—Estoppel, to deny right to easement for pipe line as plaintiff may deem advantageous to its purposes, unlimited as to time, held indefinite and uncertain.

Claimed estoppel to deny plaintiff's right to easement for pipe line as plaintiff may deem advantageous to its purposes, unlimited as to time, *held* too indefinite and uncertain to give it force.

14. Estoppel 🔑60.

Estoppel by conduct, whether consisting of representations express or implied, must be certain.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Orange Cove Water Company against Bettie Sampson and others. Judgment for plaintiff, and defendants appeal. Reversed.

Edward F. Treadwell and R. S. Laughlin, both of San Francisco, and J. A. Chase, of Visalia, for appellants.

Farnsworth, McClure & Burke, of Visalia, for respondent.

HART, J. This is an action to quiet the alleged title of the plaintiff to a right of way in, over, and upon lot 13 of certain real property of the defendants (specifically described in the complaint), for the construction and maintenance thereon of pipe lines to be used in connection with, and as a part of, a system inaugurated by plaintiff for the transportation of water for irrigation and domestic purposes "over, through and across" said lot 13 and other real property immediately contiguous thereto. The complaint also prayed for the issuance of a temporary writ of injunction enjoining defendants, and their agents, servants, and employees, from in any manner interfering with or preventing plaintiff from laying, constructing, and maintaining pipe lines upon, over, through, and across said real property. A temporary injunction as prayed for was granted.

Issue was joined upon the question of plaintiff's ownership of the right referred to, the trial was by the court, sitting without the advisory aid of a jury, and judgment passed for plaintiff, decreeing that it (plaintiff) was the owner of said right of way or easement, and that the temporary injunction be made permanent.

The appeal is by the defendants from said judgment, and is supported by a record made up in conformity to section 953a of the Code of Civil Procedure.

The facts, generally stated, are: By a decree in partition entered in the superior court of Tulare county, on the 17th day of February, 1887, between the heirs of one Hugh Hamilton, deceased, James L. Hamilton became the owner of certain lands embraced within, and constituting what is designated and known as, "Hamilton colony," in said county. Said James L. Hamilton (to be hereinafter referred to as Hamilton), on the 8th day of December, 1910, entered into a written contract with W. W. Collins, W. D. Collins, B. H. Bendheim, and the appellant, Arthur F. Sampson, whereby he agreed to sell, and the other parties agreed to buy, a certain portion of the land in said colony, including said lot 13, it being provided in said contract that the purchase price ($5,644.80) should be paid, after the payment of $1,411.20, "upon the execution and delivery of the agreement," in installments of a like sum in December of each of the years 1911, 1912, and 1913. Immediately upon the execution of said contract, the purchasers jointly took possession of the lands, and proceeded to plant the same to orange and other trees, and Bendheim, W. W. Collins, the defendant A. F. Sampson, and, for a limited period, W. D. Collins, from the time of the taking by them of the possession of the lands until a date in 1911—a period of about three years—worked or operated the same "as one body, known as the 'C. B. S. Company,' a fictitious name," testified W. W. Collins. Subsequently, W. W. Collins, Bendheim, and A. F. Sampson agreed to, and did, purchase the equitable interest of W. D. Collins in the contract of December 8, 1910, and further agreed to the making of a new contract in accord with the result of such purchase, but embracing, as W. W. Collins testified, "practically the same terms and conditions as were contained in the original written agreement." Accordingly, a written contract was prepared, and, although bearing the same date as the original contract (December 8, 1910), was not executed until September 18, 1911. This contract differed from the original in these particulars only: The name of W. D. Collins was eliminated therefrom as one of the vendees, or, in other words, was not a party thereto, and the individual interests in the lands and the precise liability, respectively, of W. W. Collins, Bendheim, and said Sampson were, and are, defined. After the substituted contract was executed by the various parties (now quoting from the appellants' opening brief, which contains an accurate statement of the facts of the controversy)—

"a deed, dated August 21, 1911, was executed by James L. Hamilton and his wife, conveying the lands covered by the contract of sale, in the proportions agreed upon in the substituted contract, to Sampson, Bendheim, and W. W. Collins. This deed was executed September 18, 1911, and was delivered to the First National Bank of Visalia, together with the substituted contract and certain escrow instructions which directed the delivery of the deed upon the terms of the contract being fully complied with. The escrow instructions were dated September 18, 1911, and are indorsed as received by the cashier of the bank on that date. The record does not show the exact date the final payments were made and the deed delivered, but it does show that both these steps took place and the deed was recorded on August 5, 1914.

"On September 22, 1913, Sampson, Bendheim, and W. W. Collins mutually agreed that the land which they jointly held should be partitioned and divided, and pursuant to this agreement W. W. Collins and B. H. Bendheim executed and delivered to the appellant Sampson a bargain and sale deed to that part of the land known as lot 13. This deed was dated September 22, 1913, and was executed and delivered the following day. It will thus be seen that the title of the appellant Sampson was initiated on December 8, 1910, and finally culminated on August 5, 1914—he and his associates being in possession of the property during all of that time.

"The Orange Cove Water Company was organized in 1911 by the same parties, to wit, W. W. Collins, W. D. Collins, B. H. Bendheim, and the appellant Arthur F. Sampson, for the purpose of supplying water to the same land which they had jointly contracted to purchase, and including lot 13. These parties were the stockholders, and W. W. Collins was president, and B. H. Bendheim was secretary. The system of the company has been supplying water to these lands since the spring of 1911.

"On September 15 and 18, 1911, Sampson, Bendheim, W. D. Collins, and W. W. Collins executed a group of deeds to the water company conveying various rights of way over the land, which rights of way are not involved in this action. These deeds were all drawn by the same attorney (E. C. Farnsworth), acknowledged before the same notary public, and recorded on the same date by the same person (W. W. Collins). They are as follows:

"A. Deed from Bendheim, Sampson, W. W. Collins, and W. D. Collins, as individuals and as copartners doing business under the firm name of C. B. S. Citrus Company, to Orange Cove Water Company conveying right of way for existing pipe line across lots 9, 12, and 13 to southwest corner of lot 15; thence east to boundary line between lots 13 and 14.

"B. Deed from Sampson to Orange Cove Water Company conveying rights of way for pipe line along lines of lots 15, 7, and west half of lot 4.

"C. Deed from Bendheim to Orange Cove Water Company conveying rights of way for existing pipe line over specifically described property.

"D. Deed from W. W. Collins to Orange Cove Water Company conveying rights of way for existing pipe line over specifically described property.

"E. Deed from W. D. Collins to Orange Cove Water Company conveying rights of way for existing pipe line over certain specifically described property.

"F. Deed from Bendheim, Sampson, W. W. Collins, and W. D. Collins, as individuals and as copartners, to Orange Cove Water Company conveying portion of lot 9 containing well, together with pumping plant, equipment, and pipe lines.

"The rights of way thus granted are not in dispute in this action. These rights of way are occupied and enjoyed by the company, and are not questioned, or in any way involved in this suit."

On the same date (September 18, 1911) that the contract whereby Hamilton and W. W. Collins, Bendheim, and defendant Sampson executed the contract to take the place of the contract of December 8, 1910, for the sale of the lands described in both said writings, Hamilton and his wife executed a deed to the plaintiff, the same having been, at the request of W. W. Collins, recorded in the office of the recorder of Tulare county on the 23d day of September, 1911, whereby they (Hamilton and wife) conveyed to it (plaintiff) a right of way to maintain certain pipes over and across certain property in Hamilton colony, which right of way had previously been conveyed by Sampson and his associates, said deed, however, containing the following provision:

> "Also the right of way to lay, construct, maintain, operate, repair or remove any necessary pipe lines for the transportation of water for irrigation and domestic purposes in said colony over and through any part of the lands of said Hamilton colony owned by the first parties or either of them."

It is upon the foregoing provision of the said deed that the plaintiff undertakes to support its claim to the particular right of way with which this action is concerned. Specifically explained, the contention of the plaintiff is that, at the time of the execution of said deed, Hamilton was the owner of lot 13, which, as seen, is embraced within Hamilton colony, and that the effect of the blanket provision of said deed was, therefore, to convey to the plaintiff an impregnable title to the particular right of way involved in this action. In attempting to sustain this contention, counsel for the plaintiff start with the assumption that the agreement of sale of December 8, 1910, was extinguished or its provisions set at naught by the written agreement of sale of September 18, 1911, and that, therefore, the sole source of any rights acquired by W. W. Collins, Bendheim, and defendants in the lands described in said agreements is in the said agreement of September 18, 1911. In other words, counsel maintain that the last-mentioned agreement worked a novation or a substitution of the later agreement for the original, thereby extinguishing the latter, and necessarily all the obligations thereby imposed upon either the first party or the second parties thereto. Upon that assumption the argument is advanced, quoting from respondent's brief:

> "Therefore, at the moment of delivery of the right of way deed, Hamilton was the owner of said lot 13, and, as he made and delivered the right of way deed and the contract of sale as a part of the same transaction, it must follow that the contract of sale was made and accepted subject to the right of way deed."

It is further maintained, upon testimony received in the case to the effect that, when the new arrangement, evidenced by the later written agreement, was made, A. F. Sampson and his associates expressed the desire that the blanket right of way deed should be given by Hamilton affecting any lands he might then have owned in Hamilton colony, that said deed "was taken with his (said Sampson's) consent and approval, and, therefore, subjects him as well as all other parties to the land purchase contract to its provisions." Proceeding further, counsel, in endeavoring to support the hypothesis that Hamilton, at the time of the examination and delivery of his blanket deed to the plaintiff, was the owner of lot 13, argue as follows:

> "On the same day that he executed and delivered the land purchase contract and the right of way deed, Hamilton and his wife executed a deed of grant conveying the property mentioned in said contract to W. W. Collins, Bendheim, and Sampson, but he placed this deed in conditional escrow with First National Bank of Visalia, and the grantees named therein did not receive it until 1914. The escrow instructions expressly provide that said deed is to be delivered only upon performance by the grantees of all the conditions of the contract and if the same were not performed, then the deed should be returned to Hamilton. This was a delivery in escrow on condition subject to return of the deed to Hamilton. It was not a valid or complete delivery of the deed in escrow."

[1] By the contract of sale of December 8, 1910, A. F. Sampson and his associates, including W. D. Collins, jointly acquired an equitable estate in the lands described in said instrument.

> "Such a contract to convey, if enforceable, has the effect of vesting the equitable estate in the vendee, leaving in the vendor the dry legal title. It is in effect a grant of the whole beneficial interest in the land." Jackson v. Torrence, 83 Cal. 521, 537, 23 P. 695; Keese v. Beardsley, 190 Cal. 465, 473, 213 P. 500; Gilbert v. Sleeper, 71 Cal. 290, 293, 12 P. 172; Baldwin v. Morgan, 50 Cal. 585, 587, 588; McClellan v. Lewis, 35 Cal. App. 64, 68, 169 P. 436.

[2-7] The question, then, is: Did the making of the new arrangement as to said lands by the parties to the said agreement of sale have the effect of divesting or destroying the equitable title which Hamilton, by the original agreement, conveyed to the vendees? There is afforded by the record here none other than a negative answer to that question. There is no evidence or even pretense that the vendees violated or breached any condition or covenant of the original agreement. There is no claim here, nor does the record afford justification for any such claim, that the vendees failed to comply with the exactions of said agreement as to payments on the purchase price of the lands or violated any condition or covenant of the contract. There was, in other words, no act or default upon the part of the vendees which operated,

or would operate, to forfeit their rights under the contract or work a reversion of their equitable interests or any thereof to the grantor. The sale by W. D. Collins of his equitable interest in the lands was to two of his cotenants and not to Hamilton. The so-called "new" contract was not in fact a new contract. There was no change in the purchase price, nor were there changes in the terms and conditions of the instrument which affected the rights of Hamilton in any manner. The vendees, with the exception of one, who, as seen, transferred his interest to two others of the original vendees, were the same. The writing amounted only to an agreement between the vendees themselves with respect to the quantity and the character of the estate or interest in the lands which they were to hold therein and also as to the number of tenants. Therefore, at the time the Hamiltons executed and delivered the plaintiff their deed conveying to it (plaintiff) a right of way "over and through any part of the lands of said Hamilton colony owned by the first parties (the Hamilton) or either of them," the defendant A. F. Sampson and his associates were the equitable owners of the lands described in the contract of sale (39 Cyc. 1302, 1303), and, by virtue of the terms of said contract, were vested with the right to the possession of said lands "to the exclusion of others." Civ. Code, § 654; Estate of Stanford, 126 Cal. 119, 54 P. 259, 58 P. 462, 45 L. R. A. 788; 29 Cyc. 1549. As hereinabove shown, the rule in equity is that by a contract of sale of real property for an adequate and sufficient consideration the vendee acquires an equitable title to such property, and thereby becomes the equitable owner. The vendee, from the time of the making of such contract, is by equity treated as trustee of the purchase money for the vendor, while the latter is regarded as holding the land in trust for the purchaser as security for the payment of the purchase price until a conveyance of the legal title to the vendee is finally made. 21 C. J. pp. 201, 202; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032, 65 L. R. A. 940; McClellan v. Lewis, 35 Cal. App. 64, 68, 169 P. 436; Baldwin v. Morgan, 50 Cal. 585. It is thus perfectly clear that the Hamiltons, when they made and delivered to plaintiff the blanket right of way deed of September 18, 1911, had no right to burden or charge any of the lands embraced within the contract of sale in question with an easement or other incumbrance. It is manifest from the foregoing considerations that the fact that the Hamilton right of way deed was recorded in the county recorder's office prior to the like recordation of the deed conveying lot 13 to Sampson has no material bearing upon the decision herein. As seen, lot 13 was not specifically mentioned in the Hamilton blanket deed, and could not be included therein under the blanket provision for the reason, as pointed out above, that it did not fall within the general provision of said deed granting a right of way over and through any lands of Hamilton colony then owned by Hamilton. Indeed, it is clear, from the fact that Hamilton had actual knowledge of the fact, as did all the parties, that the equitable title to lot 13 had previously been conveyed to Sampson and his associates, and from the further fact that, in the discussion among the parties of the matter of granting rights of way for the laying of water pipes over and across certain of the lands embraced within the contract of sale, lot 13 was never mentioned or referred to, that it was not the intention of the Hamiltons, nor within the contemplation of any of the parties when said deed was executed and delivered to plaintiff, to include said lot within the purview of the blanket provision of said deed. It will be borne in mind that W. W. and W. D. Collins, and Sampson and Bendheim and their wives, on the same date on which the contract of sale was re-executed at the request of the vendees so as to conform to the new arrangement made between the latter, as above explained, conveyed by deed to the plaintiff the rights of way for the water pipes which were, and previously had been, laid and in place over and through the lands described in the contract of sale; that among these deeds was one by defendant Sampson for the then existing right of way over and through lot 13 and along which water pipes had previously been laid, and which were then in the ground and in use; that, at the time those deeds were executed, there was no claim that Hamilton then owned lot 13.

[8-10] As to the deed by Hamilton to Sampson and associates conveying the lands embraced within the contract of sale, it is clear that, until the terms and conditions of said contract were fulfilled by the vendees therein, it was of no legal force, since there was no delivery thereof. It was deposited with the contract of sale in escrow, with instructions that it be delivered to the vendees when they had fully complied with all the conditions or the terms of the contract, and only then. But the defendant Sampson and his associates acquired their interests in the lands solely through the contract of sale, and not through the deed. Whatever might have been the specific reason prompting the act of depositing the deed in escrow with the contract of sale, it is obvious that so depositing it was not necessary to the vesting of the equitable title of the lands in the vendees. Under the circumstances here revealed, however, the fact of the recordation of the Hamilton deed prior to the recordation of the deed from Hamilton to the vendees, or the fact that the contract of sale was not recorded at or prior to the time that the first-named deed was recorded, could be of no avail to plaintiff, since the evidence without conflict shows that the plaintiff, whose officers and members were composed entirely of the vendees in the contract of sale, not only had notice, but actual knowledge, at the time it took the Hamilton right of way conveyance, of the fact that the said vendees were the equitable owners of the lands described in the contract of sale, including, of course, lot 13, and were in actual possession thereof from the time of the execution of the contract of sale to the date of the making of the Hamilton deed, and, it may be added, that, so far as it is to be learned from the record, they continued to maintain such possession down to the time of the trial of this action. The law as to this subject of notice is well understood. A general statement of the rule regarding it is declared in section 19 of the Civil Code, and its application illustrated in the following-named cases and textbooks: Talbert v. Singleton, 42 Cal. 390, 395; Rec. Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638; Crescent City Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032, 65 L. R. A. 940; Devlin on Real Estate Deeds, vol. 2, § 760; Crooks v. Jenkins, 124 Iowa, 317, 100 N. W. 82, 104 Am. St. Rep. 326.

[11-14] There is a suggestion of an estoppel as against the defendants, but we find no merit therein. It is true that the water company was organized by the defendant A. F. Sampson and associates immediately upon the execution of the contract of sale and the taking of possession thereunder by the vendees, and that, in the preliminary discussion among the vendees as to the necessity for an adequate water supply for the lands for irrigation and domestic purposes, it was agreed among them that water pipe lines should be laid over and across such parts of the acreages embraced within the sale contract as would properly subserve the needs of the lands and the vendees in that respect. But, in following out the scheme thus proposed or agreed upon after the company was organized, the vendees made to plaintiff, in accord with a previous understanding, specific grants of rights of way, and water pipes were laid over and across different parts of the lands, including lot 13, and were used down to the time that plaintiff undertook to, and, under the order of the court enjoining the Sampsons from interfering with plaintiff's activities in that particular, did, in fact, exercise the claimed right of entering upon lot 13 and laying thereon another water pipe line. It is not claimed—at any rate, the evidence does not show that any such claim was made—that any express understanding or agreement was had between the parties that any other pipe line than that already existing when the deed conveying the same to plaintiff was executed should or was to be installed and maintained in, upon, or across lot 13. Thus it is to be assumed that, at the time the deed conveying the right of way for the existing water pipe line over said lot was given plaintiff, the intention was thus to limit the right of plaintiff to use said lot for that purpose to the right expressly granted. In other words, since the grants of the rights of way for pipe lines over said lands were the culmination of an agreement between the vendees to inaugurate the water system to be used for their mutual benefit, it is to be presumed that such grants involved the granting to plaintiff of all that said parties intended or agreed to convey to it in that particular and for that purpose. Such is always the construction which must be given to grants or any instrument in writing expressly delimiting its own scope. If, then, the defendants can at all be charged with an estoppel, whereby they are to be precluded from denying the claimed right of plaintiff to a right of way for a pipe line over lot 13 other than that already expressly granted, it is not an estoppel arising by contract, either directly or incidentally—that is, not one so arising out of the agreement to organize the water company, for, as seen, that agreement, so far as such rights of way were concerned, was fully consummated and at an end—but, if any estoppel at all is available to plaintiff as against defendants, it is one by conduct. There is, though, no ground afforded by the record upon which an estoppel by conduct as against defendants can be predicated. Indeed, there is no element of estoppel by conduct present here. There is no evidence of any act or words or conduct or false representation of any fact on the part of A. F. Sampson subsequent to the granting of the rights of way above spoken of or subsequent to the time the interests of the respective vendees in the lands were segregated and divided into several interests and assigned to the vendees in severalty and as such defined, whereby and wherefrom the plaintiff or its officers could have been led to the belief or the understanding or to infer that said Sampson intended, or even intimated an intention, that it (plaintiff) would be permitted to install and maintain a pipe line along any other right of way over and across lot 13 than that which had already been expressly granted. The estoppel sought to be invoked is wanting in definiteness in several respects as well as in certainty. According to its theory, the plaintiff is entitled to an easement for the purpose explained over any part of lot 13 which it (plaintiff) may deem the more advantageous to its purposes. The defendants, according to that theory, are without right to interfere or to suggest any particular route over said lot which may be adopted. Not only is this so, but the theory seems to be that plaintiff is not limited as to the time within which the right may be asserted or put into practical operation. The easement, in other words, may be a charge or burden upon lot 13 interminably or for-

ever, subject to be exercised at any time. That this is the theory of the plaintiff is evidenced by the fact that the exercise of the alleged right was not attempted until the lapse of a period approximately of eleven years from the organization of the water company and over five years from the time (February, 1916) defendant A. F. Sampson severed his connection with, and thereby relinquished to his cotenants whatever interest he had or owned in, the plaintiff. But, regardless of the last-mentioned propositions, which, perhaps, would go more to the question of laches than that of the uncertainty of the claimed estoppel, it is clear that an attempt to invoke an equitable estoppel here would be futile because it is lacking in that element of certainty to impart to it virility and force. Naturally, since upon the doctrine of equitable estoppel one may be divested of a substantive right of property, the rule is that estoppel by conduct, whether such conduct consists of representations, either express or implied, "must be plain, not doubtful, or matter of questionable inference. * * * Certainty is essential to all estoppels. The courts will not readily suffer a man to be deprived of his property where he had no intention to part with it." Bigelow on Estoppel (5th Ed.) pp. 570–578.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

---

78 Cal. App. 173

LOS ANGELES RY. CORPORATION v. LOS ANGELES COUNTY FLOOD CONTROL DIST. et al. (Civ. 5561.)

(District Court of Appeal, First District, Division 2, California. May 26, 1926. Hearing Denied by Supreme Court July 22, 1926.)

1. Statutes ⇨174, 175.

Where reason for rule relating to interpretation of statute ceases, rule itself ceases.

2. Constitutional law ⇨48.

Every presumption will be indulged in favor of constitutionality of statute.

3. Taxation ⇨49.

Constitution does not exempt operative or nonoperative property of public utilities from requirement of Const. art. 13, § 1, that all property except as otherwise provided in Constitution be taxed in proportion to its valuation.

4. Levees and flood control ⇨23 — Operative and nonoperative property of public utility held "taxable real property," within Los Angeles flood control district, and therefore subject to assessment (Los Angeles County Flood Control Act [St. 1915, p. 1502], §§ 10, 14; Const. art. 13, § 14).

Operative as well as nonoperative property of public utility is "taxable real property," within Los Angeles flood control district created under Los Angeles County Flood Control Act (St. 1915, p. 1502), and as such is subject to assessment under sections 10, 14, notwithstanding act creating district does not specifically provide for such assessment, Const. art. 13, § 14, not being applicable.

[Ed. Note.—For other definitions, see Words and Phrases, Taxable Property.]

5. Statutes ⇨228.

Any exemption or exception from operation of general statute must be specific.

6. Evidence ⇨11.

It is common knowledge that Los Angeles County Flood Control Act (St. 1915, p. 1502), was intended to protect public highways and other property from damage, and that demand for its enactment resulted from great loss to property from destructive floods.

7. Levees and flood control ⇨22—That assessments under Los Angeles Flood Control Act are required to be levied and collected as general county taxes are collected held not to change character of charge as special assessment (Los Angeles Flood Control Act [St. 1915, p. 1502; §§ 10, 11, 14]; Const. art. 13, § 14).

That assessments under Los Angeles County Flood Control Act (St. 1915, p. 1502), §§ 10, 11, 14, are required to be levied and collected in same manner as general county taxes from which operative property of public utilities is exempted by Const. art. 13, § 14, *held* not to change character of charge imposed as special assessment for benefits so as to exempt such operative property from assessment.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by the Los Angeles Railway Corporation against the Los Angeles County Flood Control District and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Gibson, Dunn & Crutcher, Gordon Boller, anl H. F. Prince, all of Los Angeles, for appellant.

Paul Overton and Samuel Poorman, Jr., both of Los Angeles, amici curiæ for appellant.

Edward T. Bishop, Co. Counsel, and J. A. Tucker, Deputy Co. Counsel, both of Los Angeles, for respondents.

NOURSE, J. The plaintiff commenced this action to recover taxes paid under protest to the Los Angeles county flood control district, a public corporation. A demurrer to the complaint was sustained, and this was followed by a judgment in favor of the defendants, from which the plaintiff has appealed on the judgment roll.

The complaint alleged that the plaintiff was a public utility corporation engaged within the boundaries of the flood control district in the business of transporting passengers for hire; that the district was created under the "Los Angeles County Flood Control Act" (Stats. 1915, p. 1502); that, acting under the provisions of sections 10 and 14 of said act, the board of supervisors of Los Angeles county levied for each fiscal year from 1916 to 1919–20, inclusive, a special tax on the real property in the district for the purpose of paying the interest and a portion of the principal on bonds theretofore issued by the district, said tax being levied upon all the real property in the district appearing on the assessment roll prepared by the county assessor for each fiscal year mentioned; that the taxes levied against the plaintiff's operative real property for the fiscal years 1916–17, 1917–18, and 1918–19 were not paid, and said properties were sold to the state because of the delinquency on June 29, 1917; that thereafter the plaintiff redeemed said properties by the payment of $7,382.10, and has paid, before delinquency, the additional sum of $8,223.58 to cover taxes levied for the year 1919–20; that the plaintiff filed with the board of supervisors of said county its verified petitions and claims for the refund of the money so paid, but the same were disallowed. It is then alleged that the taxes so levied were invalid in so far as they related to the operative real property of plaintiff, as they were not authorized by the Constitution and laws of the state of California and were specially forbidden by section 14 of article 13 of the Constitution. The demurrer was on the general ground that the complaint failed to state a cause of action. In support of the demurrer the defendants argued that the taxes were not invalid for the reason alleged because they were in fact assessments as distinguished from the general taxes under the rule announced in L. A. Flood Control Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028, and therefore did not come under the constitutional exemption.

Appellant, conceding the rule of the Hamilton Case, insists on this appeal that the taxes are invalid because the Flood Control Act does not specifically declare that the operative property of public utilities shall be subject to assessment for these special taxes. In support of its position the appellant cites Southern California Ry. Co. v. Workman, 146 Cal. 80, 79 P. 586, 82 P. 79, 2 Ann. Cas. 583; Fox v. Workman, 155 Cal. 201, 100 P. 246; Wilson v. Pacific Electric Ry. Co., 176 Cal. 248, 168 P. 128; Los Angeles Pacific Co. v. Hubbard, 17 Cal. App. 646, 121 P. 306; and San Pedro, etc., R. R. Co. v. Pillsbury, 23 Cal. App. 675, 139 P. 669, 671. From these authorities the appellant has formulated the rule of law that "the operative property of the public utility is not assessable on account of a special improvement district unless the act creating such district and providing for assessment on account thereof specifically provides" therefor. From our reading of the cases cited we are unable to draw from any one of them a rule as broad and far-reaching as that claimed by appellant.

The Workman Case, 146 Cal. 80, 79 P. 586, 82 P. 79, 2 Ann. Cas. 583, involved an assessment upon the right of way of a steam railroad to pay the cost of a street improvement under the Vrooman Act. The portion of the act under which the assessment was made read: "The expenses incurred for any work authorized by * * * this act * * * shall be assessed *upon the lots and lands fronting thereon.*" Stats. 1885, § 7, p. 147. (Emphasis ours.) The case came before the Supreme Court on two appeals—one from the judgment on demurrer to the complaint and one from an order granting a temporary injunction. The latter appeal was dismissed on the ground that the injunction was merged in the judgment and the opinion rested on the judgment roll alone. The complaint alleged that the assessor had attempted to assess the "right of way" of the plaintiff abutting on Pasadena avenue on the basis of benefits for the improvement of the street, that unless restrained by the court the treasurer would proceed to sell that portion of the right of way covered by the assessment, and that such sale would result in a dismemberment of plaintiff's railway system. It appeared that plaintiff was operating a railroad system of about 487 miles in length, and that the lien covered about 9,000 feet of its right of way. Without interpreting the provisions of the statute, and, as we read it, on the ground of public policy alone, the Supreme Court held that:

> "There is no authority for making an assessment upon a right of way or for selling the same. A railroad company is a quasi public corporation in which the public is interested. It holds a franchise from the state and must operate its road or forfeit its franchise. A part of its right of way cannot be sold on execution or for a street assessment. The decisions are not in harmony on the question, but we think the best-considered cases hold that such right of way cannot be sold to satisfy a street assessment."

Three cases from Eastern jurisdictions were cited in the opinion in support of the text quoted, and a reading of these cases discloses that the court in each case rested its opinion on the ground of the public interest and convenience, that is to say, that in the absence of express statutory procedure for the enforcement of the assessment lien by some other method than the dismemberment of the railway system, the court would hold that it was not the intention of the Legislature to make the right of way subject to assessment and disrupt the public service rendered by the railroad under its franchise.

In dissenting from the order denying a rehearing in the Workman Case, Beatty, C. J., gave a very clear explanation of the meaning and effect of the opinion when he said:

"For although the decision only declares in terms that there is no authority for making an assessment upon a right of way, it means, when construed with reference to the facts of the case, that you cannot assess or sell a tract of land belonging to a railroad company if its track extends over it without expressly exempting the right of way; that is to say, without reserving to the company in the express terms of the sale the exclusive right to use the land for all the purposes of its traffic. The proposition broadly laid down is, that a part of a railroad company's right of way cannot be sold on execution or for a street assessment. Of course it is consistent and logical to say that such property cannot be assessed if it cannot be sold, for there is no possible way of enforcing a delinquent assessment for street improvements except by a sale of the abutting lots, and an assessment which binds no one is equivalent to no assessment at all."

Inasmuch as the Vrooman Act required that the assessment should run specifically to the property benefited and that the lien should attach to that property only, there was no way of enforcing an assessment against the railway's property except by a dismemberment of the operating sustem of the railway to the injury of the public. Our understanding of the reasoning of the court is that the law did not authorize the assessment and sale of a railroad right of way because, no provision having been made for reserving to the company the exclusive right to use the right of way for all purposes of its traffic under its franchise to serve the public, such authority should not be implied from the general grant of power to assess "the lots and lands fronting on the improved portions of the street." The expression quoted had been in the Vrooman Act since its enactment in 1885, and had a well known and accepted meaning as applying to the lots of land abutting the curb line of the street and "fronting" on the portion of the street to be improved. Then again the whole purpose and theory of the Vrooman Act was to provide a mode of procedure for the improvement of streets on the basis of benefits accruing to these abutting lots of land—among other things to provide the lot owners a convenient mode of egress and ingress. This theory of the original act was repugnant to the thought that it was intended to include in the assessment a right of way which would not be benefited by the street improvement. Because there was nothing in the act to indicate a departure from this well-known theory, and because of the question of public interest and convenience involved, the court properly held that the power did not exist. There is no intimation by our Supreme Court that if the Vrooman Act had expressly authorized the assessment and sale it would have been valid, and there is no holding that the failure to "expressly" include the public utility was the reason for the denial of the power to join it in the assessment.

Fox v. Workman, 155 Cal. 201, 100 P. 246, merely held that a bond issued upon the same assessment on the railroad right of way was void for the reasons stated in the earlier Workman Case. The Wilson Case in 176 Cal. held, in an action to foreclose a street assessment lien on a railroad right of way, that the case was controlled by the two cases just cited. In the course of the opinion in the Wilson Case the court called attention to the fact that the assessment involved arose prior to the amendment to the Vrooman Act which expressly authorized the assessment of rights of way, but this was done merely to emphasize the fact that the case was controlled by the Workman Cases which arose under the same statute. In fact the only "rule" of the Wilson Case is the one of "stare decisis."

In the Hubbard Case, 17 Cal. App. 646. 121 P. 306, the appellate court referred with approval to the rule of the former cases, and there held that, in the amendment to section 15 of the Street Opening Act of 1903, including in the assessment the "property of any railroad or street railroad," the Legislature used the word "property" in its limited sense as applying only to land including the right of way and franchise, but excluding the improvements such as the tracks, ties, piles, etc.

In the Pillsbury Case, 23 Cal. App. 675, 139 P. 669, 671, the same court had for consideration a case arising under the Street Improvement Act of 1901 (Stats. 1901, p. 34). The only question before the court was whether the amendments to the Vrooman Act, and similar street improvement acts, had changed the public policy forbidding the assessment of railroad rights of way, as announced in the Workman Cases, so that the power to assess such rights should be implied in the act of 1901, which had not been amended. The appellate court held that, as the various acts provided for different kinds of street work under different modes of procedure, it could not be implied from the amendment of the one class that the Legislature intended to change the rule as to the other. The opinion is of importance here only for the purpose of showing that up to the time of the enactment of the Flood Control Act the rule of the Workman Case and those following it was one of public policy and convenience and nothing more.

With this rule of law before it the Legislature, in June, 1915 (Stats. 1915, p. 1502), created a special taxing district designated as the Los Angeles county flood control district, and which embraced practically all Los Angeles county, except the islands off the coast, for the special purpose of providing for the control of the flood and storm waters of the district, to conserve such waters for useful purpose, "and to protect from damages from such flood or storm waters the harbors, waterways, public highways and property in said district." By sections 10 and 14 of the act the district was authorized to levy a tax each year upon "the taxable real property" in such district to pay the cost of carrying out the objects and purposes of the act, and the interest and principal upon bonds issued by the district, and said tax was directed to be "levied and collected at the same time and in the same manner as the general tax levied for county purposes." By section 16 of the act it was provided that nothing in the act should be construed to authorize the supervisors to raise money for said district by any method or system other than that by the issuing of bonds or the levying of a tax upon the assessed value of *all* the real property in the district in the manner provided. In passing on the provisions of this act the Supreme Court in Los Angeles Co. F. C. Dist. v. Hamilton, 177 Cal. 119, 128, 169 P. 1028, held that though the act used the expression "tax" it in fact conferred authority merely to levy an assessment against the real property of the district on the basis of benefits, and that the Legislature itself had determined the question of these benefits when it authorized the assessment or tax against the real property on the basis of the assessed valuation thereof for general taxation purposes. In this proceeding it is conceded by the appellants that the taxes which are involved here were in fact assessments for benefits, and that the provisions of section 14 of article 13 are not applicable for the purpose of relieving the operative property of public utilities from such assessments.

[1] This being so, the question presented is whether because of the rule in the Workman Case the failure of the Legislature to expressly designate the operative property of public utilities as subject to taxation under the act relieves such property from taxation. As we have seen, the rule in the Workman Case was based upon the question of public policy which would arise from the dismemberment of the railroad system by enforcement of the lien upon the portion of the railroad right of way assessed. This question is in no wise involved in the case before us. The Flood Control Act expressly includes all taxable real property in the district, and the lien arising from the assessment against a public utility is enforceable upon all the real property of the utility and not upon any particular portion of its rights of way. There is no reason, therefore, for the application of the rule of public policy in the interpretation of this statute, and where the reason for the rule ceases the rule itself ceases.

[2] Furthermore, we must view the act "in the light of every presumption and intendment favorable to its constitutionality." Los Angeles Co. F. C. Dist. v. Hamilton, supra, p. 125 (169 P. 1030). With this in view and treating the power to tax as a power to assess for benefits, we find that the Legislature has directed that the assessment shall be made upon all the taxable real property in the district, and that it has exempted from such assessment the personal property situated therein only. If it had been the intention of the Legislature to exempt from such assessment the operative property of any public utility, it was necessary to have that exemption stated in explicit terms.

[3-5] By the provisions of section 1 of article 13 of the Constitution, all property in the state, except as otherwise provided in the Constitution, is to be taxed in proportion to its value. Numerous exemptions appear in the Constitution itself, but these do not include either the operative or nonoperative property of public utilities. By section 14 of the same article of the Constitution a special mode of assessing all the property of certain public utilities for state purposes is provided, and such property is then exempted from taxation for local purposes. This, however, it has been conceded, does not apply to assessments upon such property for special improvements, and we find, therefore, that the operative as well as the nonoperative real property of these utilities is in the category of "taxable real property in such district" within the meaning of the Flood Control Act. It is unnecessary to cite authorities to the rule that when a statute is general in its terms any exemption or exception from its operation must be specific. Thus, when the Legislature declared that the tax should be levied upon all the taxable real property in the district it included every class of real property in the district which was not by the Constitution or statutes expressly exempted from that character of taxation. Now the operative real property of the public utilities within the district, though exempt under section 14 of article 13 from general taxation by the district, but not being expressly exempted from local assessments, comes within the general classification of "taxable real property," and as such is subject to the assessments for the purposes of the act.

[6] This conclusion follows all the more naturally because it is a matter of common knowledge that the purposes of the act were to protect from damage the public highways and other property in the district, and that the demand for its enactment resulted from the great loss to property from destructive floods which had, for a long period of years, interrupted traffic within the district, washed away railroad bridges, and damaged railroad tracks and rights of way and had caused enormous damage to the property owned by the various public utilities operating in the district.

[7] Counsel for the Los Angeles Gas & Electric Corporation, a public utility owning operative property in the flood control district, have filed a brief as "amici curiæ," in which they advance the point that such prop-

erty is not subject to taxation under the act because the only machinery provided in the act for the levy and collection of a tax is that provided for the levy and collection of the "general tax levied for county purposes" from which the operative property of these utilities is exempted by section 14 of article 13 of the Constitution. The argument is that, as this operative property is exempted from county general taxes, the fact that the Flood Control Act adopted the county tax machinery as the only method of levying and collecting the "tax" for flood control purposes discloses an intention on the part of the Legislature to exempt such operative property from the burdens of the act.

The answer to the point raised is a simple one, and is found in the comprehensive opinion written by Mr. Justice Sloss in the Hamilton Case, 177 Cal. 119, 128, 129, 169 P. 1028. In that case it was held that, though the word "tax" was used throughout the act, the Legislature in fact meant an assessment, and that, accordingly, all the "taxing" provisions of the act were to be read as authorizing the imposition of a special assessment on the basis of benefits to the real property of the district. Reading the act in the light of this decision, we find that the power was conferred upon the supervisors to impose a special assessment upon all the real property in the district to pay the interest and principal on the bonds of the district, and, to a limited extent, to raise a special fund for the general purposes of the district. This power to assess goes to all the real property in the district. No real property in the district is expressly exempted, and we have seen that the operative real property of public utilities is not exempted from special assessment for benefits by reason of section 14 of article 13 or any other provision of the Constitution, This, in fact, is conceded by the appellant, as indeed it must under the decisions. Southern Pac. Co. v. Levee Dist. No. 1, 172 Cal. 345, 349, 156 P. 502; Los Angeles Co. F. C. Dist. v. Hamilton, supra.

By sections 10 and 14 of the act it is provided that these assessments shall be levied and collected "at the time and in the same manner as the general tax levy for county purposes," and, by section 11, all the provisions of the Political Code relating to the "manner of levying, assessing, equalizing and collecting of taxes" are adopted and made a part of the act. The evident meaning of these provisions of the act is that, though the levy is an assessment for benefits as distinguished from a general tax, the machinery for the imposition and collection of the charge is the same as that provided for in the case of general taxes. Summarizing in the light of the decision in the Hamilton Case, the situation is this: The Legislature has created a special taxing district, and has declared that all the real property in the district (with certain unimportant exceptions) will be benefited by the proposed improvement. For the purpose of raising funds it has authorized the supervisors to assess all this real property, and has declared that the bonds issued by the district shall be a lien upon "all the real property in the district." For the purpose of convenience to the owners of such property, as well as to the county officials, it has provided that these assessments shall be levied and collected in the same manner and at the same time as general taxes for county purposes. The adoption of this general taxing machinery, however, does not change the character of the charge which is imposed as a special assessment for benefits, and the other provisions of the act plainly subject to such assessments all the real property in the district, including the operative real property of public utilities.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

78 Cal. App. 189

In re MAESCHER'S ESTATE.

MAESCHER et al. v. SAMMANN et al.

(Civ. 5618.)

(District Court of Appeal, First District, Division 2, California. May 27, 1926. Hearing Denied by Supreme Court July 26, 1926.)

1. Wills 🔑166(7).

Opportunity and inclination to influence testator are not sufficient showing of undue influence without some participation in making of will.

2. Wills 🔑324(3).

Evidence in will contest *held* sufficient to take to jury issue of undue influence.

3. Wills 🔑324(1).

Questions involving motives and inferences to be deduced from circumstances are, within reasonable bounds, exclusively within province of jury or trial court sitting without jury in will contest.

4. Wills 🔑326.

Questions involving motives and inferences to be deduced from circumstances must be resolved in favor of contestants in considering nonsuit in will contest.

5. Wills 🔑158.

In will contest, on ground of undue influence, it is unnecessary to prove exercise of such influence directly on testamentary act.

6. Wills 🔑164(3).

Evidence of testator's relations with wife, from whom he was separated, which would indicate that she deserved consideration in will, *held* admissible in will contest to show that will was unjust and unnatural, though she was not contestant.

7. Wills 🔑163(6).

While unjust will does not raise presumption of undue influence, its nature may be considered on such issue as circumstance.

8. Wills 🔑165(4).

Testator's statements six months before death that beneficiary was trying to force him to get divorce and marry her *held* admissible for limited purpose of showing his state of mind, and cannot be considered as narration of exercise of undue influence.

9. Wills 🔑165(2)—Declarations of testator showing state of mind are admissible on issue of undue influence, though not part of res gestæ.

Declarations of testator showing state of mind are admissible on issue of undue influence, though not part of res gestæ, but their value as evidence diminishes in proportion as they are remote from date of will.

10. Wills 🔑164(7).

Testator's state of mind *held* germane to issue of undue influence in will contest.

11. Wills 🔑384.

In will contest, error in admitting evidence bearing on mental incapacity *held* harmless, on proponents' appeal, where such issue was found against contestants.

12. Wills 🔑164(4).

In will contest, on ground of undue influence, evidence that beneficiary had asked testator, while he was in bed at her house, where he was staying, to give her some flats which he owned, *held* admissible as showing relationship between them.

13. Wills 🔑164(3)—Evidence of attention to home duties and devotion to husband by testator's wife who received little under will held admissible on issue of undue influence.

Evidence of attention to home duties and devotion to husband by wife of testator, from whom he was separated, and who received little under will, *held* admissible in will contest on ground of undue influence, since injustice and unnaturalness of will may be considered on such issue.

14. Wills 🔑384—In will contest, service on minor's mother by adoption, who had not filed necessary bond to qualify as guardian, though irregular, held not prejudicial, where she was subsequently appointed guardian ad litem, and answered on behalf of ward (Code of Civ. Proc. § 1328).

In will contest, service of citation on minor, who was proponent, by service on mother by adoption, who had applied for letters of guardianship for child's estate, but had not qualified by filing necessary bond, though irregular, *held* not prejudicial, where she was subsequently appointed guardian ad litem, and answered on behalf of ward, notwithstanding Code of Civ. Proc. § 1328.

15. Wills 🔑270.

Failure to have citation issued will justify dismissal of will contest, in absence of appearance by adverse parties.

16. Wills 🔑248.

Court's jurisdiction of will contest attaches on filing petition.

Appeal from Superior Court, of Los Angeles County; Walton J. Wood, Judge.

In the matter of the estate of Louis J. Maescher, deceased. From a judgment denying probate of an alleged will, which was contested by Charles B. Maescher and others, proponents, C. F. Sammann, executor, and others, appeal. Affirmed.

Hearing denied by Supreme Court; Seawell and Curtis, JJ., dissenting.

Milton K. Young, Lyndol L. Young, and William K. Young, all of Los Angeles, for appellants.

Courtney A. Teel and Maurice C. Sparling, both of Los Angeles, and Theodore Horstman and Clarence M. Smith, of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal from a judgment denying probate to an alleged will of Louis J. Maescher, deceased, which judgment was rendered upon a verdict of a jury that said will was executed by Maescher while acting under the undue influence of Mrs. Lottie Logan, one of the beneficiaries thereunder.

As appellants contend that the evidence is insufficient to support the verdict of the jury, and that their motion for a nonsuit, made at the conclusion of the contestants' evidence, should have been granted, we shall state the facts herein rather fully, with emphasis upon testimony supporting the verdict.

Louis J. Maescher married in 1902, and lived with his wife in Los Angeles, Cal., until 1912, when he left her, saying he would not return. Mrs. Maescher gave no cause for this action on his part, but, on the contrary, was a devoted, industrious wife, and was heartbroken when her husband left her. The year before Mr. Maescher left his wife, he met appellant Lottie Logan, and about a month after meeting her he told her he was a married man. She went about with him to public places of amusement, and during this year he would frequently return to his wife's home at 3 and 4 o'clock in the morning. Shortly after leaving his wife, Maescher went to live at the home of Mrs. Logan, where he lived until the time of his death, in July, 1923. During a part of this time Mrs. Logan also had other boarders, but during the latter years of Mr. Maescher's life her household consisted of Mr. Maescher, herself, and an infant that she had adopted, and who was also a beneficiary under the purported will and is an appellant here. During the ten years or more that Mr. Maescher lived at the home of Mrs. Logan there was no definite sum paid by him for his board and lodging. Mrs. Logan testified that she purchased much of his clothing, and charged it to her account, and paid her own accounts, and that when she needed money he would give it to her. On several occasions he gave her large amounts of money, and on one occasion gave her bonds of the value of $9,000. During a part of the time that Mr. Maescher lived with Mrs. Logan he occupied a sleeping porch off her bedroom, and was obliged to pass through her room to reach the bath. At the time of his death Mr. Maescher was living with Mrs. Logan in a four-room house owned by her.

At various times during the relationship of these people Mr. Maescher was seriously ill, and during the last three months of his life he declined very noticeably, and no longer attended to business duties. During this period he was almost constantly with Mrs. Logan. Neighbors who saw him daily testified that during the last few weeks of his life he failed both physically and mentally. About a week prior to his death he spent the night with a neighbor, and appears to have become hysterical or mentally unbalanced during the night. Mrs. Logan was sent for, and took him to her home. Several days later, on Saturday, June 16, 1923, Mrs. Logan went to the home of this neighbor, Mrs. Langworthy, to use her telephone. Mrs. Langworthy and other persons present on this occasion testified that Mrs. Logan was greatly distressed and excited, and stated that this was because she had just learned that Mr. Maescher had not made a will; that she had thought he had provided for her and the baby. She telephoned to the attorney, who afterwards drew the will, and, not being able to reach him, she telephoned to Mr. Sammann, the business manager for Mr. Maescher. She also failed to find him in his office, but left word for him to come to her home. During the conversation between Mrs. Logan and Mrs. Langworthy the latter suggested to Mrs. Logan that Mr. Maescher was incompetent to make a will, and instanced the recent occurrence at her home when he had been mentally unbalanced. Mrs. Logan agreed to this, but said that Maescher's brothers were not aware of his condition. It is admitted that late that afternoon Sammann and the attorney came to Mrs. Logan's home, and the contents of the will was discussed with Maescher.

On June 19, 1923, Mr. Maescher was taken to the office of the attorney by Mr. Sammann and there he signed the will, which contained the provisions he had directed upon the previous Saturday, according to the testimony of the attorney. Under its provisions $5,000 was left to the wife of testator, with the condition that, if she contested the will, she was to receive but $5. Twenty thousand dollars was left to Mrs. Logan, and the balance of the estate, of the value of nearly $150,000, was left to Lois Frances Logan, the adopted child of Mrs. Logan.

[1] The contest over the probate of the will was instituted by the brothers and sisters of deceased, and the jury found that the will was executed under the influence of Mrs. Logan. The facts we have set forth herein are outstanding ones in the record, but they by no means include all the matters which the jury might well have considered as fortifying their conclusion. The record shows that at the time of Maescher's death Mrs. Logan had succeeded in accumulating a fortune of over $100,000; that he had given her real property, bonds, money, jewelry, and his insurance policies. Their relations were certainly most confidential, and she had constant opportunity during the last few weeks of his life when he was weakened mentally and physically to influence his actions. It has repeatedly been held that opportunity and inclination to influence a testator are not in themselves sufficient showing of undue influence, without some participation by the person having such opportunity and inclination in the making of the will. But we have in the record before us the testimony of several disinterested witnesses regarding Mrs. Logan's concern and excitement when she learned no will had been made by Maescher, her statement that she thought a will had been made providing for her and her child, her attempt, on July 16th,

to communicate with Mr. Young, the attorney, and with Mr. Sammann, Mr. Maescher's manager, who afterwards assisted her in her efforts to probate the will, the arrival of these two persons at her home on the afternoon of that day, and the conference with Maescher about his will, which resulted in its execution three days later, which was about ten days prior to his death. There are additional facts and circumstances indicating that the testator's state of mind shortly before his death, and while free from the influence of Mrs. Logan, was opposed to the disposition of his property made in his will, and, indeed, to the making of a will at all. In conversation with his wife's relatives, he revealed his desire to provide for his wife, and to avoid making a will, thus allowing his property to go to his heirs at law.

[2-5] The foregoing evidence was sufficient to entitle the contestants to submit to the jury the issue of undue influence, and was a substantial basis for the jury to find in their favor upon that issue.

> "Questions involving motives, and inferences to be deduced from circumstances, are, within reasonable bounds, exclusively within the province of the jury, or the trial court when sitting without a jury, and under the rules regarding the granting of a nonsuit, they must all be resolved, so far as possible, in favor of the contestants." Estate of Arnold, 147 Cal. 583, 589, 82 P. 252, 254.

In many cases it is utterly impossible to prove the exercise of the influence directly upon the testamentary act, but this is not necessary. Estate of Snowball, 157 Cal. 301, 107 P. 598.

Of course, there is testimony in the record relied upon by appellants which is in conflict with that above recited. The testimony regarding the circumstances surrounding the making of the will is not so greatly in conflict. Mr. Sammann stated that he came to Mrs. Logan's home on Saturday afternoon, June 16th, in response to a telephone message left for him at his home. This is in harmony with the testimony that Mrs. Logan left word for him to come to her home. He stated that when he arrived Maescher wished to make his will, and that he (Sammann) thereupon telephoned to the attorney, who came to the house. His visit was also in accordance with Mrs. Logan's purpose, for she had telephoned to him earlier in the day, and failed to find him.

[6, 7] Appellants object to testimony in the record regarding the wife of deceased, his relations with her, and especially the facts and circumstances which would indicate that she deserved consideration from him, and that she had a natural claim upon the bounty of testator. This objection is made because the wife was not one of the contestants. However, that fact does not destroy the relevancy of the evidence offered. The evidence was offered to show that the will was an unjust and unnatural one. While an unjust will does not of itself raise the presumption of undue influence, the nature of the will may be considered by the jury upon the issue of undue influence as a circumstance. Estate of Snowball, 157 Cal. 303, 107 P. 598; Estate of Gallo, 61 Cal. App. 174, 214 P. 496.

[8] Objection is made to evidence of statements made by testator six months before his death to his wife's aunt to the effect that Mrs. Logan was trying to force him to get a divorce from his wife and marry her; that he did not wish to do this; that he was afraid Mrs. Logan would put him out of her house if he did not, and similar statements. These statements were admitted for the purpose, and restricted by the court to such purpose, of showing the state of mind of the testator. For such limited purpose they were admissible. Declarations of a testator which reveal his condition of mind are admissible for that purpose, although not a part of the res gestæ, but their effect must be carefully limited to the question of his condition of mind, and they must not be considered as narrations of the exercise or effect of the undue influence. In re Calkins, 112 Cal. 301, 44 P. 577; Estate of Arnold, 147 Cal. 593, 82 P. 252. In the instant case the jury was repeatedly instructed that the declarations of the testator were admitted only to show his state of mind, and not as evidence of the facts recited.

[9] Appellants contend that, although this evidence may have indicated the mental state of testator six months before his death, mental state is not germane to the issues, and that the incidents narrated were too remote in time to illuminate the state of mind of testator at the time of the testamentary act. We think the latter objection goes to the weight of the testimony. In 28 Ruling Case Law, 151, it is said:

> "On the issue of undue influence, declarations of a testator are admissible in evidence when they are part of the res gestæ, but it is not essential that statements made by him should be of the res gestæ to render them admissible, though their value as evidence diminishes in proportion as they are remote from the date of the will."

[10] As to the objection that the state of mind of the testator was not germane to the issue of undue influence, the matter is thus analyzed in an authoritative text on Evidence:

> "Where undue influence or fraud is the issue, three uses of the evidence present themselves. The testator's utterances * * * may be offered either as indirect evidence of the testator's condition of mind-weakness, susceptibility to importunities, and the like—or as declarations of a state of mind (under the present exception), assertions of affection or dislike, etc.,—and are thus admissible; his condition of mind, intelligence and strength of purpose, feelings toward this or that person, being all circumstances which bear on the fact of undue influence; the propriety of this use is universally recognized.
>
> "Again, the question whether a will was made

under undue influence is, in one aspect, a question whether the testamentary intentions and wishes represented in it are the normal ones of the testator, or whether, relatively to his known usual and constant state of mind, they are abnormal. It thus becomes important to learn what was the normal condition of his affections, wishes and testamentary intentions, for the purpose of establishing this standard of normality. As evidence of these affections, intentions, etc. —either by circumstantial inference or under the present exception for declarations of a state of mind—his utterances at various times before or after execution (including expressions of affection or the opposite, previous wills or statements of intention, etc.) may be resorted to. This use of such evidence is also universally accepted." 1 Greenleaf on Evidence (16th Ed.) p. 261 et seq.

[11] Appellant objects to the admission of the testimony of Mrs. Langworthy to the effect that Mrs. Logan had admitted on Saturday, June 16th, that she knew Maescher's mind had weakened, but that she was relying upon the fact that his brothers did not know this. It is objected that this statement of Mrs. Logan could not bind the other beneficiaries under the will, and was not admissible against them. This objection is undoubtedly sound. However, as this evidence was directed to the issue of mental incompetency, upon which the jury has found against the contestants, no prejudice has resulted to the beneficiaries under the will. That issue and the evidence upon it have not been discussed herein because the special verdict of the jury upon that question has eliminated it from consideration here.

[12] Objection is made to certain testimony of the witness Mary Graham. She had been employed in Mrs. Logan's household six or seven years before the will contest. She testified that on one occasion when Mr. Maescher was in bed on the sleeping porch Mrs. Logan asked him to give her some flats which he owned, and he said he would not do so. Contestants had set forth in their pleading, and attempted to prove a continuous course of conduct on the part of Mrs. Logan and the exercise of a strong influence over Maescher from the time he first met her until his death. Their theory was that Mrs. Logan separated Maescher from his wife, and gradually and steadily persuaded him to transfer his property to her until she had acquired a large fortune, and then, when he was weakened in mind and body, influenced him to make a will, leaving substantially all the balance of this property to her and her adopted child. The testimony of Mrs. Graham was a link in that alleged chain. If its reception was not justified because of the peculiar theory of the case, nevertheless, we think it was pertinent as showing the close and intimate relationship of the parties. Certainly such a request on the part of Mrs. Logan demonstrated such relationship. The nature of the relationship between a testator and one charged with having unduly influenced him in making a testamentary disposition of his property is always a proper subject-matter for investigation by the jury.

[13] The testimony of the sister of Mrs. Maescher regarding the latter's attention to her home duties and her devotion and kindness to her husband cast light upon the naturalness of the testamentary act. It has repeatedly been held that the injustice and unnaturalness of a will are circumstances to be considered in resolving the issue of undue influence. It would be more unnatural to disinherit a blameless, devoted wife than to disinherit one who had given the testator cause for complaint.

[14] It is contended that the motion to dismiss the action as to Lois Frances Logan, a minor, should have been granted upon the ground that no citation was served upon her guardian in compliance with the requirements of section 1328, Code of Civil Procedure.

The citation was issued to Lottie T. Logan, Lottie T. Logan, as guardian of Lois Frances Logan, a minor, and Lois Frances Logan, a minor. Service was made upon Lottie T. Logan for herself personally, and she was also served as said guardian. Service was also made upon the minor personally. Lottie T. Logan was the natural guardian of said child, having adopted her. Mrs. Logan had also applied for letters of guardianship to care for the estate of said child at the date of the issuance of the citation. The objection to the service is made by the appellants because Lottie T. Logan had not qualified as such guardian of the estate of Lois Frances Logan by filing the necessary bond at the time the citation was served upon her. While this fact creates an irregularity in the service, no prejudice resulted to the minor therefrom under the facts of this case. Less than a month after said service Mrs. Logan was appointed guardian ad litem of the minor, and thereupon filed an answer for herself and on behalf of her ward as said guardian ad litem.

[15, 16] In Estate of Simmons, 168 Cal. 390, 395, 143 P. 697, 698, the court says:

> "It seems entirely clear that, under this statutory scheme, jurisdiction of the subject matter of the contest is vested in the court by the filing of the petition. Mr. Justice Temple, in his concurring opinion in San Francisco Prof. O. A. v. Superior Court, 116 Cal. 443 (48 P. 379), expresses the view that the proceeding is one in rem, and that service of a citation might have been omitted from the statutory procedure because not essential to jurisdiction of the res. But if it be thought that service of the citation has any bearing on the jurisdiction, its office can be only that of a summons in a civil action, viz., to give jurisdiction of the persons of those whose rights would be affected by revocation of the probate. A voluntary appearance would dispense with the necessity of service. Abila v. Padilla, 14 Cal. 106; Estate of Ricks, 160 Cal. 467 (117 P. 539). While the issuance of citation within the year is requisite to the maintenance of the contest, and a failure to have it

thus issued would, in the absence of an appearance by adverse parties, justify the dismissal of the contest Estate of Hite, 155 Cal. 390 (101 P. 8); Estate of Ricks, 160 Cal. 467 (117 P. 539), the proceeding is none the less commenced by the filing of the petition, and the court's jurisdiction of the contest attaches upon such filing. Bacigalupi v. Superior Court, 108 Cal. 92 (40 P. 1055), relied on by respondent, merely holds that, where the petition for revocation had been dismissed, the court was without jurisdiction, after the expiration of a year from probate, to revive the lapsed petition and order a citation issued."

The other objections urged by appellants are unsubstantial. We find no error in the record warranting a reversal of the judgment, and the same is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

78 Cal. App. 138

PEOPLE v. CONSULTER. (Cr. 1308.)

(District Court of Appeal, First District, Division 1, California. May 25, 1926. Hearing Denied by Supreme Court July 22, 1926.)

Criminal law ⚷1169(2).

In prosecution for manslaughter by driving automobile into, and causing death of, person waiting for street car in safety zone, any error in admitting evidence that district was business district and giving instructions on theory that it was business district *held* harmless, in view of other evidence conclusively showing it to be business district within Motor Vehicle Act, §§ 114a, 114c (Deering's Codes & Gen. Laws Supp. 1925, p. 710).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Peter Consulter was convicted of manslaughter, and he appeals. Affirmed.

Walter H. Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and E. F. Mitchell, of San Francisco, for the People.

TYLER, P. J. Defendant was charged upon an information filed by the district attorney of the city and county of San Francisco with the crime of manslaughter. He was convicted. A motion for a new trial was made and denied.

This is an appeal from the judgment and order. The facts are simple. There is evidence in the record to show that on the 30th day of August, 1925, at about 7 o'clock in the evening, one Martin Thorsen, accompanied by his wife and two young children, a son and daughter, were standing within a safety zone situated on the east side of Mission street at Courtland avenue. The boundary line of the zone was marked upon the surface of the highway and also upon a police standard located on the southerly end thereof. Thorsen and his family were waiting for a north-bound car on Mission street. The evening was clear and it was still daylight. At this time defendant was returning from a picnic in an automobile. He was driving the machine accompanied by a party of friends. As he approached the intersection of the streets named, he was proceeding in a northerly direction along Mission street down the incline which there exists, driving on the car tracks at a speed estimated by witnesses at about 30 miles an hour. As he neared the intersection of the streets, he left the car tracks and drove his car directly into the safety zone, striking Thorsen and his little daughter. His car, after passing over Thorsen, continued on for a distance of some 200 feet when it was brought to a stop. Defendant was then questioned by a police officer as to who was driving the car. This officer testified that defendant had been drinking. By reason of the impact, Thorsen received serious injuries which caused his death some three hours later. His chest and ribs were crushed and his lungs and liver both punctured. The buildings on both sides of Mission street where the deceased met his death are occupied by stores, it being a business district. In proof of this fact, there was offered and received in evidence the testimony of certain police officers. The learned trial court instructed the jury upon this subject in conformity with section 114 (a) of the Motor Vehicle Act as it existed at the time deceased met his death. That section reads as follows:

> "A 'business district' for the purposes of this act shall mean the territory contiguous to a public highway when 50 per cent. or more of the property fronting on such highway for a distance of three hundred feet or more is occupied by buildings in use for wholesale or retail business." Deering's Supp. to Codes and General Laws 1925, p. 710.

As ground for reversal appellant contends that the trial court erred in permitting the police officers to testify concerning the character of the neighborhood of Mission street where deceased was struck, and that it likewise erred in not properly instructing the jury upon this subject. This contention is based upon the provisions of section 114, subdivision (c) of the Motor Vehicle Act. It reads as follows:

> "Every public highway shall be deemed to be outside of a business or residence district unless sign posted, as provided in this act, and in any action at law, either civil or criminal, every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district and as to the presence of

such signs as are required by this act." Deering's Supp. to Codes and General Laws, p. 710.

We do not think appellant is in any position to raise these objections. An officer of the police department in charge of such work had prepared a photographic diagram of the intersection of Courtland avenue and Mission street which showed, among other things, the width of the streets and the location of the safety zone. This diagram was admitted without objection. Upon cross-examination counsel for appellant brought out the fact that the buildings on both sides of Mission street at this point are all occupied by stores. Another police officer on his cross-examination was likewise interrogated and testified that he had made an examination of the neighborhood and that 50 per cent. of the property was used for business purposes. Moreover, there is other evidence in the record which was not objected to, which shows conclusively that the district was a business one. The photographic diagram was in evidence, and one of the witnesses for defendant testified on his direct examination, in response to questions put to him by counsel for defendant, that "there are all stores in that block there." Then again defendant asked for no instruction upon the subject, and it was a matter upon which there was and could be no dispute or question. See Varco v. Lee, 180 Cal. 338, 181 P. 223. Here no objection is raised as to the sufficiency of the evidence, and, if there was any error by reason of the instruction, the error certainly did not result in a miscarriage of justice.

As above recited, there is evidence to show that defendant drove his machine into a safety zone in a reckless manner and at a speed greater than was reasonable or proper, and that he had been drinking. Under these circumstances, it is hard to see how the jury could have reached a different verdict.

The judgment and order appealed from are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 151

PEOPLE v. COKER. (Crim. No. 897.)

(District Court of Appeal, Third District, California. May 25, 1926.)

1. Criminal law 🔑564(3)—Evidence as to finding of deceased and instrument similar to one used in killing deceased in particular county held sufficient to establish venue of offense.

Evidence that deceased's body was found in automobile in particular county under circumstances justifying conclusion that car was not driven there by deceased after he was wounded, and that instrument similar to one used in killing deceased was found in defendant's car in same county, *held* sufficient to establish venue of offense, and to justify conclusion that homicide occurred in such county.

2. Criminal law 🔑404(3).

Blood-stained ice pick, which defendant admitted he used in killing deceased, found to have been mortally wounded by long, sharp instrument, *held* properly admitted.

3. Criminal law 🔑404(3)—Ice pick, admitted by defendant to have been used in stabbing deceased, held admissible to corroborate defendant's statements as to where it would be found, and how he used it.

Blood-stained ice pick, with which defendant admitted stabbing deceased found dead from wounds inflicted by long sharp instrument, *held* admissible to corroborate defendant's statements as to where pick would be found, and as to how he used it, but not necessary to establish corpus delicti.

4. Criminal law 🔑404(3), 517(4)—Homicide 🔑228(2)—Finding of person dead from wounds not self-inflicted establishes corpus delicti, which admits statement of defendant and instrument used to commit offense.

Finding of body of person dead or mortally wounded by wounds that he could not have self-inflicted, and his following death, establishes corpus delicti and fact that homicide had been committed, which admits statements of defendant unobjected to and instrument used to commit offense.

5. Homicide 🔑228(2)—Evidence held to establish fact of homicide irrespective of statements of defendant.

Evidence as to defendant being mortally wounded by wounds which could not have been self-inflicted *held* to establish fact of homicide, irrespective of admission, statement, or confession of defendant.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Charles Coker was convicted of manslaughter, and he appeals. Affirmed.

J. Oscar Goldstein, of Chico, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

PLUMMER, J. The defendant was charged by the district attorney of Butte county with the crime of murder alleged to have been committed on the 3d day of August in the county of Butte. The trial resulted in a conviction of manslaughter. The defendant's motion for a new trial having been denied, this appeal is prosecuted from the order denying the defendant's motion and from the judgment of conviction. The points relied upon for a reversal are that the corpus delicti was not established either by circumstantial or direct evidence so as to admit of the statements or confession of the defendant, and also that the venue of the offense was not sufficiently established. The testimony bearing upon these two points set out in the transcript is as follows: Harold Teeter, a witness called by the people, testified:

"I live in Chico. I am 18 years old. I am the son of Mark Teeter. My father was stabbed on Sunday night, August 2d, around 12 o'clock, or on Monday morning, August 3d. It was just about midnight. I knew my father. I saw him after he was dead. I know as a matter of fact that my father is dead. He died in the Enloe Hospital. That is in Butte county, Cal. I last saw my father at the Enloe Hospital. I went to the Enloe Hospital about 10:30 Monday morning. The people at the hospital sent for me. I was living with my father. We were living out on Ninth and La Burnum."

Doctor N. T. Enloe, a witness called by the prosecution, testified as follows:

"My name is N. T. Enloe, and I am a duly licensed and practicing physician and surgeon in this county, and have been for 24 years. During the early morning of August 3d I had occasion to treat one Mark Teeter for certain wounds he had received. Mr. Teeter died as a result of those wounds. The nature of the wounds that he died of were small puncture wounds. There were four around the nipple, and one in the back about half way between the spine and the scapula—the shoulder blade, toward the lower point of the blade, and the other one was on the exterior surface of the left arm. As I remember it, there were four around the left nipple, one in the back, and one in the arm. The wounds were not self-inflicted. I can tell scientifically. In my opinion the wounds were not caused by an accident. I examined the wounds, and treated the man for them. In my opinion the instrument that caused those wounds would be a small sharp pointed instrument and long."

On cross-examination, the doctor further testified:

"I really do not know when I first saw Mark Teeter on the 3d of August. It was early in the morning some time; I do not remember what time. I do not know how many hours that was after he was brought to the hospital. As I remember it, when I examined the wounds, I found four punctures on the left side close to the nipple. As to what I found about those wounds that caused me to say that they could not have been self-inflicted, it would be practically impossible for a man to stand up and jab himself four times in succession, and on the wounds in the back, it would be absolutely impossible for him to get to it. * * * It would be practically impossible for the wounds in front or back to be self-inflicted. I do not know which particular wound caused the death of the man. I don't know if it was the wound on the back that caused the death. It was not the wound in the arm that caused the death. It might have been the wounds on the left chest. The contributing cause of the death of Mark Teeter was the puncture wounds with external hemorrhage. The deceased was intoxicated. As to the question of alcohol having anything to do with his death, his weakened condition made him less able to stand the shock of the puncture wounds. If he had not had the alcohol, I don't know whether he would have survived. No one could say whether he would have survived or not. The fact that the man was intoxicated and in a weakened condition made him more susceptible to the injury. I do not know what particular instrument caused those wounds—only a long sharp pointed instrument. In my opinion those wounds which I found were wounds which were caused by a sharp pointed long instrument. I performed an autopsy. The findings in that regard were a puncture in the left lung, and I do not remember which one of them went through it. His heart was on the right side. The heart is usually on the left side. I don't remember how long I treated Mark Teeter in the hospital, but about half a day I should judge. I have no way by which I could tell which one of the wounds was directly responsible for the puncture. As to any way of my determining which of the wounds was responsible for the puncture found in the autopsy, I say I found it at that time, but I do not remember which one it was. As to the drinking being a contributing cause to his decease, his weakened condition from drinking probably had something to do with it. The wounds were the immediate cause of the death of Mr. Teeter."

The testimony shows that, after the defendant had made his statement to the arresting officer, the arresting officer went to the place indicated by the defendant, and there found the deceased in an automobile, wounded as herein described; that the deceased was taken to the Enloe Hospital, where he died; also that the officers found a certain ice pick in an automobile belonging to the defendant, which was a long pointed instrument.

L. E. Newton, a witness for the prosecution, testified as follows:

"I am constable of Chico township and deputy sheriff of this county. I know the defendant Mr. Coker. I got that ice pick on or about the early morning of August 3d of this year. I got it out of Mr. Coker's car; it had blood stains on it at that time. I saw Mr. Coker on that occasion; that is early on the morning of August 3, 1925. I saw him in the police station in Chico about 12:30 on the morning of August 3d just after midnight. Mr. Coker and Johnnie Boyle were there. It was at the police station. The defendant made a statement that he had had a little trouble out to the house, and to get an ambulance and go out and bring the man in that he had trouble with. He said he thought he had killed him. He said the man was Mr. Teeter.

"Q. Now what else, if anything, Mr. Newton, did Mr. Coker tell you at that time? A. There was not very much more said right at that time because I was in a hurry to go out to the place where the trouble took place.

"Q. Now then afterwards, Mr. Newton, did he say anything further to you? (To which question defendant objected that the corpus delicti had not been proven.)

"The Court: As far as the corpus delicti is concerned, I have stated in regard to that, but that foundation is too late. As far as the corpus delicti is concerned, if that is not proven, the testimony will go out.

"Q. Did he make any other statements to you, Mr. Newton— A. No; I asked him if he killed him, and he said he did not know, but he intended to.

"Q. That is, Coker said that he intended to kill Teeter. A. Yes, sir.

"Q. Did you have any further conversation with him, Mr. Newton, at a later time? A. Not until the next morning.

"Q. Do you know whether or not at that time Mr. Coker was informed of his legal rights; that is, that he did not have to say anything? A. He was.

"Q. Will you tell us if you can remember anything that he said at that time? A. He said he expected he would stretch hemp for what he had done."

Johnnie Boyle, a witness, called by the people, testified as follows:

"I am a police officer of the city of Chico. I was on duty as a police officer about midnight August 2d, and early in the morning of August 3d of this year. I have seen that ice pick before. I put that tag on there myself; that is my handwriting. I saw Mr. Newton getting it out of Mr. Coker's car which was across the street from the city hall. I know the defendant, Mr. Coker. I saw him on the night of August 2d or early on the morning of August 3d of this year. No one else was present when I first saw him. It was about 12:30. I was on duty at the desk. The defendant was not under arrest at that time.

"Q. Did you have any conversation with the defendant, Coker, about this time, Mr. Boyle? A. Yes, sir.

"Q. Tell the conversation.

"Mr. Goldstein: I will object to it further on the ground that the corpus delicti has not been raised or established, and it is incompetent, immaterial, and irrelevant. (Objection overruled.) A. Well, he asked me where the officers were, and I said they were all out on duty, and he then asked me if there was an unwritten law here, and I answered him by saying that I didn't know anything about it, about an unwritten law, and he then said 'You better get an ambulance and send him out to Ninth and La Burnum, and get a man that is out there if he is not dead,' and at that same time he took the knife out of his pocket and laid it up on the counter, and said, 'This is all I have got,' and he said, 'Here I am,' and I told him that that was outside of the city limits, and he would have to get the constable, and so I called Newton up. And in the meantime Tom Hinderman stepped in; he is a police officer of Chico, and in a few minutes Officer Newton came, and I asked him (Mr. Coker) what the trouble was, and he said, 'We had a row out there,' and he said, 'That is the second time this thing has occurred,' and he said, 'I am not going to stand for it.' And, 'that time my family has been broken up, and I ain't going to stand for it any more,' and I asked him, I said, 'Was it a gun fight?' and he said, 'No, I run an ice pick into him,' and he said 'that he ought to have got her too.' And he said, 'The ice pick is over in my car across the street,' and I looked across the street out of the window, and saw the car parked there, and Mr. Newton stepped in in a short time, and he wanted to go out with us, Mr. Coker did, and I said, 'No, you better stay here with Mr. Hinderman until we come back,' and we got into Mr. Newton's car and drove to Ninth and La Burnum, and we turned into the alley. The house was lighted up, and, prior to that —I am ahead of my story—Mr. Coker directed us into the alley. He said the car was just west of the house in the alley, and we turned into the alley, and the car was not there, and we went down the alley 60 or 80 yards, and there we found the car jambed up against a shed or barn. And we drove alongside of it, and on the west side, and Mr. Newton got out of the car, and went around behind Mr. Coker's car, and opened the door. I got out, and Mr. Teeter was in the car, and he was lying with his head to the west and his feet was out over the east door. Mr. Newton went around behind the car, and we both put him in Mr. Newton's car, and we drove to the hospital with him, and there we took him into the hospital. I looked at my watch, and it was 20 minutes after one, and we left the hospital then, and came to the police station, and parked our car, and went over to Mr. Coker's car, and Mr. Newton looked in the front seat, and he found the ice pick lying in the front seat there, and we took it into the police station.

"Q. It was the same ice pick—this is the same ice pick, is it, Mr. Newton (exhibiting ice pick to witness)? A. Yes, that is the same pick.

"Q. And you saw Mr. Newton pick it up? A. Yes, sir.

"Q. And you put the tag on it? A. Yes, sir; I put the tag on it, and I put that knife in the envelope, and put it in the safe.

"Mr. Rothe: We will ask to have this ice pick introduced in evidence as People's Exhibit A.

"Mr. Goldstein: To which we will object on the ground that it is incompetent, immaterial, and irrelevant, and the proper foundation has not been laid, and there is not anything to connect this defendant with the ice pick.

"The Court: The objection will be overruled.

"Mr. Rothe: We will ask to have it marked People's Exhibit No. 1. (The ice pick is admitted in evidence, and marked People's Exhibit No. 1 by the clerk.)

"Mr. Rothe: Q. All you have testified to, Mr. Boyle, occurred in Butte county, Cal., did it? A. Yes, sir.

"Q. What time was it you say you first got this call, or that you first saw Mr. Coker come into the police station? A. That was about half-past 12. I took some notes on it at the time, and looked at my watch, and it was half-past 12.

"Q. And it was then that he told you that, that he—or said that he had used an ice pick on this man Teeter, is it? A. Yes, sir.

"Q. That is just a little after midnight that he told you this? A. Yes, sir."

By the testimony of the witness Boyle is shown, not simply the admission or statements of the defendant that he had stabbed the deceased, but that the body or person of the deceased was found in a car in such a condition as to justify the jury in coming to the conclusion that it was physically impossible for the deceased to have driven the car to that place; that the deceased was taken to a hospital in Chico; that the instrument with which the defendant said he had stabbed the deceased was found in the defendant's car, all took place in the county of Butte, not merely, as argued by appellant, that the conversation took place in the county of Butte. In the case of People v. Peete, 54 Cal. App. 333, 202 P. 51, the court, in passing upon the question of venue, uses language pertinent to the questions we are considering:

> "It is claimed that there was no proof of venue. It is argued that because the venue depends, not upon where the dead body may be found, but upon the place where the mortal wound was inflicted, it may not be inferred that the deceased was killed in Los Angeles county. The objection lacks merit. The venue, like any other fact in a criminal case, may be established by circumstantial evidence. And though no witness testified that Denton was murdered in Los Angeles county, the conviction being based entirely on circumstantial evidence, it is uncontradicted that the body was found in the city of Los Angeles, in the basement of the house that Denton had leased to defendant, many miles from the county line, covered with a mound of dirt, canvas, and other articles, showing that the body had been placed there by someone. This evidence, unexplained, was sufficient to justify the jury in concluding that the homicide was committed in Los Angeles county. In Hawkins v. State, 60 Neb. 380 (83 N. W. 198), it was held that 'evidence of the finding of the headless body of the person alleged to have been murdered in an old well which had been subsequently filled, situate in Frontier county, is sufficient, in the absence of other proof, to warrant the jury in concluding that the homicide was committed in that county.' To the same effect is People v. Kamaunu, 110 Cal. 609 (42 P. 1090). See, also, Wharton on Homicide, pp. 901, 902."

[1] In the instant case the body of a man mortally wounded is found in an automobile, under circumstances which impel the conclusion that the car was not driven by the deceased after the infliction of the mortal wounds, the taking of deceased to a hospital, where an examination disclosed that the deceased had upon his person wounds which could not have been self-inflicted, that the character of the wounds indicated that a long sharp instrument had been used, and that an instrument with which a like wound could be inflicted was found in the defendant's car with blood upon it, all in the county of Butte, we think sufficiently established the venue of the offense, and justified the jury in coming to the conclusion that he had been killed in the county of Butte.

[2-4] It is also argued by the appellant that the court erred in admitting the ice pick in evidence, and cites the case of People v. Hill, 123 Cal. 571, 56 P. 443, as authority for this contention. An examination of the Hill Case shows that there is no evidence identifying the stick which was admitted in evidence as the one with which the defendant in that case struck the deceased. In the case at bar the homicide is fully established by the testimony of Dr. Enloe that the deceased was mortally wounded by a long sharp instrument. It is also shown by the doctor's testimony that the wounds were of such a nature as to be practically impossible of self-infliction; that the deceased came to his death by reason of such wounds. Again, the ice pick is admissible in connection with the defendant's statement as to where it would be found and as to how he had used it. It is corroborative of the defendant's statement, but is not a necessary part of the testimony to establish the corpus delicti. As shown by the cases cited in this opinion, the finding of the body of a person either dead or mortally wounded by wounds that he could not have self-inflicted, and his following death, establishes the corpus delicti, and the fact that a homicide has been committed, which in turn, under the authorities, admits the statement of the defendant, when there are no other objections to its admissibility, and this, in turn, admits the ice pick as a means or instrumentality by which the offense was committed.

In 8 Cal. Jur. 165, in giving a definition of the term "corpus delicti," we find the further statement that—

> "Proof of the corpus delicti does not involve proof that the crime was committed by the defendant or the person charged with committing it. Consequently, mere proof of the defendant's connection with the crime is not sufficient, on the one hand, to establish the corpus delicti, and, on the other, it is not necessary in order to establish the essential elements of the crime to prove the defendant's connection with it. Yet, proof of the criminal agency frequently involves proof of the defendant's guilt."

In section 248, same volume, the rule is stated that the corpus delicti may be established by direct or circumstantial evidence, though it cannot be established by the extrajudicial confessions of the defendant:

> "The corpus delicti may be established by direct or circumstantial evidence. But it cannot be established by the extrajudicial admissions or confessions of the defendant, or, as the rule is frequently expressed, a conviction cannot be had on the extrajudicial admissions or confessions of the defendant unless corroborated by proof aliunde of the corpus delicti. While slight proof of the corpus delicti has in many cases been held to be a sufficient basis for the admission of confessions, it is nevertheless true that all the elements of the crime must be made to appear before a defendant's extrajudicial admissions or confessions are admissible for any purpose, and they cannot be used to establish any necessary element for the commission of the crime. Yet, it is not required that full proof of the body of the crime be made independently of the confession, that is to say, that the evidence, other than the admissions and declarations of the defendant, establish the commission of the offense beyond a reasonable doubt. The admission or confession is admissible in support of any element of the crime to which it applies, otherwise it would be useless except to prove the agency of the accused."

In this particular, the appellant relies upon the case of People v. Tapia, 131 Cal. 647, 63

P. 1001, where the defendant was convicted of murder and the body of the deceased more or less consumed by fire. The court said:

> "A great deal of his body [the deceased] had been entirely consumed by the fire; still, we think, it was sufficiently identified as the body of the deceased. But the evidence of the other facts necessary to make full proof of the corpus delicti—that is, that his death was caused by criminal means used by another person and not by his own act or by accident—was very slight. We hardly think that any jury would have found that a murder had been committed without certain evidence tending somewhat to connect appellant with the crime charged, and particularly without the testimony of another Indian, named Francisco (who was comparatively a stranger to appellant), to the effect that appellant had made a confession to him that he (appellant) killed the deceased."

This excerpt shows that the circumstances in that case are readily distinguishable from those of the case at bar. Here we have all the elements necessary to show the fact of a homicide, irrespective of any statement of the defendant. In the Tapia Case, the building in which the deceased's body was found by the neighbor was destroyed by fire without evidence as to the origin of the fire. In the case at bar, the testimony is that the deceased was mortally wounded in a manner which was practically impossible to have been self-inflicted, and completely meets the further statement of the rule found in the Tapia Case, where it is said:

> "It is well-settled law that the corpus delicti must be established independently of evidence which merely tends to connect the defendant with the crime charged; and independently of any asserted extrajudicial admissions or confessions of the party charged, and that such admissions or confessions cannot be considered as evidence of the corpus delicti. In People v. Simonsen, 107 Cal. 345 [40 P. 440], this court declared the rule as follows: 'The term "corpus delicti" involves the elements of crime,' and that 'defendant's admissions cannot be used to establish any necessary element in the commission of the crime' "—citing a number of cases.

[5] The testimony further shows all the elements, as we have said, of the crime, to wit, the commission of a homicide without any reference whatever to the admissions or statements or confession of the defendant. We also think the case of People v. Frank, 2 Cal. App. 283, 83 P. 578, relied upon by appellant, is inapplicable to the case at bar. The definition of the term "corpus delicti" there given is substantially as we have herein set forth. The finding of a dead body alone does not establish, as held in that case, the corpus delicti, but, as held in that case, it must be shown that death is the result of criminal agency, which conditions are fully and completely met in the case at bar. See, also, People v. Flores, 34 Cal. App. 393, 167 P. 113; People v. Britt, 62 Cal. App. 674, 217 P. 767.

Under the New York Code of Criminal Procedure, providing that the confession of a defendant shall not be sufficient without additional proof that the crime charged has been committed, the finding of the dead body of a murdered man, with the unmistakable marks of a murder committed, is sufficient additional proof to warrant the conviction of a defendant on his own confession. Kerr on Homicide, § 494; 3 Rice on Criminal Evidence, § 293; People v. Deacons, 109 N. Y. 374, 16 N. E. 676.

Other cases might be cited upon the question of the sufficiency of the proof in this case to establish the corpus delicti, and also show the sufficiency of the proof as to venue, but we think the foregoing sufficient to show that the defendant was justly convicted. The order and the judgment appealed from are affirmed.

We concur: FINCH, P. J.; HART, J

---

78 Cal. App. 90

CORDES v. PAULSON. (Civ. 3005.)

(District Court of Appeal, Third District, California. May 21, 1926. Rehearing Denied June 19, 1926.)

1. Corporations ⚷215.

Stockholders' liability under Const. art. 12, § 3, and Civ. Code, § 322, is distinct and separate from that of corporation, and cannot be extended by corporation.

2. Corporations ⚷237.

Corporation's payment on debt *held* not assumption of indebtedness, fixing personal liability on stockholders who acquired stock after debt was incurred, but before such payment.

3. Corporations ⚷269(2).

Assignment of claim against corporation, which was not dated, and did not state that it covered right of action against stockholders, *held* properly excluded, in action to enforce stockholders' liability.

4. Corporations ⚷268(5)—In action to enforce stockholders' liability for corporate debts, variance between allegations that indebtedness was for goods sold and delivered and proof that debt was for overpayment to corporation held fatal (Code Civ. Proc. §§ 469, 470).

In action to enforce stockholders' liability for corporate debts, variance bteween allegations that indebtedness was for goods sold and delivered and proof that debt was for an overpayment to corporation *held* fatal, where pleading could not be amended, under Code Civ. Proc. §§ 469, 470, owing to statute of limitations.

5. Dismissal and nonsuit ⚷58(5).

Material variance is ground for nonsuit, unless pleader obtains leave to amend pleading to conform to proof.

---

6. Corporations 🔑237.

Corporation's request to creditor to apply certain payment on certain invoice will prevent subsequent action to enforce stockholders' liability as to such invoice, in view of Civ. Code, § 1479, though corporation owed such creditor other money at time payment was made.

7. Corporations 🔑237.

Stockholders' liability cannot be enforced, where it is not shown whether sale creating debt was to corporation or to company which corporation had taken over.

8. Corporations 🔑237.

Stockholder *held* not liable for corporation's indebtedness incurred before he became stockholder.

9. Corporations 🔑237.

Stockholder *held* not liable for indebtedness transferred to corporation by order of one using corporation's letter head, but who was not officer of company, which order did not show time of incurring liability or creation of debt.

10. Corporations 🔑240(4).

Stockholders' liability *held* unenforceable by assignee of creditor, where alleged assignment was never offered in evidence.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Josephine M. Cordes, executrix under the last will and testament of W. F. Cordes, deceased, substituted plaintiff for W. F. Cordes, deceased, against John Paulson. Judgment for defendant on his motion for nonsuit, and plaintiff appeals. Affirmed.

G. A. Harrison, Maurice E. Harrison, and Byron F. Stone Jr., all of San Francisco, for appellant.

L. P. Farnham, and Duard F. Geis, both of Willows, for respondent.

PLUMMER, J. Action to enforce stockholder's liability. The defendant had judgment on his motion for nonsuit, and plaintiff appeals.

The complaint alleges the existence of a California corporation known as and called "California Marketing Exchange," having an authorized capital stock of $100,000, divided into 4,000 shares, of the par value of $25 each; that at all times between September 13, 1920, and February 28, 1921, inclusive, the defendant was the owner of 20 shares of the capital stock of said corporation; that between September 13 and September 24, 1920, the number of shares issued was 130, and between September 24, 1920, and February 28, 1921, inclusive, the whole number of subscribed and issued shares of the capital stock of said corporation was 140. The complaint then sets forth five separate causes of action, which causes of action it is alleged were assigned to W. F. Cordes, deceased, and constituted the basis of his action herein. In these several causes of action the plaintiff alleges indebtedness by the corporation, and, by reason of such indebtedness, seeks to hold the defendant for his proportionate share thereof.

[1] Section 3 of article 12 of the Constitution of the state of California and section 322 of the Civil Code provide that each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities, contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock of the corporation. As set forth in 6 California Jurisprudence, p. 997, § 378:

> "Although the liability of stockholders must have its origin and inception in some act of the corporation, it is distinct and separate from that of the corporation. * * * The corporation has nothing to do with the liability of stockholders after it arises. That is strictly a matter between creditors and stockholders, not as corporators, but as individuals. * * * The corporation is powerless to extend a stockholder's liability by a new promise or by an agreement extending the period of the statute of limitations or by changing the form of indebtedness."

In Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335, the liability of stockholders as distinct from that of the corporation, and also the powerlessness of the corporation after the liability or debt has been created to affect or change the same, is thus set forth:

> "Recognizing, as we must, that the stockholder becomes liable to the corporation's creditors solely as an original debtor, and not in any way as a surety or guarantor for the corporation, and that this liability arises by operation of law from the creation and existence of the debt, not through any power of the corporation to bind him to personal liability for its obligations, it would seem requisite to fixing such liability in an action against the stockholder to prove the facts establishing the corporate debt. The law makes the act of the corporation creating a corporate liability binding on the stockholders, but it does not extend the power of the corporation any further in the matter or authorize it to represent the stockholder in putting up a defense against his personal indebtedness. The limitation of the authority of the corporation to in any way enlarge or extend or renew the stockholder's statutory liability is declared in the decisions of this court holding the corporation powerless to extend such liability by a new promise, or by agreement extending the period of the statute of limitations, or by changing the form of the indebtedness. Hyman v. Coleman, 82 Cal. 650, 23 P. 62, 16 Am. St. Rep. 178; Winona Wagon Co. v. Bull, 108 Cal. 1, 40 P. 1077. In Winona Wagon Co. v. Bull, supra, this court adopts the following language from Trippe v. Huncheon, 82 Ind. 307, as to the relation of the corporation to stockholders' liability: 'The corporation has nothing to do with this liability, nor has it the right or power to represent its members as to this individual obligation. It is a matter between the creditors of the corporation and its

members, not as corporators, but as individuals.' "

Other authorities might be cited to the same effect, but the foregoing make it clear that, after the debt or liability is incurred, no subsequent acknowledgment thereof, no subsequent promise by the corporation, no matter what the form of the act by the corporation may take, can extend the liability of the stockholder, or create any new or additional obligation to be kept or performed by the stockholder.

In several of the alleged causes of action, set forth in the complaint, the appellant relies upon letters by officers of the corporation showing the existence of the indebtedness before the defendant became a stockholder and for a considerable period thereafter, and upon this basis seeks to hold the defendant. The authorities which we have cited clearly establish the fact that the liability of the corporation is distinct and separate from that of the stockholder, and while the letters written by officers of a corporation may evidence the circumstances of an indebtedness of the corporation they are immaterial as to the liability of a stockholder. A considerable portion of the briefs of counsel have been consumed in a discussion of the law as to what admissions of indebtedness of corporations made by its officers may be admitted in evidence in an action against a stockholder, but, from a careful inspection of the record, as will hereafter appear, we are satisfied the question of the admissibility of such testimony is not really involved in this case, by reason of the fact that the letters referring to the indebtedness of the corporation do not refer to debts contracted while the defendant was a stockholder, save and except in one instance, where a letter accompanying a check specified that the payment was to be applied upon a particular indebtedness while the defendant was a stockholder, and anything we might say would be unnecessary to a decision of this case, and therefore obiter as to the admissibility of the acknowledgment of an indebtedness of a corporation by the officers thereof.

With this preliminary statement as to the law by which this case is governed, we will consider the various causes of action set forth in the plaintiff's complaint, following the order therein, although the proofs as introduced upon the trial did not do so.

[2] For his first cause of action the complaint alleges that "between September 13, 1920, and September 23, 1920, the said California Marketing Exchange incurred an indebtedness and became and is indebted to Rosenberg Bros. & Co., in the sum of $850.95 for goods sold and delivered between said last-mentioned dates to said corporation by said Rosenberg & Co." to the California Marketing Exchange. In support of this allegation the plaintiff offered correspondence between California Marketing Exchange and Rosenberg Bros. & Co., as follows:

A letter, dated September 3, 1920, written by the secretary of the California Marketing Exchange to Rosenberg Bros. & Co., the material portion of which is in these words:

> "We have your letter of August 30th in regard to balance due you for feed stuffs. According to our books we are indebted to you to the amount $1,521.19; statement inclosed."

And a subsequent letter, dated October 9, 1920, written to Rosenberg Bros. & Co., by the manager of the California Marketing Exchange, from which it appears that California Marketing Exchange then and there forwarded to Rosenberg Bros. & Co. a check for the sum of $503.33 payment on account. A few other letters between the respective corporations were also introduced, but none of them show any facts further than indicated by the two letters from which we have quoted.

The appellant's claim that the letter of October 9, 1920, is an assumption of the indebtedness by the corporation, California Marketing Exchange, so as to fix the liability of a stockholder as of that date is without merit. It clearly appears that no indebtedness or liability whatsoever was incurred during the period of time the defendant was a stockholder of the California Marketing Exchange. The indebtedness of the corporation was all incurred before he became a stockholder, and the fact that payment on the indebtedness was thereafter made by the corporation, while he was a stockholder, does not in any wise change or affect his liability. The further correspondence referred to herein relates to a discussion as to the giving of notes payable so many days after date for the remainder due on the account. Whether such notes were or were not given the record does not disclose. What we have said suffices to show that the trial court committed no error in granting a nonsuit as to the plaintiff's alleged first cause of action, irrespective of whether the defendant's objection to the want of a sufficient assignment by Rosenberg Bros. & Co. to the plaintiff of its claim against the California Marketing Exchange was or was not well taken.

[3] For his second cause of action the plaintiff alleges:

> That the "California Marketing Exchange, between September 24, 1920, and February 28 1921, became indebted to Albers Bros. Milling Company in the sum of $5,146.76, and that prior to the beginning of this action Albers Bros. Milling Company sold, assigned, and transferred to the plaintiff all its right, title, and claim to recover for said goods sold and delivered as herein set forth."

In support of its second cause of action the plaintiff introduced testimony to the effect that, prior to the time when the defendant became a stockholder in the California Marketing Exchange, the Albers Bros. Milling Company had sold to the California Marketing Exchange, a considerable quantity of goods, wares, and merchandise, and also between September 30 and November 12, 1920, sold and delivered certain specified articles of merchandise to the California Marketing Exchange, and then attempted to show the plaintiff's right to maintain an action against this defendant on account thereof by reason of the following alleged assignment, to the introduction of which the defendant's objection was sustained:

"Creditor's Assignment of Claim.

"Board of Trade of San Francisco.

"In the Matter of California Marketing Exchange, Willows, California.

"Dated, San Francisco, ———, 192—.

"In consideration of one dollar, and other good and valuable considerations to us severally paid by the assignee next hereinafter mentioned, the receipt whereof is hereby acknowledged, we hereby sell, assign, and transfer to W. F. Cordes, our claims and demands against the first above named in the amounts hereinafter set forth, and we severally authorize said assignee to enforce the payment of the same, by legal remedies or otherwise, for his use and benefit.

"Witness our hands, with the several amounts of said claims and demands placed opposite thereto.

"Albers Bros. Milling Co., $5,256.60.
"[Seal] By Bert M. Denison, Secretary."

No testimony was introduced otherwise as to when said assignment was executed, or whether it did or did not, or was or was not intended to, cover the right of action, if any, possessed by the Albers Bros. Milling Company against this defendant. The alleged assignment simply stands alone in the record, and, without discussing the question as to whether the secretary was or was not shown to have been authorized to execute assignments, it is sufficient to say that the court's ruling in excluding the assignment upon the showing made was not erroneous, and therefore the judgment of nonsuit as to the plaintiff's second alleged cause of action was properly entered.

[4] For his third alleged cause of action, the plaintiff alleged that the California Marketing Exchange, between September 24, 1920 and February 28, 1921, became indebted to the Western Meat Company, a corporation, in the sum of $395.60 for goods sold and delivered between said dates by said Western Meat Company to the California Marketing Exchange, and that said cause of action had been regularly and duly assigned by the Western Meat Company to the plaintiff. The record shows that on or about October 20, 1920, the Western Meat Company purchased from the California Marketing Exchange a certain carload lot of hogs; that on or about the 23d day of October, 1920, the Western Meat Company forwarded a draft in favor of the California Marketing Exchange on account of said carload of hogs in the sum of $1,500, before the arrival of said hogs, under the belief that a full carload of hogs had been shipped. Upon the arrival of the hogs it was found that a full carload had not been shipped, and that the Western Meat Company had overpaid the California Marketing Exchange in the sum of $400. This overdraft, or to recover for money had and received from the Western Meat Company, is the basis upon which plaintiff founds his third cause of action. The defendant objected to the introduction of such testimony, which was produced by way of a deposition and also moved for a nonsuit on the ground of variance between the allegations and the proof.

Upon this appeal, the appellant relies upon cases where one may waive a tort and sue for goods, wares, and merchandise sold and delivered, but we do not see the applicability of such authorities to the case at bar. The Western Meat Company had not sold any hogs to the California Marketing Exchange. The California Marketing Exchange had sold a lot of hogs to the Milling Company, and were simply overpaid the value thereof. The record does not show that any particular lot of hogs were sold by the California Marketing Exchange to the Western Meat Company; simply from the record it can only be inferred that the Western Meat Company had ordered a carload of hogs from the California Marketing Exchange, and the California Marketing Exchange delivered a partial carload, and drew upon and obtained from the Western Meat Company some $400 more than it was entitled to. It does not appear from the record that when the defendant's objection was interposed to the variance between the proof and the allegations, or when the defendant's motion for a nonsuit upon such ground was made, the appellant attempted to take advantage of the provisions of either section 469 or section 470 of the Code of Civil Procedure. The reason, therefore, however, is evident from an inspection of the dates appearing in the record, because at the time of the trial, had the plaintiff's claim been otherwise sufficiently well grounded, the statute of limitations had run against the possibility of pleading plaintiff's third cause of action against the defendant on account of the matters attempted to be proven showing the overdraft.

[5] From a reading of the complaint, it is evident that, as to the third cause of action, the defendant, a stockholder and not an officer of the corporation, would be led only to make inquiries as to whether $395.60 worth of goods, wares, and merchandise were actually sold by the Western Meat Company to the California Marketing Exchange during the time he was a stockholder thereof, and, not finding any such testimony, consider the allegations unfounded, and not that the cause of action was really for money had and received by reason of an overdraft. As set forth in section 183, p. 263, 21 California Jurisprudence, such a variance is fatal to one's right of action to recover unless the pleading is

amended or the objection waived. "A material variance is ground for nonsuit, even though the evidence was admitted without objection, unless the pleader obtains leave to amend his pleading so as to make it conform to the proof." See cases also there cited. Section 181 of the same volume sets forth the rule that the proof and the allegations must correspond. The pleading cannot be amended in this case, for the reasons we have stated, and it follows that the court's order directing a nonsuit as to the plaintiff's alleged third cause of action was properly entered.

[6] For his fourth cause of action, the plaintiff alleges that the George H. Croley Company, between the 24th day of September, 1920, and the 28th day of February, 1921, sold and delivered goods, wares, and merchandise to the California Marketing Exchange in the sum of $638.60, and that the claim of the said Croley Company, prior to the beginning of this action, was sold and transferred to the plaintiff herein. Passing by all of the defendant's objections to the sufficiency of the assignment by the Croley Company to the plaintiff, we will consider simply the items claimed to evidence the indebtedness upon which the suit is based. The record shows that on the 11th day of October, 1920, seven tons of feed, amounting in value to the sum of $500, were shipped by the George H. Croley Company either to the California Marketing Bureau or to the California Marketing Exchange. Although apparently overlooked by counsel, the record shows that whether said $500 worth of goods, wares, and merchandise were received by the California Marketing Exchange or California Marketing Bureau is wholly immaterial, by reason of the fact that this particular item of indebtedness has been paid. The transcript sets forth the following letter in relation thereto:

> "California Marketing Exchange, Inc.
> "Willows, California, October 30, 1920.
>
> "Geo. H. Croley Co., 8th & Townsend, San Francisco, Cal.—Gentlemen: Attention. We are inclosing trade acceptance for $500, being the amount of the last invoice for shipment of October 11th. We will mail another check for $500 early next week, and will pay a like sum every week, or, if you would prefer, we could give you trade acceptances for the balance due, paying the balance in four equal payments, 15 days apart.
>
> "Yours very truly,
> "California Marketing Exchange, Inc.,
> "E. H. Phreaner, Secretary."

The receipt of which is evidenced by a letter of the Croley Company to the California Marketing Exchange, dated November 3, 1920, which letter is as follows:

> "November 3, 1920.
>
> "California Marketing Exchange, Willows, California—Gentlemen: Attention Mr. E. H. Phreaner. We are in receipt of your letter of October 30th, with inclosed trade acceptance, for which we thank you. If it is the same to you, we would prefer that you give us trade acceptances for the balance due, paying the balance as you suggested—in four equal payments 15 days apart.
>
> "Respectfully yours,
> "Geo. H. Croley Company, Inc.,
> "By ———, Asst. Secretary."

By the provisions of the first subdivision of section 1479 of the Civil Code, irrespective of the argument of counsel, it must be held that the $500 canceled the item of indebtedness mentioned in the letters set forth. The subdivision of the section specifically sets forth:

> "If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied."

[7] There remains undischarged in the indebtedness alleged in the fourth cause of action of the complaint the sum of $138.60, which would create a liability, if any, against the defendant, as the owner of one-seventh of the issued capital stock, of the sum of $19.14; but even this indebtedness and liability on the part of the defendant as a stockholder is not sufficiently proven. It appears from the record that the Croley Company had been shipping goods to the California Marketing Bureau and also to the California Marketing Exchange during the year 1920, and that some time during the month of July, 1920, the California Marketing Exchange took over the business of the Bureau; but it does not appear whether the $138.60 worth of goods were shipped to the California Marketing Bureau or to the California Marketing Exchange. The transcript shows the following testimony:

> "Q. Mr. Zwart, will you state the amount of goods shipped and delivered to the California Marketing Bureau or the California Marketing Exchange during the year 1920, giving in each case the character of the goods shipped or value of the goods shipped?"

In answer to this question the witness gave a schedule of the dates of shipment and the value of each shipment, but did not say to whom the goods were shipped. The proof is thus insufficient to show facts and liability on the part of the defendant for the said sum of $19.14, and therefore the defendant's motion for a nonsuit as to plaintiff's fourth cause of action was properly granted.

[8] For his fifth cause of action, the plaintiff alleges that the Union Lithograph Company sold and delivered between the 24th day of September, 1920, and the 28th day of February, 1921, to the California Marketing Exchange, certain goods, wares, and merchandise, of the reasonable value of $419.80, and that prior to the commencement of this action the Union Lithograph Company sold, transferred, and set over all its right, title, and claim to recover from said corporation and from the defendant its right to recover, etc.

The testimony shows the following facts: That on July 8, 1920, the California Marketing Exchange received from the Lithograph Company goods valued in the sum of $220.60; that on the 6th day of November, 1920, the California Marketing Exchange received from the Lithograph Company stationery valued at the sum of $150, and aggregating a total sum of $370.60, upon which a payment was made of the sum of $71, on the 11th day of October, 1920, leaving due thereon from the California Marketing Exchange to the Lithograph Company the sum of $299.60.

[9] As the defendant did not become a stockholder in the California Marketing Exchange until the 13th day of September, 1920, the item of $220.60 is automatically eliminated from consideration. It also appears from the record that the Lithograph Company had also delivered certain stationery to the Glenn Hog Growers' Association prior to the time when the defendant became a member in the California Marketing Exchange, and also had taken over the business of the Glenn County Hog Growers' Association. The plaintiff's claim as to such liability on the part of the defendant is based upon the following letter, to wit:

> "California Marketing Exchange, Inc.
> "Willows, California, December 22, 1920.
>
> "Union Lithograph Co., 741 Harrison St., San Francisco, Cal.—Gentlemen: Will you kindly send us a statement of the account which you have against us, and also the Glenn County Hog Growers' Association. The amount due from the Hog Growers should be transferred to our account, as we ordered the supplies. Thanking you for your kind attention, we are, "Yours truly, California Marketing Exchange, Inc.,
> "[Signed] L. M. Bedon."

No proof was introduced as to the official character of the writer of the foregoing letter, and, as stated by the trial court at the time of the introduction, it did not appear that the man who wrote the letter was an officer of the company, but simply that the writing appeared on a sheet of paper bearing the letter head of the California Marketing Exchange. Taken at its best, it would only be an admission of the indebtedness by the corporation and does not evidence the time of the incurring of the liability or the creation of the debt so as to charge the defendant as a stockholder.

[10] This leaves only the sum of $150, for which the defendant, if the proof were otherwise sufficient, would be liable, as the owner of one-seventh of the issued capital stock, in the sum of $21.40. The record shows that the alleged assignment of the Union Lithograph Company was never offered in evidence; it was simply marked as Plaintiff's Exhibit 8 for identification. The case was not tried as though the assignments were offered in evidence and had only been marked for identification. For this reason we need not consider the argued question as to the sufficiency of this alleged assignment, and for the reasons which we have stated we need not consider, the sufficiency of any of the assignments, other than calling attention to the fact that the court did not err in its ruling in relation to the sufficiency of the Albers Bros. Milling Company assignment. A considerable portion of counsel's briefs have been devoted to the question as to the admissibility in testimony of admissions made of indebtedness of a corporation to bind a stockholder thereof; but, as it appears from what we have stated that such questions are not involved, any ruling thereon would be simply the expression of an opinion on issues immaterial to a decision of this case.

It appears from what we have heretofore said that the trial court did not err in granting the defendant's motion for a nonsuit, and hence the judgment of the trial court must be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

---

78 Cal. App. 199

HIGGINS v. MOGAN, Superior Court Judge. (Civ. 5663.)

(District Court of Appeal, First District, Division 2, California. May 27, 1926.)

1. Appeal and error ⚷938(1).

Where respondent in mandamus to require settlement of bill of exceptions made no appearance, it will be assumed that only defense is that tendered trial court in opposition to settlement of bill.

2. Appeal and error ⚷870(2).

Though order setting aside defendants' default is not appealable, it is reviewable on appeal from judgment, under Code Civ. Proc. § 956.

3. Exceptions, bill of ⚷51—Judge held required to settle and sign bill of exceptions to order setting aside defendants' default (Code Civ. Proc. §§ 649, 650).

Under Code Civ. Proc. §§ 649, 650, providing that bill containing exceptions to any decision may be presented for settlement within ten days after written notice of decision and after settlement must be signed by judge, judge must sign and settle bill of exceptions to order setting aside default of appearance of defendants which is presented within ten days, though order is not appealable in itself.

Application by A. W. Higgins, trustee in bankruptcy of the Old Mission Kopper Kraft, Inc., bankrupt, for writ of mandate, to be directed to Hon. E. P. Mogan, Judge of the Superior Court, State of California, in and for the City and County of San Francisco, requiring him to settle and allow plaintiff's proposed bill of exceptions. Peremptory writ granted.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Edwin H. Williams, of San Leandro, for petitioner.

Webster, Eggertsen & Gleason, for respondent.

NOURSE, J. This is an original application to this court for a writ of mandate requiring the respondent judge of the superior court to settle and allow the plaintiff's proposed bill of exceptions. The petition alleges that the plaintiff was a duly appointed and acting trustee in bankruptcy of the Old Mission Kopper Kraft, Inc.; that on August 4, 1925, he commenced an action in the superior court of the city and county of San Francisco against two defendants, who were regularly served with process and failed to appear therein, and that on November 19, 1925, the default of both of said defendants was duly entered; that thereafter said defendants moved the superior court to set aside said default; and that on January 8, 1926, said motion was granted, and said defendants were given leave to answer plaintiff's complaint; that notice of said order was not given to the plaintiff until March 2, 1926; and that immediately thereafter plaintiff excepted to said order and prepared his proposed bill of exceptions thereto; that said proposed bill was served upon the said defendants within the time prescribed by law and duly presented to the judge of said court for settlement; that no amendments were proposed thereto by said defendants, but that objections were made by them to the settlement of the bill upon the sole ground that the order setting aside said default was not an appealable order, and was, therefore, not an order to which a special bill of exceptions might be filed; that after hearing upon said objections the judge of said court refused, and still refuses, to settle or allow said bill.

[1-3] Upon the return date of the order to show cause issued by this court no appearance was made on behalf of the respondent, and we are left to assume that the only defense to the issue of a writ of mandate as prayed herein is that tendered to the trial court in opposition to the settlement of the proposed bill. The petitioner herein frankly concedes that the order setting aside the default is not an appealable order, but he insists that under the express provisions of section 649 of the Code of Civil Procedure he is nevertheless entitled to a settlement of his proposed bill. This section of the Code provides in part:

> "A bill containing the exception to *any decision* may be presented to the court or judge, for settlement at any time after the decision is made, but the *same must be presented within 10 days* after written notice of making such decision, and after having been settled must be signed by the judge and filed with the clerk."

Section 650 of the same Code provides, in part:

> "When a party desires to have exceptions taken *at a trial* settled in a bill of exceptions, he may, at any time *thereafter*, and *within 10 days after the entry of judgment* * * * prepare the draft of a bill." (Emphasis ours.)

Section 956 of the same Code provides that upon an appeal from a judgment the court may review the verdict or the decision "and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party."

Thus, though the order setting aside the defendants' default is not an appealable order, it is nevertheless reviewable upon an appeal from the judgment under the provisions of section 956. In the absence of a bill of exceptions covering the hearing, upon the order to set aside the default an appeal from the judgment would bring up the judgment roll alone, and the merits of the decision upon the order would not, therefore, be open to examination by the appellate court. Though it may be that under section 650 these intermediate orders, such as the one involved here, are to be considered a part of the "trial" so that a single bill of exceptions might cover all these intermediate decisions as well as the final hearing itself, and so may be settled after final judgment (a point which we do not deem necessary to decide in this proceeding), it is evident that the Legislature has prescribed a special mode for the settlement of a separate bill of exceptions to any intermediate decision under the terms of section 649.

Though this section is permissive in its terms, the permission is given to the party aggrieved and not to the trial court. By the express terms of the section a party *may* present for settlement a special bill of exceptions to any decision within 10 days after notice of the decision, and when settled the bill *must* be signed by the judge. The clear meaning of the section is that when such a bill is presented to the judge within the time prescribed by the section he must both settle and sign the same. There is nothing in the section or in any other portion of the Code which supports the respondent in his argument that the words, "any decision," mean only a decision from which a separate appeal might be taken.

Let a peremptory writ of mandate issue to the respondent to settle and sign the proposed bill of exceptions as prayed.

We concur: LANGDON, P. J.; STURTEVANT, J.

78 Cal. App. 203

McCONVILLE v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY et al. (Civ. 5322.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1926. Hearing Denied by Supreme Court July 26, 1926.)

1. Judgment 🔑328.

Order amending clerical error in original judgment *held* not to supersede judgment or incorporate it into order.

2. Judgment 🔑287, 328—Act of clerk correcting original judgment pursuant to order of court and separately entering order was ministerial, not affecting materiality or finality of judgment or order.

Act of clerk in correcting original judgment pursuant to order of court and separately entering and docketing order was ministerial, and did not affect materiality and finality of judgment or order.

3. Judgment 🔑331.

Not every alteration of judgment by court which rendered it will operate as a readjudication of case.

4. Judgment 🔑331—Change materially affecting judgment and rights of parties against whom it is rendered and involving exercise of judicial discretion amounts to new judgment.

Change in judgment materially affecting judgment and rights of parties against whom it is rendered and involving exercise of judicial discretion amounts to new "judgment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment (In Law).]

5. Judgment 🔑297, 331—Trial court may correct clerical errors in its judgments on own motion, and amendment leaves original judgment otherwise effective and unimpaired.

Trial court has full jurisdiction to correct clerical errors in its judgments even on its own motion, and such amendment leaves original judgment otherwise effective and unimpaired.

6. Judgment 🔑304.

Order directing amendment of judgment to correct judicial error is a nullity, and amendment of judgment is void.

7. Judgment 🔑304—Failure to allow intervener sums not mentioned in findings and conclusions held a judicial error, which could not be corrected by amendment of judgment.

Failure of judgment to allow intervener certain amounts paid to plaintiff recovering judgment in action for negligent injury, but not mentioned in findings and conclusions, was a judicial error, which could not be corrected by order directing amendment of judgment.

8. Judgment 🔑200—Findings and conclusions of court constitute statement of court's decision and supersede minute order of court's decision.

Findings and conclusions of court constitute statement of court's decision as finally made and supersede minute order of court's decision.

9. Judgment 🔑256(5)—Findings held sufficient to support judgment for plaintiff and intervener in action for negligent injury.

Findings as to amount of judgment for plaintiff in action for negligent injury, and amount paid by intervener to plaintiff, *held* sufficient to support judgment for plaintiff and intervener.

10. Judgment 🔑304.

Remedy for correction of judicial errors in judgment is only by motion for new trial or appeal, or, in proper case, by amendment, under Code Civ. Proc. § 473.

11. Appeal and error 🔑1072—Denial of motion for new trial, made after attempted amendment of judgment not affecting rights of defendants, held not prejudicial.

Where attempted amendment of judgment was void and in no way affected rights or obligations of defendant having ample opportunity to present motion for new trial and to appeal from original judgment, he cannot complain of denial of motion for new trial made after attempted amendment.

Mandamus by L. B. McConville to compel the Superior Court of the County of Los Angeles and Carlos S. Hardy, as Judge thereof, to act on a motion for new trial. Writ denied.

Mott & Vallee and Culver & Nourse, all of Los Angeles, for petitioner.

Voltaire Perkins, C. B. Conlin, E. R. Simon, and Haas & Dunnigan, all of Los Angeles, for respondents.

CRAIG, J. By this proceeding a writ of mandate is sought to compel the superior court to pass upon a motion for new trial. The facts necessary to a determination of the question involved are as follows: Luther Johnson filed suit against L. B. McConville for damages based upon alleged negligence by the agent of McConville in operating an automobile owned by the latter. The New York Indemnity Company filed a complaint in intervention; its claim was predicated upon the same facts as those alleged in the complaint of Johnson. Issue was joined upon each of these pleadings, and the case was tried by the court without a jury. At the conclusion of the trial the court rendered its decision, a portion of the minute-order entry of which is as follows:

"The court now finds judgment for plaintiff, general damages $3,000, and loss of time $4,000 (20 months at $200), and costs. Intervener to have lien for amounts paid. Stay of execution of ten days from entry of judgment granted. Plaintiff's attorney to prepare judgment and findings."

The findings of the court thereafter made included a finding that the intervener had paid the sum of $178.25 for hospital and medical expenses of the plaintiff, but this was the only finding as to expenditures made by the intervener; and as conclusions of law from the facts found the trial court decided that the plaintiff was entitled to judgment in the sum of $7,000, and that the indemnity company was entitled to receive out of such amount $178.25, and to have a lien upon the balance for the amount demanded in the complaint in intervention.

On November 25th judgment was entered based upon these findings, wherein it was adjudged and decreed that the plaintiff have and recover from the defendant the sum of $7,000, together with costs and disbursements, and that the indemnity company be paid out of said sum $178.25, and that it have a lien of $1,317.94 on the balance, which lien should continue up to 245 weeks from February 26, 1924. No notice of entry of this judgment was given. However, on December 4, 1925, the defendant served upon the plaintiff Johnson and filed a notice of intention to move for new trial, but this notice was not served upon the intervener.

On December 8 there was entered an order entitled, "Order amending judgment," which provided that the judgment "filed the 24th day of November, 1925, and entered the 25th day of November, 1925, in book 596 at page 276 of judgments, be and the same is hereby amended by substituting in the third paragraph thereof in the place and stead of the figures '178.25,' the figures '359.77,' and it is further ordered amendment be made nunc pro tunc as of the date of filing and entry of said judgment." On the same date, pursuant to the above order, the clerk amended the original judgment and wrote on the margin, "amended by order of court, entered 12—8—25, Book 601, page 220." The clerk also amended the original docket entry of the judgment and entered the order on a separate page of the record. No notice of the making, filing, or entry of this amendment to the judgment was given to the defendant or to his attorneys, and they had no notice of it until February 2, 1926.

This nunc pro tunc order was made pursuant to a written stipulation between attorneys for the plaintiff and the intervener previously filed, which stipulation appears to have been based upon the fact that during the trial there was uncontradicted evidence to the effect that in addition to the item of $178.25 expended for hospital and medical expenses of the plaintiff, the indemnity company had paid $181.52 as disability compensation.

On January 18, 1926, a motion for new trial was argued and submitted. On February 2, 1926, the defendant served upon the attorneys for the plaintiff and attorneys for the intervener a second notice of intention to move for new trial, and to vacate the judgment as amended. This latter motion came on regularly to be heard on February 4, 1926, and after argument the court ordered the proceedings dismissed for want of jurisdiction. It seems clear that the sole question involved is the date of the entry of final judgment. Was it entered November 25, or on December 8, 1925? Obviously, it was the former date, unless the effect of the court's order made on December 8 was to substitute a new judgment for that already entered.

[1] The petitioner asserts that the amendment refers to the original judgment (which is true), and therefore incorporates the latter in the former, which does not follow. In nearly all cases where a clerical error in a judgment has been corrected by amendment an order was made directing the amendment, and necessarily referring to the judgment to be amended. For example, this was so in Combination Land Co. v. Morgan, 95 Cal. 548, 30 P. 1102. Nevertheless, it was held that the second order merely corrected the first, leaving the first in full force and effect. It was not held that the second order superseded the first and resulted in the first being incorporated in the second, as counsel argues.

[2] Nor is the mere fact, if it be true, that the clerk, in addition to correcting the first judgment upon its face, also separately entered and docketed the second order, determinative of the status of the latter. The clerk's action was of course ministerial. It is of no consequence as affecting the materiality or finality of either the judgment entered on November 25 or the order subsequently made.

[3-5] Not every alteration of a judgment by the court which rendered it will operate as a readjudication of the case. The authorities are clear that a change which materially affects the judgment and the rights of the parties against whom it is rendered and which involves the exercise of judicial discretion amounts to a new judgment. Mann v. Haley, 45 Cal. 63; Estate of Potter, 141 Cal. 350, 74 P. 986. It is equally well settled that the trial court has full jurisdiction to correct clerical errors in its judgments, even upon its own motion, and that such an amendment leaves the original judgment otherwise effective and unimpaired. Egan v. Egan, 90 Cal. 15, 21, 27 P. 22; Homeseekers' Loan Ass'n v. Gleeson, 133 Cal. 312, 65 P. 617.

[6] But under either view of the matter the petitioner is, we think, precluded from the remedy sought. If the amendment be regarded as having been made to correct a mere clerical error, the first judgment stands as the final judgment of the court, and, of course, the second motion for a new trial was properly dismissed. On the other hand, if the correction was of a judicial error, the order of the court directing the amendment was a nullity; the amendment made was void and no motion for a new trial designat-

ing such an order as that sought to be set aside need be considered or heard by the trial court.

[7, 8] If the first judgment was erroneous in omitting an allowance of the item of $181.52, we have no doubt that the error was a judicial one. In the findings of fact and conclusions of law no reference is to be found to this matter, or to the claim that the company had paid it as disability compensation. The only basis for the assertion that the court intended to include this sum in its judgment is the fact that by its amendment of the order it was provided, "Intervener to have lien for amounts paid," and also that the evidence that the intervener advanced this money was uncontradicted. We have no means of knowing what amounts the court had in mind except as indicated by the findings, and regardless of the evidence which is mentioned, and of the fact that by omitting such an item from its consideration error may have been committed. For aught that appears in the record, the court may have deliberately intended to leave it out. But, even if the minute order had been specific in mentioning as one of the "amounts" the $181.52, it would be superseded by the findings and conclusions of law. These constitute a statement of the court's decision as finally made. O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225.

[9, 10] The findings are complete and sufficient to support the judgment entered on November 25th. In view of the undisputed testimony it apparently was error for the court to have omitted to find that the intervener had paid out the sum in question on behalf of the plaintiff as well as to have failed to include this item in the judgment. However, for such an error the remedy is by motion for new trial or appeal. Judicial errors such as this may be corrected only through one of these means. First National Bank v. Dusy, 110 Cal. 69, 42 P. 476; Byrne v. Hoag, 116 Cal. 1, 47 P. 775. Perhaps, also, in a proper case by amendment under section 473 of the Code of Civil Procedure. Scamman v. Bonslett, 118 Cal. 93, 50 P. 272, 62 Am. St. Rep. 226. It follows that the order of December 8th was beyond the court's jurisdiction and void. It had no effect upon the judgment previously entered, which remains the final judgment of the court.

There is nothing in the cases cited in conflict with the foregoing. They consist of instances in each of which an order was made after judgment correcting a clerical misprision, and not materially affecting the substance of the judgment, and therefore it was held to have remained in full force and effect, or, of cases where a material change was made involving the exercise of judicial discretion, and which were subsequently determined to be amendments correcting judicial errors. Wherever in this latter group the second order was construed as a judgment superseding a former one, the second judgment was made pursuant to a motion for new trial or at a period in the litigation where it was in fieri, neither of which is true in the instant case.

[11] The petitioner has no cause for complaint, for he had ample opportunity to present a motion for new trial based on the judgment of November 25th and to appeal from that judgment. It is also true that there was nothing in the attempted amendment which in any way altered his rights or obligations. Had his contention been sustained to the effect that the order amending the judgment, and the entry and docketing of the former, constituted a new judgment, it would have gained him no advantage except to furnish him a second chance to appeal.

The application for a peremptory writ of mandate is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

---

78 Cal. App. 293

KAY v. LAVENTHAL et al. (Civ. 5533.)

(District Court of Appeal, First District, Division 2, California. June 7, 1926. Hearing Denied by Supreme Court Aug. 4, 1926.)

1. Joint adventures ⚷4(1).

Defendant, agreeing to share profits of business with plaintiff who advanced money, cannot acquit himself of liability to account for profits, by showing that he turned money over to others who conducted business.

2. Joint adventures ⚷5(3).

In action for accounting of profits, evidence that defendant entered on venture and made large number of sales *held* to warrant denial of motion for nonsuit.

3. Depositions ⚷101.

Plaintiff's deposition taken by defendant is not rendered inadmissible in behalf of plaintiff by defendant's death before trial.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Julian Kay against Isidore Laventhal and others. Judgment for defendants, and plaintiff appeals. Reversed.

Harold C. Faulkner, of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action to recover commissions.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In his complaint he placed his claim against three different defendants. The case was tried before the trial court sitting without a jury. At the end of the plaintiff's case the trial court granted separately motions of nonsuit as against each defendant. In accordance with those rulings judgment was rendered in behalf of the defendants. The plaintiff has appealed from the judgment, and on this appeal he urges that the ruling granting the nonsuit as to the defendant Isidore Laventhal constituted reversible error.

For some years prior to 1917, Isidore Laventhal had been engaged in transacting a wholesale liquor business in San Francisco under the name of Laventhal Bros. During a part of the time Julian Kay, the plaintiff, was in the employment of Laventhal Bros., but that employment was terminated and later the plaintiff engaged in the cigar business, conducting that business under the name of the Model Cigar Company. In the transaction of the cigar business he had several salesmen and the business was largely confined to making sales in San Francisco. After the plaintiff severed connections with Laventhal Bros., that firm became involved financially and an assignment was made for the benefit of creditors. After that assignment had been made, Isidore Laventhal again engaged in the wholesale liquor business, but in what capacity is one of the questions presented by the record in this case. A place of business was opened up at 554 Mission street. The house was known as Laventhal Mercantile Company. Edward B. Laventhal was generally present and to outward appearances was the bookkeeper. Isidore Laventhal was generally present at the place of business and performing different functions as will herein later appear.

In August, 1917, certain changes had occurred and were about to occur regarding the sale of malt and spirituous liquors. Those changes made it possible to transact a larger amount of business on a smaller capital than theretofore. Appreciating the importance of these facts, the plaintiff conceived the idea of inducing his former employer, Isidore Laventhal, to take advantage of the situation and broaden out his business. Accordingly, a meeting was arranged, and Mr. Kay, Mr. Isidore Laventhal, and one of Mr. Kay's salesmen, Mr. Schwartz, met in the office of the plaintiff in the Monadnock building in San Francisco. At that meeting Mr. Kay proposed that he would turn over to Mr. Laventhal the services of his salesmen and that in conjunction with Mr. Laventhal's organization that an increased effort to make sales of liquor should be made. The plaintiff agreed to finance the business. In return for what he did, Mr. Kay required that his salesmen should receive 25 per cent. of the gross profits on sales made by them; that Mr. Laventhal should receive 50 per cent. of the gross profits on sales made by Kay's salesmen and 75 per cent. of the gross profits of sales made by himself; and that Mr. Kay personally should receive 25 per cent. of the gross profits. The proposition as made was acceptable and the enterprise commenced and continued for a period of about six months. The actors worked out of the house at 553 Mission street. Mr. Kay's salesmen, Schwartz, La Rock, and Israel, appeared at that place of business and turned in orders and received directions. Sometimes Mr. Isidore Laventhal was there directing affairs and sometimes Mr. Kay was present. On nearly all occasions Mr. Edward B. Laventhal was present and was working on the books. Mr. Kay's salesmen personally accompanied Isidore Laventhal and introduced him to the customers of Mr. Kay who were also engaged in handling liquors. Carrying on the business in this method, gross profits to the extent of $20,000 or thereabouts were earned. From time to time, as a salesman became entitled to his commission of 25 per cent., a check was drawn in his favor by Laventhal Mercantile Company, and those checks were delivered to the salesmen by Edward B. Laventhal. For the purpose of financing a bank account was opened with the Donohoe-Kelly Bank. The account was opened in the name of Laventhal Mercantile Company. The bank was authorized to cash checks drawn by Laventhal Mercantile Company signed by E. B. Laventhal. The reference given to the bank was the name of the plaintiff (at that time called J. H. Kominsky). From time to time loans were obtained from the bank, which loans were credited to Laventhal Mercantile Company. The loans were advanced on notes indorsed by I. Laventhal and secured by collateral furnished by the plaintiff. There was evidence that the plaintiff had never been paid any commission or any part thereof. After the action was commenced, I. Laventhal died and later his executor was substituted as a defendant in his place.

[1, 2] In support of the ruling granting the nonsuit against Isidore Laventhal, the respondent contends that the agreement under which the plaintiff claims called for the organization of a new enterprise to be known as Laventhal Mercantile Company and that such company was never formed. However, we find nothing in the evidence that called for the organization of a new company—the business was to be conducted, so far as the record discloses, by Isidore Laventhal. The respondent further shows that the plaintiff advanced money to Isidore Laventhal, who, in turn, delivered the money thus received to his brother, Edward B. Laventhal, doing business under the name of Laventhal Mercantile Company. But whether he did so gratuitously or otherwise did not relieve the responsibility resting on Isidore Laventhal

to keep his contract with the plaintiff. The respondent further contends that—

> "The Laventhal Mercantile Co. conducted by Edward B. Laventhal was not the enterprise from which plaintiff was to receive a percentage of the gross profits."

Conceding that to be so, nevertheless Isidore Laventhal was still the principal who was responsible to the plaintiff. The respondents further contend that there is no evidence "that a new enterprise was undertaken by defendant in August, 1917, embodying an idea or plan suggested by plaintiff, nor is there any evidence that such enterprise, if in fact undertaken, ever conducted business or earned any profits." In the first place, the plaintiff was not bound by his evidence to connect all of the defendants, but it would have been sufficient if he connected the defendant Isidore Laventhal. Furthermore, there is an abundance of evidence to show that Isidore Laventhal, acting with others, did enter upon the plan suggested by the plaintiff and did make a large number of sales, and it will be presumed under an attack as by a motion for a nonsuit that at least some gross profits were earned. In different forms the respondent repeats the contention that the evidence was wholly insufficient as showing that any gross profits were earned. The contention is not well founded. True it is that the exact amount of the gross profits does not clearly appear. However, the ruling complained of was a ruling granting a nonsuit. The question is: Does the record show that any gross profits were earned? The reply is that Schwartz was paid a 25 per cent. commission, amounting to $1,700; that La Rock was paid a commission of 25 per cent., amounting to about $500. Moreover, it appears that Isidore Laventhal personally made sales to the same amount or a larger amount than were made by Schwartz. In the face of such a record the amount due the plaintiff could properly be ascertained by a judgment on the merits and not by a motion for a nonsuit.

[3] After the defendants had been served with summons, they caused the deposition of the plaintiff to be taken. At the time of the trial Isidore Laventhal had died and the action stood as one against his estate. During the presentation of the plaintiff's case the plaintiff sought to introduce his own deposition which had theretofore been taken. An objection was made by the defendants and the objection was sustained. The ruling was erroneous. The deposition would have been admissible if Isidore Laventhal had not died, and there is nothing in the statute showing that a different rule obtains because of the subsequent death of Isidore Laventhal. It is hardly necessary to recite the facts, but it is sufficient to remark that there are several matters contained in the deposition which were of considerable importance to the appellant.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

199 Cal. 231

McNAB v. MILLS et ux. (Sac. 3730.)

(Supreme Court of California. Aug. 16, 1926.)

Partnership ⚿53—Finding of partnership, entitling plaintiff to accounting, held supported by evidence.

Evidence *held* to support trial court's finding of copartnership in operation of ranch, entitling plaintiff to accounting, though property originally came to parties as tenants in common.

In Bank.

Appeal from Superior Court, El Dorado County; J. B. Landis, Judge.

Action by Stewart McNab against W. L. B. Mills and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Abe Darlington and Henry S. Lyon, both of Placerville, and O. G. Hopkins, of Sacramento, for appellants.

Thomas Maul, of Placerville, for respondent.

WASTE, C. J. Plaintiff brought this action for the dissolution of a partnership alleged to exist between himself and the defendant W. L. B. Mills, for an accounting of their transactions and dealings, and asking that the property of the alleged partnership be sold to pay the debts, first, of the partnership; second, of the partnership to the plaintiff; and that the surplus, if any, be equally divided between plaintiff and defendant W. L. B. Mills. The defendants answered, denying specifically the allegations of the complaint, with the single admission that plaintiff and defendant W. L. B. Mills owned the property described in the complaint, but alleging that they owned it in common, and that no part of it was partnership property. They denied that a partnership ever existed. On the issues thus joined trial was had, judgment was entered for the plaintiff, and the defendants have appealed.

The trial court found that the appellant W. L. B. Mills and his brother, P. L. B. Mills, purchased a ranch in El Dorado county, title to which was conveyed to them. The purchase price was advanced by respondent, as evidence of which he received a promissory note, secured by a mortgage of the property, which he did not record. The ranch was thereafter operated by the brothers until June, 1922, when P. L. B. Mills conveyed to respondent McNab his undivided half interest therein and in the personal property used in its operation. The consideration for the purchase by McNab was a cash payment and cancellation of the note and mortgage as to P. L. B. Mills, but it was not the intention of the parties to this transaction that appellant W. L. B. Mills should be in any manner relieved of his portion of the indebtedness to McNab. The court further found that upon the consummation of this transaction respondent McNab and appellant W. L. B. Mills entered into an agreement by which they formed a partnership, known as the "M & M Ranch"—the terms of the agreement being that the partnership assumed the indebtedness of appellant and his brother to McNab, and that the M & M Ranch was to become the capital of the partnership and was to become partnership property; that after the formation of the partnership respondent was to advance such sums of money as the partners deemed necessary for the development of the ranch, the purpose of the partnership being to carry on the business of conducting, operating, and developing the ranch as ranches were ordinarily operated in the vicinity; that it was further agreed that, before any profits or assets of the partnership should be divided beween the partners, respondent McNab was first to be repaid for all sums advanced by him, together with the original indebtedness of the partnership to him; that after the payment of this indebtedness to respondent the profits of the business were to be divided between respondent and appellant W. L. B. Mills, share and share alike; that respondent and said appellant would assume the joint management of the ranch.

The court further found that the partnership was formed in accordance with the terms of the agreement, and the ranch was operated and conducted by the partners as partnership property and was the property of the partners; that the indebtedness of appellant W. L. B. Mills and his brother, P. L. B. Mills, to respondent McNab, assumed by the partnership at the time it was formed, amounted to $8,433.11; and that in accordance with the terms of the partnership agreement respondent advanced and loaned to the partnership the sum of $21,784.70, which sum the partnership promised and agreed to repay out of its property and assets before there should be any division of profits, properties, or assets. There are other findings, more or less of an evidentiary character, which need not be noted. Further findings are that the relationship between the partners became unfriendly to such an extent that it was no longer possible to carry on the business of the partnership in a profitable manner. The court also found that the defendant Ruby Mills, wife of W. L. B. Mills, had no interest in the property affected by the action; that all of said property is partnership property, and is held by the respondent McNab and appellant W. L. B. Mills as trustees for the partnership existing between them.

Appropriate conclusions of law were drawn by the trial court, which thereupon entered its interlocutory judgment, dissolving the

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

partnership between the respondent and appellant W. L. B. Mills and ordering an accounting. It further ordered that all of the property of the partnership be sold, and the proceeds, after payment of expenses, be applied, first, to the payment of the creditors of the partnership other than its members; second, to the debts of the partnership owing to the partners; and the remainder, if any, to be equally divided between plaintiff and defendant W. L. B. Mills as members of the partnership. From this judgment the defendants appeal, contending that the evidence does not justify the findings. Their contentions are that no partnership agreement was entered into between McNab and W. L. B. Mills to purchase the land described in the complaint; that no partnership agreement or relation was subsequently entered into between them; and that appellant W. L. B. Mills and respondent were in fact merely tenants in common in a joint enterprise, bearing the relation of debtor and creditor to each other.

The sole question to be considered on the appeal is the sufficiency of the evidence, in which appellants admit there is no substantial conflict, to support the findings of the trial court. The only witnesses were those called by plaintiff in support of the allegations of his complaint, except that the defendant W. L. B. Mills testified very briefly in his own behalf. While no written agreement expressing the terms and conditions of the partnership alleged to exist between the appellant W. L. B. Mills and the respondent was entered into, we are satisfied from a careful reading of the evidence that the actions, transactions, conduct, and understanding of the parties amply support the finding of the trial court that they entered into a partnership, which continued to exist. Appellants admit the indebtedness of W. L. B. Mills to the respondent for one-half of the purchase price of the real property, and that respondent advanced the additional sums necessary to carry on the ranch. In the language of the trial court:

> "The complaint sufficiently alleges, and the facts sufficiently support and develop, that there was a joint venture sufficient to entitle the plaintiff to an accounting. The evidence produced, coupled with such inferences as may properly be drawn therefrom, justifies the assumption that the intention of the parties was to operate as a copartnership, and that from a very careful consideration of their actions no other conclusion can be reached; and even though the ranch property in question may have originally come to the parties in the character of tenants in common, this character was destroyed by the parties having farmed and operated it upon joint account and as partnership property, and by their acts thereby made it partnership assets."

For the reason that we have reached the conclusion that the judgment must be affirmed on the merits, it becomes unnecessary to consider the motion to dismiss the appeal and the motion to affirm the judgment, which were made and submitted when the case was called for oral argument.

The judgment is affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; RICHARDS, J; LENNON, J.

---

199 Cal. 168

CALIFORNIA BEAN GROWERS' ASS'N v. RINDGE LAND & NAVIGATION CO.

(Sac. 3567.)

(Supreme Court of California. Aug. 2, 1926.)

1. Agriculture 🔑6—Co-operative association held not liable for delay in selling member's crop, though market price dropped.

That co-operative marketing association delayed selling of crop delivered to it *held* not to make it liable to a member, notwithstanding crop had dropped in price, in absence of showing that association unreasonably exercised its discretion, especially where member assented to delay.

2. Agriculture 🔑6—Whether accounting by co-operative marketing association selling crop was unreasonably delayed held question of fact.

Where agreement between co-operative marketing association and member provided for commingling of beans, and that returns were to be paid proportionally from sale proceeds, and crop was sold in summer, but no accounting was made until November, whether accounting was unreasonably delayed, *held* question of fact for trial court.

3. Agriculture 🔑6—Co-operative association's unreasonable delay in accounting for crop returns held no defense to member's prior breach of contract to deliver following year's crop.

That co-operative marketing association unreasonably delayed accounting for crop returns *held* no defense, in action for member's refusal to deliver following year's crop, where member breached its contract before any considerable part of prior crop had been sold.

4. Agriculture 🔑6.

Co-operative association's unauthorized use of crop proceeds to finance growers *held* no excuse for member's prior breach of contract to deliver crop to association.

5. Contracts 🔑126—Expenditure to present by fair means merits of measure advocated before legislative body held legal.

It is neither illegal nor improper to expend such reasonable sums as may appear to be necessary to present, by fair and open means, merits of any matter advocated before legislative body.

6. Evidence 🔑60—Means used to present merits of measure before legislative body are presumed fair and open.

In absence of evidence to contrary, it will be presumed that means employed in presenting merits of measure before legislative body were fair and open.

7. Agriculture 🔑6—Co-operative association's expenditure to procure tariff legislation held not to exceed its authority.

That co-operative marketing association expended money derived from outside interests and membership fees, to procure favorable tariff legislation *held* not in excess of its authority under articles of incorporation.

8. Agriculture 🔑6—That co-operative association permitted owners to withdraw crops from pool after delivery held, in view of agreement, no excuse for another member's breach.

That co-operative marketing association permitted owners to withdraw crop from pool *held* no excuse for member's failure to deliver following year's crop, where it was not shown that association suffered any detriment, or that withdrawal did not occur at time when members by agreement had right of crop withdrawal.

9. Agriculture 🔑6.

That member of co-operative marketing association had breached contract, and no action had been commenced against him, *held* no defense to action for another member's breach.

10. Agriculture 🔑6—That co-operative association officer sold crop direct held no defense to another member's failure to deliver crop to association.

That co-operative marketing association officer sold crop direct, and not through association, *held* no defense to action for another member's failure to deliver crop, where it did not appear that sale was before member's withdrawal right arrived, or that association consented to sale.

11. Contracts 🔑346(8)—Where answer denies general allegation of performance, and specifically states plaintiff's failures, failures not set up therein held unavailable to defendant.

Where answer denies general allegation of performance of contract by plaintiff, and also states the particulars wherein plaintiff has failed to perform, failures not apparent on face of contract, nor embraced in facts alleged in complaint, are not available to defendant.

12. Accord and satisfaction 🔑11(1)—Account stated 🔑6(2)—Statements presented and check tendered by co-operative association to member in full satisfaction of claim, and cashed without objection, held an account stated and accord and satisfaction.

Evidence that co-operative marketing association member demanded settlement, and association sent check with statement that it represented final settlement with slight exception, and later sent second check, with statement that it represented final settlement, and member cashed both checks without objection, *held* to show an account stated and accord and satisfaction.

13. Account stated 🔑6(4)—Principal must object to account rendered by agent within reasonable time.

When agent has rendered an account to his principal, latter must, if he would object, do so within reasonable time, and failure to do so may be treated as admission that account was true, and principal was willing to be bound by it.

14. Accord and satisfaction 🔑26(2)—Account stated 🔑19(2)—Fact of agency will be considered in determining whether there has been an account stated or an accord and satisfaction.

Fact that parties were principal and agent will be considered in weighing evidence to determine whether there has been an account stated or an accord and satisfaction.

15. Accord and satisfaction 🔑26(1)—Account stated 🔑19(1).

Account stated and accord and satisfaction between co-operative association and member will be presumed to have disposed of controversy concerning credits to which latter was entitled.

16. Monopolies 🔑17(2)—Agreement under which co-operative association was to sell, and members to deliver, entire crop held not to create unlawful trust or combination in restraint of trade.

Agreement between co-operative marketing association and its members by terms of which association was to market, and members to deliver to it, all beans produced by or for them during three successive years *held* not to create an unlawful trust or combination in restraint of trade.

17. Agriculture 🔑6—Provision for liquidated damages of cent per pound for failure to deliver crop to co-operative association held valid.

Provision for liquidated damages of one cent for each pound of beans disposed of by member of co-operative marketing association, in violation of agreement with association, *held* valid, in view of difficulty of estimating damages to association resulting from breach.

18. Agriculture 🔑6—Under agreement that member's failure to deliver crop to co-operative association terminated membership, defaulting member was not relieved of liability to deliver subsequent crop.

Where co-operative marketing association member failed to deliver crop for one year, it did not cease to be member, where association took no steps to cancel membership, and was not released from agreement to deliver crop for subsequent year, notwithstanding provision that refusal to deliver automatically terminated membership.

19. Damages 🔑68—Interest on liquidated damages held proper, where amounts could be made certain by mere calculation (Civ. Code, § 3287).

Interest was recoverable on amounts awarded as liquidated damages from breach of contract to deliver crops to co-operative marketing association, under Civ. Code, § 3287, where amounts were capable of being made certain by mere calculation.

In Bank.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action for damages for breach of contract by the California Bean Growers' Association against the Rindge Land & Navigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Ashley, of Stockton, for appellant.

Sapiro & Hayes and Sapiro, Levy & Hayes, all of San Francisco, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Presiding Justice FINCH, sitting pro tempore for Mr. Justice LAWLOR, is adopted as the opinion and decision of the court.

"The plaintiff is a nonprofit co-operative marketing association, and the defendant is one of its members. The general features of the plaintiff's organization and the agreements which it makes with its members are similar to those considered in Poultry Producers, etc., v. Barlow, 189 Cal. 278, 208 P. 93; California Canning Peach Growers v. Downey (Cal. App.) 243 P. 679; Poultry Producers, etc., v. Murphy, 64 Cal. App. 450, 221 P. 962; and Anaheim C. F. Ass'n. v. Yeoman, 51 Cal. App. 759, 197 P. 959. On the 7th day of August, 1918, the parties hereto entered into a marketing agreement by the terms of which the plaintiff agreed 'to market,' and the defendant agreed 'to consign and deliver' to the plaintiff as 'agent, * * * and not otherwise, all of the beans of every variety * * * produced by or for' defendant 'during the years 1918–20,' with certain exceptions which are not involved herein. The defendant delivered all of its beans produced during the year 1918 to the plaintiff, but refused to deliver those of the years 1919 and 1920. Plaintiff brought this action to recover liquidated damages, as provided for in the agreement, alleged to have been sustained by reason of such refusal. The trial court entered judgment in favor of the plaintiff, and the defendant has appealed.

"The complaint alleges the execution of the agreement; that 'plaintiff has performed all of the terms, conditions, and covenants of said agreement on its part to be performed'; that the defendant refused to deliver the beans produced by it in 1919 and 1920 to the plaintiff; that 'it would be impracticable and extremely difficult to fix and determine the actual damages suffered by plaintiff herein as the result of defendant's failure to deliver said beans'; that the agreement provides that, 'inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the association should the grower fail to so consign and deliver his beans, the grower hereby agrees to pay to the association one cent for each pound of beans sold, consigned, or marketed by or for him other than in accordance with the terms hereof, as liquidated damages for the breach of this contract, all parties agreeing that this contract is one of a series dependent for its value upon the adherence of each and all of the contracting parties to each and all of the said contracts'; and stating the amount of such liquidated damages.

"The answer is too long to be set out at length. In addition to copies of the articles of incorporation and the by-laws of the plaintiff and the agreement between the parties, it contains about thirty pages of typewritten matter. Some of the allegations are of evidentiary matters and other are immaterial to the questions raised by the appeal. It is alleged that the defendant was induced to become a member of the association and to execute the agreement by certain false representations and promises made by the plaintiff, that the plaintiff negligently failed to take proper care of defendant's beans of 1918 and allowed a part of them to be damaged by moisture and by rats and mice and that 'excessive expenses' were charged against defendant, but the evidence does not support such allegations. The answer 'denies that plaintiff has performed all or any of the terms or conditions or covenants of said agreement on its part to be performed'; states the quantities of beans produced by defendant in 1919 and 1920; alleges that it 'agreed to deliver to plaintiff all of said beans * * * in accordance with the terms of said agreement * * * and would have done so, had plaintiff prior thereto and at that time kept and performed its agreement'; that 'plaintiff did not keep and perform its said agreements, as hereinafter appears.' In subsequent parts of the answer it is alleged that during the year 1918 the defendant delivered to the plaintiff, under the agreement, 11,231 bags of beans of the aggregate weight of 1,004.000 pounds; that the fair market value thereof was 6 cents a pound; that in November, 1918, plaintiff paid the defendant on account thereof the sum of $4,300; that no other substantial payment was made until November 29, 1920, when $22,744.73 was paid; that 'there was neither excuse nor occasion either for the delay in marketing plaintiff's beans or for the delay in reporting, accounting, and paying therefor'; that 'said beans could have been sold before the bean harvest of 1919 and one year was under the then circumstances a fair and reasonable time in which to market and pay therefor'; that 'plaintiff sought to have a tariff placed by Congress on beans not produced in the United States, and, without right or authority, expended about $15,500 to that end prior to March 31, 1920'; that 'it financed the 1919 growers out of credits from the 1918 crop, and for that reason $1,262,012.90 of the proceeds of the 1918 crop were unavailable for distribution at March 31, 1920, and only $71,506.02 was available for that purpose'; that 'some directors took their own 1918 beans out of plaintiff, and sold them directly and individually, and not in or by the association; that one of the present directors did not deliver his 1919 crop of beans to the association; that no action has been commenced against him; that the chief officer of plaintiff sold 1918 beans and 1919 beans to private dealers direct, and not through the association.' By way of set-off, counterclaim, and cross-complaint the defendant set up a claim against the plaintiff for the difference between the alleged value of its 1918 crop of beans and the amount it had received from plaintiff on account thereof. The defendant also prayed for an accounting.

"The following facts are taken from the evidence: The plaintiff was organized in the early part of 1918, and by the end of that year it had about 1,500 members, who had delivered to it up to that time, under agreements essentially the same as that between the plaintiff and the defendant, about 1,000,000 sacks of beans. Due to the activities of the national food administration, the bean crop of California in 1918 'was the largest crop ever raised, almost double * * * the average crop.' Other food products were 'abnormally large.' The warehouses of the state did not have sufficient capacity to take care of all food products. In the fall of that year 'there was more rain damage than had ever been known before. * * * Heavy rains came early in September.' The bean crop was damaged by these rains. 'A large percentage of them were so badly damaged they could not be made into choice recleaned beans.' 'The grower was permitted to deliver to any public warehouse that he selected.' The warehouses handled them 'just as they handled beans of other persons * * * that were delivered there.' The association endeavored 'to get for those beans the best treatment in the warehouses that was possible.' Large quantities of damaged beans were placed on the market. With the termination of war conditions, the 'government * * * went out of the market, * * * and it was impossible to find any buyers who could take such a large quantity of beans. * * * The sale of a large quantity of beans for export was made impossible because of the fall in foreign exchange.' There was no speculative market. 'There was a carry over from 1917. * * * There was such a tremendous supply of beans, which in reality took about three years to handle, that it was virtually impossible to sell any quantity of beans outside of orders to the government.' One witness testified: 'If we had offered such a tremendous quantity of beans at any time to the home trade, it would have sent the market down probably 2 or 3 cents.' The evidence clearly shows that the plaintiff made every reasonable effort to care for the beans under its control, and to market them at a fair price, but was unable to sell the bulk thereof until the summer of 1920.

[1] "Appellant contends that at any time during the period of six months commencing November 1, 1918, the beans could have been sold at a price higher than that which was finally received for them. If the contention be conceded, it does not follow that the plaintiff is liable for its failure to sell during the earlier period. The plaintiff was clothed with a reasonable discretion in the marketing of the beans under its control, and it is not to be held accountable for an honest mistake of judgment, if the course pursued by it was apparently warranted by conditions then existing. There is nothing in the record to show that the plaintiff did not reasonably exercise the discretion with which it was vested. It further appears that the defendant consented to the delay of which it now complains. The agreement provides: 'The grower further agrees that the association shall, if possible, dispose of the beans delivered hereunder during the season of their delivery, and that they shall not be stored beyond April 1st of any year by the association for his account or otherwise, without his express written consent.' March 10, 1919, the defendant executed and delivered to the plaintiff an instrument reading as follows: 'The undersigned * * * hereby expressly consents and hereby expressly authorizes and directs the said association to hold, * * * until further orders from us, * * * the beans heretofore delivered by him to the association beyond April 1, 1919, and to market them when, in the discretion of the management of said association, the most advantageous terms may be secured by the sale thereof.' No further order or direction was given by the defendant.

[2, 3] "The plaintiff sold the bulk of the beans of 1918 during the months of June, July, and August, 1920. In September of the latter year it offered to pay defendant the net proceeds of the sales of its beans upon the defendant's accounting for its crop of 1919, and on the 29th of November, 1920, plaintiff paid defendant for all the latter's beans which had been sold, without any deduction on account of defendant's failure to deliver its 1919 crop. The agreement provides: 'The association shall market and sell the beans of the grower, mingled with the beans of like variety and grade delivered by other growers named in contracts similar to this contract, at the reasonable and fair value thereof; and the grower agrees that his beans shall be so handled and mingled and that the returns therefrom, less brokerage and all other costs and charges and the association charge, as set forth in paragraph 2 hereof, shall be credited and paid to him on a proportional basis out of the amounts received by the association during the season from the sale of all such beans of each variety and grade.' It is apparent that, with 1,500 members, and 1,000,000 sacks of beans of different varieties and grades, an elaborate system of accounting was required in order to carry out the foregoing provisions of the agreement. It could not have been contemplated that the plaintiff should go to the heavy expense of making a separate distribution of the proceeds of every sale made by it, regardless of the amount thereof. Under all the circumstances, it was a question of fact for the trial court to determine whether the plaintiff unreasonably delayed accounting to defendant. In any event, such delay is not available as a defense to this action, because the defendant had breached its contract by refusing to deliver its 1919 crop of beans before the plaintiff had sold and received payment for any considerable part of the 1918 crop.

[4] "In May, 1919, the plaintiff sold 250,000 sacks of beans, but 'the final delivery and payment therefor was not made until some time in the early part of 1920. There were several smaller orders in between.' The minutes of March 27, 1920, recite that the association made certain payments to the Bank of Italy on account of money borrowed from that bank with which, apparently, to finance the bean growers of 1919, among the payments being one of '$250,000 paid on account subject to renewal. That the $250,000 so paid was borrowed temporarily from the proceeds of sales of 1918 crop. * * * That the security for said $250,000 is in the hands of the Bank of Italy, and said $250,000 will be reborrowed from the bank when actually needed to make distributions.' The respondent contends that the proceeds of the 1918 crop were not ready for distribution at the time this money was borrowed temporarily, and that the 1918 growers were the gainers by the transaction, because they were credited with interest on the money borrowed. One of the officers of the association testified: 'The directors * * * tried to be

guided by good judgment in making these distributions. * * * The amount of clerical work that has to be done in charging a large amount of accounts and charges * * * made it necessary for us to go slow for a month or so in making this final distribution. I know it was done as rapidly as possible. We increased our office force at the time.' Of course, the association was without authority to use the proceeds of the 1918 crop to finance the growers of 1919, but it does not appear that the defendant was injured thereby, and, since the defendant had breached the contract prior to the unauthorized use of such money, plaintiff's misuse of the money at a subsequent time was not an excuse for the defendant's breach, if it be conceded that such temporary misuse of the money would have justified a refusal by the defendant to perform in any event.

[5-7] "The plaintiff expended the sum of $15,449.75 in an effort to have the tariff rates on beans increased. It appears that of this sum $9,684.35 was contributed to the association by outside interests, and that the remainder of $5,765.40 was taken from the amount collected as membership fees, and was not charged to the growers as an expense of marketing their beans. No attempt was made to show the particular purpose for which the money was used, or that it was illegally or improperly expended. It is neither illegal nor improper to expend such reasonable sums as may appear to be necessary to present, by fair and open means, the merits of any matter advocated before a legislative body. 6 Cal. Jur. 126, and cases there cited. It is to be presumed, in the absence of evidence to the contrary, that such means only were employed. Fites v. Marsh, 171 Cal. 487, 488, 153 P. 926; Schweppe v. Sandberg, 50 Cal. App. 507, 511, 195 P. 454. The articles of incorporation provide that one of the purposes of the association is 'to do each and every thing necessary, suitable, or proper, for the accomplishment of any of its purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to, or expedient for, the interests or benefit of this association, in its proper activities, and to contract accordingly.' Under such broad powers, it cannot be said that the association exceeded its authority in the proper expenditure of a reasonable sum to procure favorable tariff legislation.

[8-10] "Appellant complains that the court refused to permit it to prove its allegations to the effect that some of the officers and members of the association withdrew from the pool the beans which they had delivered to it in 1918; that one of the directors did not deliver his 1919 crop of beans to the association; and that the chief officer of the association sold his bean crops of 1918 and 1919 directly to dealers and not through the association. In its opening brief the appellant says: 'Of course, the fact that others breached their contracts by not delivering beans would not of itself and alone furnish excuse for defendant to breach its contract. * * * The objectionable thing is plaintiff's permitting: Delivered 1,918 beans to be withdrawn for sale by the owner; its directors to violate their duties as well as contracts; and nondirector member contractors to do likewise.' It is not alleged that the association or its members suffered any detriment from the alleged withdrawal of beans which had been delivered to it. Should a member withdraw his beans from the pool at a time after the association had sold the bulk of the beans under its control at higher prices than that prevailing at the time of, and subsequent to, such withdrawal, then, no detriment from other considerations appearing, the other members would be the gainers thereby, because the withdrawing member would thereby lose his right to share in the distribution of the proceeds of the beans sold at the higher prices and the other members would receive a greater proportion of the proceeds of sales at the higher prices. The testimony shows that a withdrawal of beans 'was treated the same as a sale'; that is, the member who withdrew his beans was charged the same proportion of the association's expenses as those whose beans were sold by it. The offered proof was not directed to any issue raised by the answer. It is not alleged that any beans were withdrawn from the 1918 pool prior to April 1, 1919. The agreements between the association and its members provide that the beans of a grower 'shall not be stored beyond April 1 of any year by the association for his account or otherwise, without his express written consent.' The reasonable construction of this provision is that the grower had the right to withdraw any of his beans held by the association after April 1st of any year, unless he consented that they be held after that date, because, if the association was unable to sell the beans on or before April 1st, and could not hold them thereafter, its right to possession and control thereof must have terminated with that day. There is evidence to the effect that the beans held by the association could not have been sold earlier than they were sold, and the court found that 'it is not true that said beans could have been sold before the bean harvest of 1919.' The allegation that one of the directors 'did not deliver his 1919 crop of beans to the association,' and that 'no action has been commenced against him' does not state a ground of defense. The order in which actions may be commenced against defaulting members is immaterial. There is no allegation to the effect that the plaintiff does not intend to bring an action against such director, or that it was a party to such default or in any manner consented thereto. For like reasons the allegation that 'the chief officer of plaintiff sold 1918 beans and 1919 beans to private dealers direct and not through the association' does not state a defense. Whether they were sold before or after April 1st of the respective years mentioned does not appear and it is not alleged that the plaintiff consented to their sale in the manner alleged.

[11] "The complaint alleges that 'plaintiff has performed all of the terms, conditions and covenants of said agreement on its part to be performed.' The answer denies this allegation. If it be conceded that under the issue so raised, if nothing further in that connection appeared in the answer, the defendant would have had the right to introduce evidence of the facts which it attempted to prove, it limited such right by its subsequent specific allegations of failure to perform. Where a plaintiff alleges performance of a contract on his part in general language, 'the general allegation will not save the complaint where, in addition, plaintiff sets out what he has actually done, and such facts fall short of due performance.' 13

C. J. 727; McNulty v. New Richmond Land Co., 44 Cal. App. 744, 747, 187 P. 97. The same rule should apply to an answer which denies a general allegation of performance by the plaintiff and, in addition, sets out the particulars in which the plaintiff has failed to perform. In Eucalyptus G. Ass'n. v. Orange C. N. & L. Co., 174 Cal. 330, 163 P. 45, an action for damages for breach of a contract to plant trees and care for them for a given time, the complaint alleged 'that the said plaintiff has generally and specifically complied with and performed each and all the conditions on its part to be performed and contained in said written agreement.' The answer denied this allegation in general language, and alleged certain defaults of the plaintiff as an affirmative defense. It appeared from the findings of the court that, 'under the terms of the contract, * * * the plaintiff was to furnish pumping plants, including the wells, of capacity sufficient to obtain the water that would be required to enable the nursery company to carry out the contract. Plaintiff was also to do the leveling of the land necessary for that purpose.' Plaintiff did not properly level or grade the land nor did it install pumping plants of sufficient capacity to flood and irrigate it. The court said that such failures of performance by plaintiff 'fall within the category of excuses for nonperformance, and they are excuses not apparent on the face of the contract, nor embraced within the facts alleged in the complaint. They are, therefore, matters of defense, and to be available to the defendants they must be set up in the answer.'

"In answer to the defendant's cross-complaint, which contains the same matters set up as a set-off and as a counterclaim, the plaintiff, in addition to denials of such matters, alleged, and the court found, that there had been an account stated between the parties and an accord and satisfaction as to the proceeds of the 1918 crop of beans. In ruling upon the admissibility of evidence in support of such alleged set-off, counterclaim, and cross-complaint, the court stated that, because of such account stated and accord and satisfaction, 'the question of recoupment or question of damages by the defendant cannot be inquired into and considered in this action. * * * But for the purpose of absolving the defendant from further compliance, that is a different question. In other words, if you can show the plaintiff breached its contract so as to absolve you from further compliance with the contract, that is a complete defense, but does not entitle you to any damages. You took your money—cash—and had your settlement. That was a final settlement.'

"During the time the beans were held in storage the plaintiff from time to time sent the defendant statements of sales made and of charges debited to the defendant's account, such as insurance, cleaning, and resacking beans, patching sacks, etc., and the defendant often replied with complaints that the charges were excessive. September 16, 1920, defendant wrote plaintiff, demanding a settlement, and, among other things, saying: 'Your auditor's report which was submitted to us some time ago made the amazing statement that the money realized from the 1918 beans was actually used to finance the 1919 crop. This seems to us incredible. If true, the directors have made themselves personally responsible, as they undoubtedly did by refusing to sell the beans when a good price was offered early in 1919. We shall be obliged to take legal steps along these lines if a check is not promptly sent to us. We shall also take very decided exceptions to your expense accounts as they are extravagant beyond all reason. You have no right under the agreement to deduct more than $1.00 per ton for such expenses, and section 4 provides for the return of any unused portions of the $1.00 per ton.' Thereafter the plaintiff furnished the defendant with a complete statement of all receipts and disbursements in connection with the defendant's 1918 beans, showing that all of such beans, except 3,500 pounds which were damaged, had been sold, and that the defendant had been credited with a net balance on account of beans sold in the sum of $22,744.73. Damaged beans were not entered into the pool, as there would be no basis for the distribution of the proceeds thereof among the growers, the selling price thereof depending upon the extent of the damage thereto, but they were sold separately, and the net proceeds thereof credited to the individual growers. November 29, 1920, the plaintiff sent the defendant a check for $22,744.73, inclosed with a letter reading as follows: 'We have pleasure in inclosing herewith our check No. 2525 for $22,744.73 representing a final settlement of the 1918 account with the exception of two small lots which remain unsold, these were enumerated on a statement which we recently forwarded to you.' On the following day the defendant acknowledged receipt of the check in a letter reading as follows: 'We are in receipt of your letter of November 29th, inclosing your check No. 3536 for $22,744.73.' February 24, 1921, plaintiff wrote defendant, inclosing statement of sale of the damaged beans and a check for the net proceeds thereof, amounting to $66.51, and saying: 'This amount represents the final settlement on your 1918 account.' The defendant cashed the first check November 30, 1920, and the second one February 26, 1921. The record does not show that the defendant made any objection to the settlement until its answer was filed herein August 18, 1921.

[12-14] "The foregoing evidence is sufficient to support the finding of the court to the effect that there was an account stated between the parties and an accord and satisfaction. Berger v. Lane, 190 Cal. 443, 447, 213 P. 45; Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989; Creighton v. Gregory, 142 Cal. 34, 39, 75 P. 569; Schneider v. Oakman Con. Min. Co., 38 Cal. App. 338, 342, 176 P. 177; Johnston v. Burnett, 17 Cal. App. 497, 120 P. 436; 34 A. L. R. 1036, note. The fact that the relation of principal and agent existed between the parties does not change the rule. 'When the agent has rendered an account to his principal, it is open to the latter to object either to the fullness or the accuracy of the account; or, on the other hand, to agree to it as a full and accurate account of the agent's transactions. If he expressly agrees to it, the account will then have ordinarily all the characteristics of an account stated. But it is not necessary that the principal's acquiescence shall be express; it may be implied from the facts and circumstances as in other cases. The essential thing is that the facts and circumstances relied upon, as constituting acquiescence, must be such as reasonably lead to the inference that the principal assents to the account as correct. If an agent * * *

renders to his principal an account of his transactions, the principal must, in general, if he would object to it, do so within a reasonable time, and, if he does not, the agent is justified in treating the principal's silence as an admission by the principal "that the account as rendered was just and true and that he was willing to be bound by it."' Mechem on Agency (2d Ed.) § 1351; Crane v. Stansbury, 173 Cal. 631, 161 P. 7; Johnston v. Burnett, supra. The fact that the relation of principal and agent exists between the parties, of course, is to be considered in weighing the evidence to determine whether there has been an account stated or an accord and satisfaction. Mechem on Agency (2d Ed.) § 1352. That fact was given weight in Egan v. Crowther (Cal. App.) 241 P. 900, 902.

[15] "The fourth paragraph of the agreement provides: 'The association charge shall be used for meeting the expenses of the association. If, at the end of the year's operations, any surplus remains out of the said charge, the association may use the same for any purpose of common advantage or profit to the growers or may refund the surplus, or any portion thereof, to the growers, in proportion to their shipments to or through the association.' It does not appear whether there was any such surplus from the 1918 beans. If so, it was one of the matters in dispute between the parties. In defendant's letter of September 16, 1920, it said: 'You have no right under the agreement to deduct more than $1 per ton for such expenses, and section 4 provides for the return of any unused portions of the $1 per ton.' It must be presumed, therefore, that the settlement disposed of that controversy. The payments of November 29, 1920, and February 24, 1921, were made expressly as 'a final settlement of the 1918 account,' and it must be presumed that the settlement included all credits to which the defendant was entitled. The stated account and the accord and satisfaction are not attacked on the ground of fraud or mistake in the procurement thereof.

[16, 17] "The contentions that the agreements between the association and its members create an unlawful trust or combination in restraint of trade, and that the stipulation in the agreement for liquidated damages is invalid, are sufficiently answered contrary to appellant's contentions, in the decisions first cited in this opinion. The clause providing for liquidated damages recites that 'it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the association should the grower fail to consign and deliver his beans.' The complaint alleges, and the court found, to the same effect. From the nature of the association and its agreements with its members it is apparent that it would be impracticable or extremely difficult to fix the actual damage resulting from such a breach of the agreement by a member. The agreement contemplates that the association may sell the beans of a grower prior to the delivery thereof to the association. It provides: 'The grower agrees to ship directly to any person under contract with the association such percentage of his shipments as the association may direct, packed as the association may instruct.' If growers refuse to deliver their beans to the association, it may find it impossible to fulfill its own contracts for the sale of beans and thereby become liable in damages to the buyers thereof. If large quantities of beans are withheld by the growers, and sold directly by them, the market for beans may be undermined to the detriment of all members of the association. Such conduct on the part of the growers may well imperil the very life of the association or destroy it and defeat the purposes for which it is organized.

[18] "The by-laws of the association provide: 'If any member shall cease, fail, neglect, or refuse for any reason whatsoever to market all or any of the beans grown or owned by him as provided by the said crop sale agreement, then his membership shall ipso facto cease and determine, and his certificate and his membership in this association and all of his rights and interest therein shall by that act be automatically canceled, and such member shall not, nor shall any one in his behalf, be entitled to any appraisement or share in the property or good will of the association.' The question arises whether, upon defendant's refusal to deliver its beans of 1919, it ceased to be a member, and, if so, whether it was thereby released from its agreement to deliver its beans of 1920. The association took no steps to cancel defendant's membership, but insisted that the defendant was under obligation to deliver its crops of 1919 and 1920 under the terms of the agreement. In Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P. 177, there was involved a contract for the sale by the plaintiff to the defendant of not less than 5,000 barrels of oil a month for a period of one year. The agreement provided: 'The violation of any of the terms or conditions thereof by either party hereto shall work a forfeiture thereof, and this agreement shall thereupon become void and of no effect.' The defendant took oil as provided by the contract for a time, and then refused to take any oil during the remainder of the year. Plaintiff thereupon sued for damages consisting of lost profits for the remaining months of the year. Plaintiff was given judgment, and the defendant appealed. The court said: 'Appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became "void and of no effect"; that this provision means that the violation terminated the contract, and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. The language means that by a violation of the terms of the contract the rights of the party violating it cease, and, as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends.' That case is decisive of the question here under discussion.

[19] "Appellant contends that the judgment is erroneous, in that it allows interest upon the amounts awarded as liquidated damages from the respective dates upon which the defendant refused to deliver his crops of 1919 and 1920. Such amounts were capable of being made certain by mere calculation, and interest thereon, therefore, was properly allowed. Civ. Code, § 3287.

"A careful examination of the voluminous record does not disclose any error to the prejudice of appellant's rights."

The judgment is affirmed.

199 Cal. 190

LANTZ v. VAI et al. (L. A. 9146.)

(Supreme Court of California. Aug. 2, 1926. Rehearing Denied August 26, 1926.)

1. Appeal and error 🔑113(2).

Order setting aside judgment destroyed it, and motion for new trial could not be predicated thereon, and appeal from such judgment will be dismissed.

2. Appeal and error 🔑82(3).

Order vacating judgment is reviewable on appeal in same manner as special order after final judgment, and on bill of exceptions prepared according to Code Civ. Proc. § 649, in view of section 663a.

3. Appeal and error 🔑627(2).

Considering that Supreme Court rule allows 40 days for filing transcript on appeal after perfection of appeal, where 77 days elapsed without filing transcript, motion to dismiss appeal will be granted.

4. Exceptions, bill of 🔑40(4).

Where plaintiff applied for extension of time to prepare bill of exceptions 12 days after 10 days allowed to prepare bill, by Code Civ. Proc. § 650, extension was ineffective and conferred no authority to settle bill.

In Bank.

Appeals from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action to quiet title by Charles Lantz against Victorine Vai and others, in which Victorine Vai filed a cross-complaint. From an adverse judgment, plaintiff appeals. On motion to dismiss appeals. Appeals dismissed.

Winslow P. Hyatt, Frederick C. Huber, and Chas. Lantz, all of Los Angeles, for appellant.

C. F. Culver and Earl E. Johnson, both of Los Angeles, for respondents.

WASTE, C. J. Respondent Victorine Vai has moved to dismiss the appeals noticed by appellant. As plaintiff in the court below, the appellant brought an action to quiet title to real property. Certain of the defendants, including the respondent Victorine Vai, answering, traversed the allegations of the complaint, and Victorine Vai, by way of cross-complaint, sought to quiet her title to the same land, but under a different description, as against the claims of the plaintiff. The trial court found that both the plaintiff and the defendant Victorine Vai had failed to establish title, or right of possession, and entered judgment that neither plaintiff nor defendant Victorine Vai was the owner of the property.

Judgment was entered on August 19, 1925. On September 8 the defendant Vai served on plaintiff notice of the entry of this judgment. On September 15 she served on plaintiff, and filed, notice of intention to move for a new trial, and on the same day gave notice of motion to have the judgment vacated and set aside and another and different judgment entered. The motion was granted. The court set aside and vacated the judgment of August 19 and rendered another, by which it was decreed merely that the plaintiff Lantz is not the owner, or entitled to the possession, of the real property in dispute. The substituted judgment was entered on October 14, 1925, and on October 27 the defendant Vai served on plaintiff notice of its entry. Plaintiff excepted to the order granting the motion for another judgment, and prepared a bill of exceptions thereto, which was served on October 31, and settled, allowed, and filed on November 19. On the last-named date plaintiff obtained an order from the court extending for 30 days his time within which to prepare a bill of exceptions to the substituted judgment. This second bill of exceptions was presented to the trial judge and was refused settlement on January 14, 1926.

Reference has been made to the fact that on the 15th day of September, 1925, the defendant Victorine Vai served and filed a notice of intention to move for a new trial. On the 19th day of September the plaintiff also served and filed like notice of intention. On November 9, 1925, the motions for a new trial appear to have been denied, although the record in the court below is indefinite as to what actually occurred. On November 24, 1925, plaintiff filed a notice of appeal from that portion of the judgment entered on August 19 in favor of the defendant Victorine Vai and against plaintiff and also from the substituted judgment of October 14.

[1] The respondent Victorine Vai has moved to dismiss the appeals upon the ground that the notice of appeal was not filed within the time allowed by law, and that the transcript was not prepared and filed within time. Appellant conceded at the time of the oral argument that his appeal from the judgment of August 19, 1925, was not properly taken, and might be dismissed. As no formal order of dismissal was entered at the time, he now requests that he be allowed to withdraw the concession. But we are of opinion that no appeal lies from the judgment of August 19. The effect of the order vacating and setting aside the judgment was to destroy it. See Mantel v. Mantel, 135 Cal. 315, 67 P. 758. There can be no appeal from a judgment which has been set aside; neither can a motion for a new trial be predicated upon a judgment which does not exist. It is therefore unnecessary to consider the contention of the appellant that valid proceedings on the motions for a new trial heretofore noted were pending. The appeal from the judgment of August 19 must be dismissed.

[2, 3] The order granting the motion to vacate the judgment of August 19 was one

properly reviewable on appeal in the same manner as a special order made after final judgment and on a bill of exceptions to be prepared in accordance with the provisions of section 649 of the Code of Civil Procedure. Code Civ. Proc. § 663a. Such a bill was prepared and filed on the 19th day of November. Therefore, when appellant filed his notice of appeal on the 24th day of November, his appeal was perfected and his record made. The time within which to file his transcript commenced to run on that date, and the 40 days expired on the 3d day of January, 1926. No extension of time for the preparation or the filing of the transcript as to this appeal was obtained, and the plaintiff was not relieved of his default. At the time this notice of motion to dismiss the appeal was given, plaintiff had not only failed to file his transcript within 40 days (Supreme Court rule 2), but 77 days had in fact elapsed. These facts entitle the respondent to an order dismissing the appeal from the order vacating and setting aside the judgment of August 19, 1925.

[4] Notice of entry of the substituted judgment was served on the 27th day of October, 1925, and plaintiff, under section 650 of the Code of Civil Procedure, then had 10 days to prepare and serve a draft of his proposed bill of exceptions. The 10 days expired on November 7. He did not apply for an extension of time to prepare this bill until the 19th day of November, which was 12 days too late. The order of the judge granting the extension after the expiration of the statutory period within which to prepare the bill was ineffective and was properly ignored by the lower court as conferring no authority upon it to settle the bill subsequently presented. In re Clary, 112 Cal. 292, 295, 44 P. 569. See also, Cameron v. Arcata, etc., R. Co., 129 Cal. 279, 61 P. 955, and Rath v. Vaughan, 45 Cal. App. 38, 187 P. 44.

No transcript having been prepared and filed within the time required by law, and it not appearing that the plaintiff below who is seeking to appeal was relieved from his default, it is ordered that the appeals be and they are dismissed.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LENNON, J.

---

199 Cal. 199

In re WILSON'S ESTATE. (L. A. 9227.)

(Supreme Court of California. Aug. 3, 1926.)

1. Executors and administrators ⚷314(11)—Court had power in considering administrator's petition for distribution to determine heirs and next of kin, notwithstanding absence of statutory proceeding to determine heirship (Code Civ. Proc. § 1664).

Where certain parties claiming to be heirs filed petition for partial distribution to them, and subsequently administrator filed petition for distribution to alleged father and only heir of deceased, court, in determining petition had power to decide who were next of kin and heirs and to distribute to persons entitled thereto, notwithstanding absence of proceeding, under Code Civ. Proc. § 1664, to determine heirs.

2. Executors and administrators ⚷315(6).

A decree of distribution is conclusive as to rights of heirs, subject only to be reversed, set aside, or modified on appeal, under Code Civ. Proc. § 1666.

3. Executors and administrators ⚷314(12)—Orders determining heirs on petition for distribution held unappealable in advance of decree for distribution, but reviewable on appeal from decree (Code Civ. Proc. § 963, subd. 3).

Minute order determining heirs and next of kin and subsequent written order on same subject, made in determining petition for distribution when there had been no proceeding to determine heirship, *held* not appealable in advance of decree of distribution, but reviewable on appeal from such decree, under Code Civ. Proc. § 963, subd. 3.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Petition by the administrator of the estate of John Wilson, deceased, for distribution. From a decree determining heirship, John Wilson, alleged father and heir of deceased, appeals. On motion to dismiss appeal. Appeal dismissed.

Siemon & Garber, of Bakersfield, for appellant.

Brittan & Brittan, of Bakersfield, for respondent administrator.

I. F. Chapman, of San Francisco, and H. Ray Bailey, of Bakersfield, for other respondents.

SHENK, J. This is a motion to dismiss an appeal in a probate proceeding. The motion is made on the ground that the order is not appealable and on the further ground that the appeal was not taken within the time provided by law.

By order duly made on March 18, 1924, the public administrator of Kern county was appointed administrator of said estate. In the petition for letters of administration it was stated that the heirs of the deceased were unknown. On May 8, 1924, notice was served on the administrator that Alfred Edward Stay, Frederick Charles Stay, Mary Victoria Robbins, and Ada Stay Penney claimed to be heirs at law of the deceased, and requesting that notice of certain designated proceedings during the course of the administration of the estate be given to them. On October 2, 1924, the said alleged heirs filed a petition for partial distribution of the estate to them. On February 20, 1925, the administrator filed his first and final account, report, and petition for distribution, in which he alleged,

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

among other things, that the next of kin and only heir at law of the deceased was John Wilson, father of the deceased. On the same day, to wit, February 20, 1925, John Wilson served notice on the administrator that he was the sole heir of the deceased, and requested special notice of certain proceedings thereafter to be taken in connection with the settlement of the estate. By stipulation of all the parties the first and final account, report, and petition for distribution was continued to and set for hearing on the 15th day of June, 1925, the same to be submitted and determined upon depositions theretofore taken and then on file. The matter was heard, and on July 11, 1925, the court caused to be entered a minute order, wherein it was "ordered, adjudged, and decreed by the court that the next of kin and only heirs of said deceased are Alfred Edward Stay, Frederick Charles Stay, Mary Victoria Stay Robbins, and Ada Stay Penney; that the petition of the administrator to distribute the property to one John Wilson, alleged father of said deceased, be denied"; and the matter of the settlement of the account and distribution of the estate was thereupon continued pending the ascertainment and payment of the inheritance tax. The order concluded as follows: "If findings are necessary, let attorneys for the above heirs prepare findings and order to be signed by the court."

No findings were prepared or presented by counsel, whereupon the trial judge of his own motion prepared and filed, on November 10, 1925, a document denominated, "Decree establishing heirship," wherein it was ordered, adjudged, and decreed that the heirs of the deceased were as determined in the minute order of July 11th, and likewise that the said John Wilson was not the father of deceased nor entitled to share in the estate. On November 20th the said John Wilson served and filed his notice of intention to move for a new trial. The motion was heard and denied on January 18, 1926, and on the same day the said John Wilson filed his notice of appeal from the written order of November 10th. It is the appeal from that order that is now sought to be dismissed.

[1-3] It is obvious from the foregoing facts that neither the minute order of July 11th nor the written order of November 10th were made and entered pursuant to proceedings taken under section 1664 of the Code of Civil Procedure. No petition to determine heirship was filed after the expiration of one year from the appointment of the administrator nor at all except as such relief was sought in the petition for distribution which is still pending. Nor was there any order made by the court directing service of notice on persons interested, as required by said section 1664. There was not even an attempt to proceed under that section. All the parties were, however, properly before the court on the petition for distribution. In determining that petition the court had full power to decide who were the next of kin and heirs at law of the deceased and to distribute the estate to the persons entitled thereto. Estate of Schmierer, 168 Cal. 747, 145 P. 99; More v. More, 133 Cal. 489, 495, 65 P. 1044; The William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323; 12 Cal. Jur. 186, and cases cited. The decree of distribution is conclusive as to the rights of heirs, subject only to be reversed, set aside, or modified on appeal. Section 1666, Code Civ. Proc. The minute order of July 11th and the written order of November 10th were both made pursuant to issues relating to heirship involved in the petition for distribution. They were determinations necessarily incident to that petition when, as here, there had been no proceedings taken under section 1664. In advance of the decree of distribution those orders were therefore not appealable. But the same matters were and are subject to review on appeal from any decree of distribution which may hereafter be made pursuant to the petition therefor (subdivision 3, § 963, Code Civ. Proc.; Estate of Allen, 175 Cal. 356, 165 P. 1011; Estate of Wittmeier, 118 Cal. 255).

In support of the second ground of the motion it is urged that the minute order of July 11th, in probate practice, was a final order from which an appeal, if any, must have been taken, and that it was unnecessary for the court to enter a second order on the same subject in order to set the time running for an appeal. There is merit in the contention (sections 1704, 1715, Code Civ. Proc.; Tracy v. Coffey, 153 Cal. 356, 95 P. 150), but in view of our conclusion that neither the order of July 11th nor the order of November 10th was an appealable order it becomes unnecessary to further consider or pass upon the second ground of the motion.

The motion is granted, and the appeal is dismissed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.

199 Cal. 194

MURPHY v. BUCKE'S DEPARTMENT STORE. (Sac. 3702.)

(Supreme Court of California. Aug. 3, 1926.)

Appeal and error ⚷443—Retention of jurisdiction by trial court over parties and subject-matter to secure to owner of unissued corporate stock issuance of shares held valid.

Where plaintiff owned unissued shares, judgment that corporate directors proceed to obtain permit for issuance, and on failure to so proceed then court clerk should make application, and that retained jurisdiction until application should be determined, *held* valid; hence appeal while trial court was so proceeding did not oust it of jurisdiction.

In Bank.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by E. P. Murphy against Bucke's Department Store, a corporation, for money had and received. From the judgment, plaintiff appeals. Affirmed.

Duard F. Geis, of Willows, for appellant.

R. M. Rankin, of Willows, and W. E. Johnson, of San Francisco, for respondent.

SHENK, J. Plaintiff appeals from a judgment in his favor. He brought the action against the defendant corporation, setting forth three counts in the complaint. The first count related to $6,000, alleged to be due as the value of his interest in a stock of merchandise assigned to defendant corporation; the second was for the recovery of $5,000 paid in cash to the corporation upon its formation on account of the purchase by the plaintiff of 50 shares of stock of the corporation, of the par value of $100 each; the third was for money had and received, and embraced the total of the two previous counts, or $11,000. The answer denied any liability on the part of the defendant corporation, and by affirmative allegations set forth the facts as found substantially by the court.

John Bucke had conducted a general merchandise store in Orland, Glenn county. In 1920 he met with financial reverses. In behalf of his creditors the business was taken over by the San Francisco Board of Trade, and was conducted for a brief period by a representative of that board. Mrs. I. M. Bucke, wife of John Bucke, J. J. Lachenmyer, a brother of Mrs. Bucke, and the plaintiff, E. P. Murphy, entered into an agreement with the Board of Trade whereby Murphy, acting in behalf of himself, Mrs. Bucke, and Lachenmyer, purchased the business for a certain cash consideration, and, in addition, gave promissory notes for $19,000 signed by himself and indorsed by Lachenmyer. The business was then conducted by the three for a short period as a copartnership; each partner owning an undivided one-third interest. On October 20, 1920, they incorporated under the name of Bucke's Department Store, with a capital of $50,000. The three copartners were the only stockholders and directors. Lachenmyer was elected president, Mrs. Bucke vice president, and Murphy secretary. In addition to the transfer of the merchandise, valued at $18,000, to the corporation, each of the parties contributed $5,000 in cash, with the understanding that each was to receive capital stock representing his one-third interest in the merchandise and his $5,000 cash contribution. In February, 1921, the board of directors passed a resolution directing the secretary and attorney to prepare the necessary application to the commissioner of corporations for permission to issue its stock. The application was prepared by Murphy as secretary, but, according to the court's finding, was held in abeyance by agreement of the board of directors, and was never filed. This was the status in April, 1922, when plaintiff left the business, moved to Los Angeles, and ceased to act as secretary, although he did not resign from that office. Raymond Lachenmyer, son of J. J. Lachenmyer, became the acting secretary, and the minute book and other records of the corporation remained in Orland.

In December, 1922, plaintiff made written demand upon the corporation to issue to him 50 shares of its capital stock to represent his $5,000 cash contribution. The corporation made no reply, nor did it take any steps to secure permission to issue its capital stock. On December 13, 1922, plaintiff made demand upon the corporation that it return to him the sum of $5,000 previously paid in. On March 1, 1923, the complaint in this action was filed. After trial before the court sitting without a jury, it was adjudged that plaintiff was the owner of one-third of the capital stock of said corporation; that the defendant make application to the commissioner of corporations for permission to issue $25,000 par value of capital stock; that one-third of not to exceed $25,000 par value of whatever amount of stock might be authorized be issued and delivered to plaintiff; that the directors proceed to obtain such permit prior to April 12, 1924; that, in the event of their failure to do so, the clerk of the court be appointed a commissioner to do so, and that the court retain jurisdiction until such time as plaintiff should receive his stock.

The plaintiff contends that the judgment was not responsive to the issues, and did not afford him the relief to which he was entitled. On the issues raised by the complaint and the denials and affirmative allegations of the answer the court found facts which clearly entitled the plaintiff to the issuance of the stock of the corporation to the extent of his one-third interest. In fact, the defendant concedes that the plaintiff is entitled to the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

issuance of the stock, and the plaintiff concedes that he could not be legally aggrieved if the said stock were issued to him. But he complains that the form of the judgment was not in the alternative, in this, that it did not provide that he would be entitled to the reasonable value of the stock, in the event of the nondelivery thereof to him within a reasonable time.

The issues presented by the pleadings and the proof may properly be deemed of equitable cognizance. In the consideration of the evidence presented thereon, the court provided for a proper remedy—the issuance of the stock to the plaintiff. To that end it was provided that the necessary preliminary steps be taken to obtain authority to issue the stock to which the plaintiff was entitled. This authority could only be granted by the filing of an application for a permit to issue the stock with the commissioner of corporations, and the judgment provided that this should be done. The judgment was rendered, served on the defendant, filed and entered on March 26, 1924. It was therein provided that the directors of the defendant proceed in the manner provided by law to obtain a permit for the issuance of said stock prior to April 12, 1924, and, in the event that the directors failed to so proceed, then the clerk of the court as a commissioner on behalf of the defendant should make the application. The judgment further provided that the court retain jurisdiction of the cause until such time as the application for the permit to issue the stock be heard and determined by the commissioner of corporations. The judgment was therefore interlocutory in character. It contemplated further action on the part of the court in the event the permit be issued and necessarily such further action as might be deemed proper in the event the permit be not issued. But the plaintiff filed his notice of appeal on April 5, 1924, or seven days before the expiration of the time within which the defendant was required to file the application for the permit. Assuming that the judgment was appealable, the trial court was ousted of its jurisdiction by the appeal before the defendant was in default under the judgment, and before any showing was made that the issuance of the permit and the stock could not be brought about as required by the judgment. Under the circumstances the plaintiff was not aggrieved at the time the appeal was taken. We do not deem it necessary to decide whether or not the judgment was appealable. In either event the court retained jurisdiction over the cause to see that the plaintiff obtained what he was entitled to under the facts. There is nothing particularly unusual or contrary to good practice for the court, in the exercise of its equity powers, to retain jurisdiction of the parties and the subject-matter of the action, when the circumstances of the case warrant the same, until the appropriate remedy may be finally accorded by the judgment in the action. The plaintiff had paid in full for, and was the owner of, the stock in question, and he was therefore entitled to the aid of the court in obtaining the issuance to him of a certificate representing such ownership. Mitchell v. Beckman, 64 Cal. 117, 28 P. 110; Cortelyou v. Imperial Land Co., 156 Cal. 373, 104 P. 695; 6 Cal. Jur. 754, and cases cited. This the trial court was proceeding to do when the notice of appeal was filed herein.

Having concluded that the court still has jurisdiction to proceed in the manner contemplated by the judgment, it is unnecessary to pass upon other questions raised on this appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.; LENNON, J.

199 Cal. 185

CALIFORNIA FIREPROOF STORAGE CO. v. BRUNDIGE et al. (L. A. 9070.)

(Supreme Court of California. Aug. 2, 1926. Rehearing Denied August 26, 1926.)

1. Telegraphs and telephones 🔑26½.

Railroad Commission may regulate form, contents, and cost to subscribers of telephone directory, in view of Public Utilities Act, § 2, subds. (s), (t), (dd).

2. Telegraphs and telephones 🔑26½.

Railroad Commission has power to regulate insertion of advertising matter in telephone directory in connection with classified list and printing of names in larger print, in alphabetical list of subscribers paying therefor.

3. Telegraphs and telephones 🔑26½.

Telephone service, tending to be a natural monopoly, is the proper subject of public regulation and control.

In Bank.

Application by the California Fireproof Storage Company for writ of mandate to be directed to Harley W. Brundige and others, as members of the Railroad Commission of the state of California, and to the Commission, to compel them to assume jurisdiction of a complaint against the Southern California Telephone Company involving rates for advertising in telephone directory. Writ granted.

H. S. Clewett, of Los Angeles, for petitioner.

Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and R. L. Vaughn, of San Francisco, for respondents.

Lawler & Degnan, of Los Angeles, and Alfred Sutro and Norbert Korte, both of San Francisco, amici curiæ.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PER CURIAM. This is an application for a writ of mandate to compel the Railroad Commission to assume jurisdiction of a complaint against the Southern California Telephone Company, filed by petitioner herein.

The complaint lodged with the commission showed substantially the following facts: Petitioner is a private corporation which is, and for several years has been doing business in the city of Los Angeles. The Southern California Telephone Company is a "telephone corporation" within the definition thereof given in the Public Utilities Act, and is a "public utility" within the terms of said act. Stats. 1919, pp. 491, 493, § 2 (t), (dd). The telephone company operates a telephone line in the city of Los Angeles, and in connection with its telephone business in that city, and to facilitate telephonic communication by such of the public as wish to use its telephones, it annually issues to, and distributes among its subscribers telephone directories. In these directories are listed the names and telephone numbers of its subscribers. For some years past the telephone company has permitted a large number of persons who are among the number of its subscribers, including the petitioner here, to insert advertising matter in the classified business section of the directories issued by it. It has based its charges for this advertising upon a schedule of rates and charges which were established by it for the purpose. For a number of years past it has printed in heavy, black, bold-faced type the names of such of its telephone subscribers as would pay a fixed and established charge for the privilege of having their names so printed. Petitioner is one of those whose names were thus printed. Prior to 1925 the telephone company's charge to all such advertisers for inserting advertising matter in the classified business section of its directories was $50 a month for each half page of advertising, and for printing the names of subscribers in heavy, black, bold-faced type $1 per month for each name printed in this distinctive manner. In each of several years prior to 1925 petitioner and the telephone company entered into a contract under which the telephone company undertook to, and did, insert in the classified business section of its directories five half pages of advertising matter for petitioner, and also caused petitioner's name to be printed in bold-faced, black type in the place where it occurs in the listed names of the telephone subscribers; and petitioner agreed to, and did, pay for this advertising at the above-mentioned rates. When preparing to print and issue the directories for 1925, the telephone company notified petitioner that it intended raising the rates theretofore fixed by it for the advertising which it previously had done for petitioner, and informed the latter that the rates which it previously had charged for such advertising as petitioner had caused to be inserted in the classified business section of the directories would be increased from the former rate of $50 per month to the rate of $100 per month for each half page, and that the rates for printing all subscribers' names in bold-face, black type would be increased from $1 to $5 per month. Other advertisers were given the privilege of advertising in the classified business section of the new directories at the old rate of $50 per month. The increased rates were established by the telephone company without the order or authorization of the Railroad Commission.

In the complaint which petitioner filed with the respondent commission, that body was asked to assume jurisdiction over the matters set forth in its said complaint, and conduct a hearing thereon, and grant to the petitioner such relief as the facts developed upon such hearing required, and as were just and equitable in the premises. The commission declined to entertain the complaint upon the ground that the law had not vested it with jurisdiction so to do. Hence this proceeding.

It is claimed by petitioner that a telephone directory is a constituent part of the company's "telephone line" within the definition of that term as given in subdivision (s) of section 2 of the Public Utilities Act, and that therefore, the additional charges are void, because the increases were not authorized by the Railroad Commission. It likewise is claimed that the increase in the rate charged petitioner for advertising in the classified business section of the directories as compared with the rates charged other like advertisers constitutes an unlawful discrimination, and therefore void.

[1-3] The single question presented in this proceeding is as to whether the Railroad Commission has, and should, assume jurisdiction over the telephone directories of the Southern California Telephone Company, a public service corporation, and over the matter of the form and content of such directories, and over the matter of the charges and receipts of said corporation connected with, and accruing from, the publication, distribution, and use of such directories. A telephone directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience. It is as much so as is the telephone receiver itself, which would be practically useless for the receipt and transmission of messages without the accompaniment of such directories. The form which such directories conveniently took with the inception of this modern method of message transmission was that of an alphabetical list of the names of the subscribers to the service, and there can be no question as to the right of the regulatory body over this form of public utility to regulate the form, content, and cost thereof to subscribers who had entitled themselves to the convenient use of such service. If, for example, the corpo-

ration should undertake to put forth a directory which was not alphabetically arranged, the Railroad Commission would doubtless have the right to prescribe such arrangement, or, if the corporation should essay to issue its directory with the names therein printed in a type too small or too dim for comfortable use, or should attempt to issue its directory in an inconvenient or perishable form, the regulatory body doubtless would have power to order remedied these defects in this instrumentality, and, if it should become manifest that the public convenience would be the better subserved by the provision therein of a classified list of subscribers, we do not doubt the power of the regulatory body to require that the telephone companies include such a classification in their directories as are at present provided in the form of a gratuity. In the development of this form of public service telephone companies have found it practicable and profitable to diminish the cost and increase the profits of operation by making use of its directories as a means and form of advertising available to its subscribers. The activities of these companies in this direction have taken on two forms: First, that of the insertion of advertising matter in connection with its classified list; second, in the printing in the alphabetical list of its subscribers the names of those who are willing to pay for such preference in boldface type, or, in other words, in a better and clearer type than that employed in printing the names of subscribers not paying extra for such preferment. Granting the right of these public service corporations to employ this instrumentality for such profitable purposes, we cannot do other than regard its use for such purposes as a mere incident in the operation of its public service over which the regulating body ought to have full control. We think this is made manifest by a consideration of that one of the above-mentioned forms of advertising which these corporations indulge in, viz. the printing for a consideration of the names of certain of its subscribers in black-faced type. We can well conceive that, if the telephone company is to be free of control to select such of its subscribers as it may choose to assess or to favor in this regard, it would be in a position to so juggle with this particular form of advertising as to give a minimum of efficiency to those who did not so advertise, or whom it did not, for any reason, see fit to favor in the foregoing regard, or to discriminate in other respects among its customers, and thus subject this particular instrumentality of its service to serious inequalities and abuses. With respect to the insertion of display advertisements in its directories, while the opportunity for abuse may not be so manifest, the petitioner herein sets forth facts which show that this telephone company is engaged in the exercise of a discrimination as between this petitioner and others of its subscribers in the direction of doubling the rates formerly charged the petitioner for such advertising, while permitting other subscribers to have like space at the former rates. The employment of this instrumentality of its public service as a means for making such discriminations among its subscribers ought not to be tolerated, and can only be permitted upon the theory that the telephone company, in making use of its directory for advertising purposes, is engaged in a strictly private enterprise, and hence in that respect is not subject to public regulation and control. We cannot subscribe to this theory for the foregoing reasons, but there are also other reasons why we think we ought not to do so. The telephone service in its relation to the public, and in its general and practical operation, is, or at least tends to be, a natural monopoly; and, this being so, it is, in an especial sense, the proper subject of public regulation and control. If in the employment of one of its essential instrumentalities it undertakes to so manipulate its form and use as to make a considerable profit out of that portion of the public which it is thus enabled to serve, we are of the opinion that such profit should be taken account of by the regulating body as are the other earnings of this public utility in determining what just and reasonable rates should be allowed and paid by the public for the service it provides.

In reaching the foregoing conclusions, we have given due consideration to the briefs of the respondent and amici curiæ and to the authorities therein referred to. We are cited to no case which immediately touches the question before us, nor do we think that the cases to which counsel refer have application to the situation presented in the instant case. In deciding to issue the writ herein, we do not undertake to determine the scope of the inquiry of the Railroad Commission, but only that it should entertain the complaint of the petitioner with a view to an investigation of the subject over which we think it has full jurisdiction and control.

Let the writ issue requiring the Railroad Commission to take and exercise jurisdiction over the subject-matter of the petitioner's complaint.

199 Cal. 203

YUBA INV. CO. v. YUBA CONSOL. GOLD FIELDS (MARIGOLD DREDGING CO., Intervener). (Sac. 3500.)

(Supreme Court of California. Aug. 6, 1926.)

1. Appeal and error 🔑1097(1).

Where there is no material change in pleadings and material facts on second trial, judgment of appellate court reversing and remanding judgment at first trial is law of the case.

2. Quieting title 🔑19.

Action to quiet title authorized by Code Civ. Proc. § 738, is to determine any adverse claims of defendant to land in controversy.

3. Appeal and error 🔑1201(3).

Amendment of pleadings in action to quiet title to conform to determinations of appellate court which reversed and remanded first judgment *held* unnecessary and did not change form of action.

4. Appeal and error 🔑1214.

Where main contention in action to quiet title was whether deed conveyed fee or easement, appellate court's statement of rights of parties *held* law of case in second trial, and evidence tending to detract from plaintiff's rights, as thus declared, was properly excluded.

5. Deeds 🔑143—Where, under reservation in deed, plaintiff was entitled to possession, rents, and profits of land until "demand" was made for them, defendant held not entitled thereto before making such demand.

Where, under reservation in deed, plaintiff was entitled to possession, rents, and profits of land until "demand" was made for them, defendant *held* not entitled thereto before making such demand regardless of whether it would have been complied with if made, "demand" being notice requiring surrender of possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Demand.]

6. Lis pendens 🔑26(1)—One who agreed with plaintiff in action to quiet title to remove metals from lands in question held to acquire, with full knowledge of defendant's claim, same rights as plaintiff had.

One who agreed with plaintiff in action to quiet title to remove precious metals from lands in question, and who intervened in such action after first trial, *held* to acquire, with full knowledge of defendant's conflicting claim, same rights as plaintiff had.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Yuba Investment Company against the Yuba Consolidated Gold Fields, in which the Marigold Dredging Company intervened. From the judgment defendant appeals. Affirmed.

Charles W. Slack and Edgar T. Zook, both of San Francisco, and W. H. Carlin, of Marysville, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, and J. E. Ebert, of Marysville, for respondent.

Devlin & Devlin, of Sacramento, for intervener and respondent.

SHENK, J. This is an action to quiet title. Both the plaintiff and the defendant deraign title through a common source. Judgment in favor of plaintiff at a former trial was reversed (Yuba Inv. Co. v. Yuba Consol. G. Fields, 184 Cal. 469, 194 P. 19). Upon a retrial judgment was again rendered in favor of the plaintiff from which the defendant appeals, presenting the record in a bill of exceptions.

By act of Congress of March 1, 1893 (U. S. Comp. St. §§ 10004–10029), the California Débris Commission was created. The purpose of its creation among other things was to make examinations and surveys along the tributaries of the Sacramento river in order that the storage of mining and other débris might be provided for. During the year 1900 the commission desired to acquire certain lands in Yuba county owned by James O'Brien and others for a settling basin to clear the waters of the Yuba river of detritus caused by hydraulic mine dredging and to prevent the detritus from finally reaching the Sacramento river and obstructing its navigable channel. To that end O'Brien, under date of December 6, 1901, executed a deed of conveyance to the United States of America of certain lands in townships 15 and 16 north, range 5 east, M. D. B. & M. The deed described the lands in three parts. The lands first described are called the South Settling Basin and include the lands in controversy located in sections 4, 5 and 8 in township 15 and are 1,000 acres and more in area. The lands secondly described comprise some 800 acres lying between the official banks of the Yuba river and are called the North Settling Basin. The lands thirdly described comprise and are called "Dredging Ground" or the "442-acre tract." For a more extended outline of the terms of said deed reference is made to the opinion of this court on the former appeal. The lands in controversy were acquired by the federal government for the purpose of establishing a settling basin, but as time went on the plans of the federal authorities were changed and the said lands were not used for that purpose. For the reason that said lands were no longer needed by the federal government for the purpose intended or for any purpose they were offered for sale and were described in a deed dated October 30, 1911, purporting to convey the same from the United States to the defendant Yuba Consolidated Gold Fields, a corporation.

A deed dated April 10, 1912, described and purported to convey the said lands from James O'Brien to the plaintiff Yuba Investment Company, a corporation. On April 12, 1912, this action was commenced. The litigation involves mainly the construction of the deed from O'Brien to the United States dated December 6, 1901. As the pleadings were framed and the proof offered on the first trial the plaintiff proceeded on the theory that it was the owner of said lands in fee simple under the deed of grant from O'Brien dated April 10, 1912; that the deed of December 6, 1901, from O'Brien to the United States conveyed to the latter an easement only; that as the purpose for which the easement was created had not been accomplished, and as the plan of establishing a settling basin on said lands had been abandoned, the easement no longer existed. In order to prove its case on that theory, the plaintiff produced evidence of circumstances surrounding and transactions leading up to the execution of said deed as tending to show that it was the intention of the parties that the fee was not to be conveyed but an easement only created. This proof was necessarily offered and received on the supposition that the deed was ambiguous or uncertain in its terms and required judicial construction and the aid of extrinsic evidence to ascertain the intention of the parties. The theory advanced on behalf of the defendant was that the title to the land in fee simple was transferred by O'Brien to the United States; that the original deed was plain and certain; and that parol evidence was inadmissible for the purpose of limiting or qualifying the estate thereby created; and that, as the grantee of the United States, the defendant was possessed of the title in fee. At the former trial the defendant objected to the introduction of evidence of circumstances surrounding and negotiations leading up to the execution of the original deed. The court overruled the objection, and, in the light of the evidence thus admitted, the court rendered its judgment to the effect that the plaintiff was the owner in fee simple of the lands in question; that the deed of December 6, 1901, intended to and did confer upon the United States and that the United States intended to and did acquire only the right to an easement to use and the privilege of using said real property for the purpose of constructing thereon and using the same as a settling basin, and that the defendant had no right, title or interest in said real estate except the right to deposit thereon detritus resulting from dredging operations on the 442-acre tract as provided for in said deed.

On the former appeal this court decided, in accordance with the defendant's contention, that the deed from O'Brien to the United States conveyed the fee, and that parol evidence was inadmissible to explain its terms or aid in its interpretation for the reason that its provisions were clear, plain, and unambiguous. It was also decided on conflicting claims of the parties that the reservations in that deed of the precious metals in the lands therein described necessarily included the incidental right on the part of the plaintiff to extract such precious metals and to such possession of the premises as was necessary to the full enjoyment of that right so long as its exercise did not interfere with the plans and purposes of the United States. It was also decided that, although under the deed the defendant had the right to deposit on the lands of the plaintiff the detritus resulting from dredging operations on the 442-acre tract, the said right of deposit was limited to the reasonable necessities of the defendant in connection with its dredging operations on that tract. It was also decided that the defendant's claim for compensation for the rents and profits of the lands in question as alleged in its cross-complaint was without merit for the reasons that it had not been shown that the United States or its grantee, the defendant herein, had ever demanded possession as a prerequisite to its right to compensation.

In preparation for the second trial the plaintiff amended its complaint to conform to the determinations of this court on the former appeal. The defendant amended its answer and filed an amended and supplemental cross-complaint in which it again set forth its claim for rents and profits from the 12th day of April, 1912, and alleged that any demand on its part for the possession of the premises or for the rents and profits thereof would have been refused by the plaintiff and would have been useless.

On the second trial the court adhered closely to what it deemed to be the law of the case as established on the former appeal. It ruled that by reason thereof the only issue for determination on the retrial was whether the servitude existing in favor of the defendant to deposit detritus from its dredge mining operations on the 442-acre tract should still be imposed upon the lands in controversy, in view of the holding of this court that the defendant was limited in the imposition of said servitude to its reasonable requirements. Accordingly, the trial court received evidence in support of the allegations of the amended complaint, which evidence was substantially the same as that produced by the plaintiff on the former trial, excepting, however, the evidence of circumstances surrounding and negotiations leading up to the execution of the original deed. In harmony with its conception of the law of the case, the court excluded evidence offered in behalf of the defendant, the purpose of which was to show that it was the intention of the parties to the original deed that the reservation to the grantor of the precious metals in the lands in controversy did not include the right to extract and remove the same. It also excluded evidence offered by the defendant, the purpose of which was to show that the dredge mining of the land in controversy was inconsistent with the use of said lands for the purpose of a settling basin. It likewise excluded evidence to show that the defendant had been damaged by the withholding on the part of the plaintiff of certain of the lands in question.

It is the contention of the defendant that the trial court extended the doctrine of the law of the case beyond the point warranted by the decision of this court on the former appeal. It is earnestly insisted that the only issue before this court on that appeal was as to whether the deed of December 6, 1901, conveyed the fee or an easement; that the issue of the right of the plaintiff to extract and remove the gold from the lands in controversy and the further issue of the defendant's dumpage rights were not involved in the former appeal; and that, therefore, the declarations of this court relating to those matters do not constitute the law of the case. On the other hand, it is the contention of the plaintiff that the controlling issues of the controversy were before the court on the former appeal, and it but remained on the retrial to determine, as a question of fact, the reasonable necessity of the continuance of the defendant's dumpage privileges.

[1] We are satisfied that the position taken by the plaintiff and by the trial court should be sustained. There is no dispute between the parties as to what legally constitutes the law of the case. It is only upon the application of the established rules to this particular case that their argument diverges. It is well settled that when the judgment or determination of an appellate court is rendered on a certain state of facts it ceases to be of binding force if the material facts presented upon the subsequent appeal are essentially different or if on the second trial there are material changes in the pleadings or in the evidence. In either case the decision on the former appeal would not be binding on the second appeal as the law of the case. Conversely, if there be no material change in the pleadings and the material facts appear under essentially the same circumstances as on the former appeal, the doctrine of the law of the case does apply (2 Cal. Jur. 944 et seq. and cases cited).

[2] With the foregoing rules in mind it is remembered that the present action is one to quiet title. Such an action, as authorized by statute (section 738, Code Civ. Proc.), is brought by the plaintiff for the purpose of determining any adverse claim that may be asserted by the defendant in and to the lands in controversy.

> "The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to" (Peterson v. Gibbs, 147 Cal. 1, 5, 81 P. 121, 109 Am. St. Rep. 107).

[3] While it appears that the pleadings herein were amended to conform to the determinations of this court on the former appeal, it is obvious that such amendments did not change the form of the action as an action to determine adverse claims, nor were the amendments necessary in order that the rights of the parties be fully considered and their claims be fully settled on the retrial.

[4] On the former appeal it was decided that the terms of the deed of December 6, 1901, were plain and unambiguous and that parol evidence was for that reason inadmissible to add thereto or detract therefrom or to indicate the intention of the parties. Section 1856, Code Civ. Proc.; section 1625, Civ. Code; Beall v. Fisher, 95 Cal. 568, 30 P. 773; Riley v. North Star Mining Co., 152 Cal. 549, 93 P. 194; Fitzgerald v. County of Modoc, 164 Cal. 493, 129 P. 794, 44 L. R. A. (N. S.) 1229. It is true that the main contention at the former trial was as to whether the deed conveyed the fee or an easement, but the other issues were inherent in the action and were discussed. It was specifically stated by this court on the appeal that in view of the necessity of a retrial the rights and claims of the parties, under what were necessarily deemed to be the plain and unambiguous terms of the deed, should be stated. The court, therefore, proceeded to and did declare the rights of the parties under the deed. After a careful examination of the record on the former appeal and a careful consideration of the contentions made by the parties on that appeal, including those made by the defendant in its petition for a rehearing, it must be said that this court was justified in considering that the terms of the deed relating to the right of the plaintiff to remove the precious metals from said lands and relating to the plaintiff's right of possession and relating to the extent of the dumpage privileges of the defendant were so plain and certain as not to be subject to modification by parol evidence. The court therefore held, as matter of law appearing on the face of the deed, that the reservation to the plaintiff of the precious metals in the lands in controversy necessarily reserved to it the right also to extract and remove the same; that the plaintiff's right of possession of the land and to the rents and profits therefrom was also reserved unto it until demand had been made therefor; that the dumping privileges acquired by the defendant did not merge in the fee acquired from the United States; and that said dumpage rights extended only to what was reasonably necessary for its mining operations on the 442-acre tract.

With the foregoing determinations before us the conclusion seems impelled that the only issue of fact before the court on the retrial was as to the extent to which the defendant's dumpage rights had survived. On this issue the court found on competent and sufficient evidence that the said rights had been reduced to nothing by reason of the practical completion of all possible mining operations on the part of defendant on the 442-acre tract. It would then be apparent that the evidence offered by the defendant, which was intended to detract from the plaintiff's other rights under the deed as declared by this court on the former appeal, was properly excluded by the trial court. In this state of the case it would necessarily follow that the admissible evidence, with the one exception noted, was substantially the same on the second trial as on the first.

[5] It was decided on the former appeal that, under a proper construction of the language of the O'Brien deed, the plaintiff was entitled to the possession of the lands in controversy and to the rents and profits thereof until "demand" therefor had been made by the defendant, and it appeared that no such demand had been made. By amended pleadings the defendant averred that such a demand, if made, would not have been complied with and would have been useless. It is contended that this averment was admitted by the plaintiff by its failure to deny the same; that the "demand" referred to in the former decision must, therefore, be deemed to have been waived; and that, in any event, the court should modify the judgment herein so as to allow the defendant the rents and profits established by the evidence from the 12th day of April, 1912, to the 6th day of December, 1920. Prior to the last-mentioned date, the possession of the premises was surrendered to the defendant with the exception of such possession as was necessary to carry on the mining operations of the plaintiff Many cases are cited by the defendant to the proposition that a demand is deemed waived when it is alleged and proved or admitted that such demand if made would not have been complied with and would have been useless. Such undoubtedly is the law in cases where it is properly applicable, but in the case at bar it has no application. In holding that under the reservations contained in the O'Brien deed the plaintiff was entitled to retain possession of the land and the rents and profits thereof until demand for the same should be made, it is obvious that the term "demand" was used in the sense of "notice requiring surrender of possession." Under the reservations contained in the deed the plaintiff was entitled to the possession of the land and to the rents and profits thereof until such notice was given, and no right to possession or to the rents and profits accrued to the defendant prior to such notice. The trial court, therefore, properly denied the relief which the defendant sought on this branch of the case.

[6] Subsequent to the decision of the court on the former appeal the plaintiff entered into an agreement with the intervener, Marigold Dredging Company, a corporation, pursuant to which the intervener agreed to remove the precious metals from certain lands in the South Settling Basin. Under this agreement the intervener dredge mined the lands in a portion of section 5 within said basin. By its complaint in intervention the intervener sought to make common cause with the plaintiff and against the defendant in the litigation. In its cross-complaint the defendant claimed damages against the intervener for the alleged wrongful withholding and dredge mining of the said lands. The trial court excluded evidence of said alleged damages and its ruling is specified by the defendant as error. It cannot be so regarded. The plaintiff had the right to remove the precious metals from said lands, and no good reason has been advanced by the defendant why the plaintiff could not, by contract, vest the intervener with the same right. In its answer to the plaintiff's amended complaint the defendant alleged that the intervener had notice and knowledge, at and prior to the date of said agreement, that the defendant claimed that the plaintiff had no right to extract the precious metals from the lands in the South Settling Basin without the consent of the defendant. Notwithstanding the recital in the agreement of the pendency of this action and in general the issues involved the court found said allegation to be untrue. This finding, as urged by the defendant, is unsupported by the evidence, but this we deem unimportant and not prejudicial to the rights of the defendant for the reason that the intervener had the right to acquire, with full knowledge of the defendant's claim, the same rights to dredge mine the said lands as the plaintiff itself possessed. The advent of the intervener in the litigation created no issues not involved or determinable as between the original parties to the action.

Numerous other points are made by the parties, but in view of the conclusions above expressed we deem further notice of them unnecessary.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.; LENNON, J.

199 Cal. 212

PEAK et al. v. KEY SYSTEM TRANSIT CO. (S. F. 11904.)

(Supreme Court of California. Aug. 9, 1926.)

1. Appeal and error 🔑345(1).

Appeal, taken within 30 days after order denying applicant's motion for a new trial, but not within 60 days after entry of judgment, *held* proper, if new trial proceeding was duly initiated, in view of Code Civ. Proc. § 939.

2. Appeal and error 🔑345(1).

Failure to serve notice of intention to move for new trial on one of two plaintiffs *held* not to present case, where there was no initiation of new trial proceeding, so as to prevent appeal within 30 days of order denying it.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by U. H. Peak and another against the Key System Transit Company. Judgment for plaintiffs, and defendant appeals. On motion by plaintiff State Compensation Insurance Fund to dismiss defendant's appeal. Motion denied.

Donahue, Hynes & Hamlin, of Oakland, for appellant.

Frank J. Creede, T. W. M. Slaven, and W. J. O'Connor, all of San Francisco, for respondents.

PER CURIAM. [1, 2] Motion to dismiss appeal. Plaintiff and respondent Peak brought an action to recover damages from defendant and appellant, Key System Transit Company, a corporation, on account of personal injuries, alleged to have been inflicted by the negligence of said Key System Transit Company. Respondent state compensation insurance fund, the carrier of the insurance policy issued to Peak's employer, by virtue of the provisions of the Workmen's Compensation, Insurance, and Safety Act, and, as such insurer, having paid compensation on account of the injuries received by Peak, also filed an action against said Key System Transit Company to recover the damages which it had sustained and had been compelled to pay by reason of its contract of insurance. Section 26, Workmen's Compensation, Insurance, and Safety Act 1917 (St. 1917, p. 854), as amended by Stats. 1919, p. 920, § 8. On the second day of the trial the court granted said state compensation insurance fund's motion to intervene as a plaintiff in said action. The jury returned a verdict in favor of plaintiffs in the sum of $2,500. Within the statutory period defendant served upon respondent Peak and filed with the court a notice of intention to move for a new trial, but did not serve said respondent state compensation insurance fund, or its attorneys, with said motion. Within 30 days after the termination of the proceedings upon the motion for a new trial, which was denied, appellant gave to both respondents a notice of appeal and prepared its record on appeal. Respondent state compensation insurance fund, in due time, filed in this court a notice of motion to dismiss the appeal which is now before us. The grounds of the motion, as therein stated, are, first, that the notice of appeal was not filed within the time allowed by law; and, second, that no notice of intention to move for a new trial was served at any time upon it, respondent state compensation insurance fund. Respondent Peak does not join in this motion. The notice of intention to move for a new trial as served upon Peak was within the time allowed by law and the motion having been heard by the court was denied. It is true that the appeal was not taken within 60 days after the entry of judgment, but it was taken within 30 days after the entry of an order denying applicant's attempted motion for a new trial, which was in time if such proceeding was duly initiated. Code Civ. Proc. § 939; Estate of Nutt, 180 Cal. 419, 181 P. 661. Assuming, as we must, that it was erroneous not to serve the state compensation insurance fund with notice of intention to move for a new trial, "it does not follow that no new trial proceeding was duly initiated." Service upon Peak within the time prescribed by statute conferred jurisdiction upon the trial court to determine the motion. Estate of Nutt, supra. This proceeding does not, as pointed out in the Estate of Nutt, supra, present a case wherein there was no initiation of a new trial proceeding as to any adverse party.

The motion to dismiss the appeal is denied.

---

199 Cal. 215

C. J. KUBACH CO. v. McGUIRE, President of Board of Public Works. (S. F. 12179.)

(Supreme Court of California. Aug. 9, 1926.)

1. Municipal corporations 🔑58.

"Charter" is not only organic law of city, but also law of state within constitutional limitations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charter.]

2. Municipal corporations 🔑58.

City charter, being enactment of lawmaking power of state, is subject to recognized rules of statutory construction.

3. Statutes 🔑233.

State and its agencies are not bound by general words of statute limiting rights and interests of citizens, unless expressly or impliedly included within limitation.

4. Municipal corporations 🔑666.

City charter provision, limiting height of buildings in certain district to 150 feet, in absence of express language to that effect, *held* not to restrict height of buildings erected by city.

5. Municipal corporations ⚿666—City hall held not subject to height limitation.

Though neither overwhelming vote of electors in favor of new city hall 400 feet in height, nor construction of other public buildings in excess of general charter limitation of 150 feet on height of buildings, is conclusive as to scope of such provision, they shed some light on question whether Legislature and people intended that city itself should be subject to limitation thereof.

In Bank.

Application by the C. J. Kubach Company for peremptory writ of mandamus against Hugh J. McGuire, as President of the Board of Public Works of the City of Los Angeles, to compel him to sign a certain contract for construction work on the City Hall. Writ granted.

Richard J. O. Culver, of Los Angeles, for petitioner.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for respondent.

SHENK, J. At a special election held in 1923 in the city of Los Angeles, the electors thereof authorized the issuance of bonds in the sum of $5,000,000 for the construction of a new city hall. By a vote of more than two to one said electors have expressed a preference for the construction of the new building on a plot of ground 400 feet wide and 800 feet long on North Main street between First and Temple streets, and to consist of a 28-story structure approximately 400 feet in height. The main portion of the building, as designed and approved by the voters, will, if constructed, be 200 feet wide by 400 feet long to the height of four stories, then 150 feet wide by 250 feet long for an additional six stories, and the balance of the building will be in the shape of a tower 110 feet square.

The city has expended in excess of $2,500,000 for the acquisition of the land upon which to construct the building as proposed. The necessary excavations have been made, and the foundations have been constructed. Contracts have been let for the steel construction, and other contracts, not included within the general contract, hereinafter mentioned, have been awarded. After proceedings duly taken pursuant to the requirements of the city charter, a contract was awarded to the petitioner for furnishing all necessary labor, materials, equipment, and appliances for the construction of that portion of the new building embraced within the plans and specifications for the general contract for the sum of $2,852,700. The contract was duly prepared, and by proper resolution the board of public works directed its president, the respondent herein, to sign the same on behalf of said city as provided by the charter. The respondent has refused to sign the contract on the ground that it calls for the construction of a building in excess of 150 feet in height, and therefore in alleged violation of section 3 (11) (a) of the Charter, which provides:

> "No building, structure or any part thereof of a height exceeding one hundred fifty feet shall be erected within that portion of the city described as follows, or within one hundred fifty feet of the exterior boundaries of said district.
>
> "Bounded on the north by Temple street, and the easterly prolongation thereof; on the east by San Pedro street, and the northerly prolongation thereof; on the south by Pico street and on the west by Figueroa street."

This proceeding in mandamus is to compel the respondent to sign said contract, notwithstanding his predilections as to the alleged violation of the provision of the charter above quoted. The application for a peremptory writ had been submitted on a general demurrer to the petition setting forth generally the foregoing facts.

It is the contention of respondent that the said charter provision is applicable alike to the city in the construction of its public buildings as to the inhabitants of said city in private enterprises. It is the contention of the petitioner that the city is not so bound unless the language of the limitation is clear and unmistakable, to the effect that the city itself should be so bound, and that such language does not here appear.

[1-3] We are of the opinion that the contention of the petitioner should be sustained. Under the Constitution, the charter of the city is not only the organic law of the city, but it is also a law of the state within the constitutional limitations (Ex parte Sparks, 120 Cal. 395, 399, 52 P. 715; Dalton v. Lelande, 22 Cal. App. 481, 487, 135 P. 54; Stern v. City Council of Berkeley, 25 Cal. App. 685, 688, 145 P. 167). Being an enactment in the exercise of the law-making power of the state, it is subject to the recognized rules of statutory construction. In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. Marin Municipal Water Dist. v. Chenu, 188 Cal. 734, 207 P. 251; Balthasar v. Pac. Elec. Ry. Co., 187 Cal. 302, 202 P. 37, 19 A. L. R. 452; Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am. St. Rep. 451; Wittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016.

[4, 5] The rules laid down in the foregoing cases would seem to apply to the city in its present situation, and to justify the conclusion that it was not intended that the city should be so restricted in the construction of its public buildings. This conclusion is

fortified by the showing also made by the petition herein, that, since the adoption of said charter provision, a public library building and a new hall of justice, both in excess of 150 feet in height, having been constructed within said district without objection. While neither the overwhelming vote in favor of a new city hall of this particular height and design at the location mentioned, nor the construction of the other public buildings within said district in excess of the general charter limitation, is conclusive as as to the scope of said provision, nevertheless those facts shed some light on the question as to whether it was intended by the people of the city and by the Legislature in adopting and approving the charter provision that the city itself should be subject to the height limitation prescribed in said section 3. We think there is not in that section such a clear and definite expression of the intentions so to limit the city in the construction of its public buildings as would remove the provision from the operation of the general rule contended for by the petitioner.

Let a peremptory writ issue requiring the respondent to sign said contract as directed by the board of public works and as prayed for herein.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; TYLER, Justice pro tem.

---

199 Cal. 218

MOODY et al. v. ZUMWALT. (Sac. 3656.)

(Supreme Court of California. Aug. 13, 1926.)

1. Vendor and purchaser ⊂⊃18(2).

Agreements extending options to purchase land *held* to show intent to pay interest and taxes irrespective of purchase.

2. Contracts ⊂⊃88.

Written agreements import consideration.

3. Vendor and purchaser ⊂⊃18(2).

Continuous extension of option to purchase land *held* sufficient consideration for promise to pay interest and taxes irrespective of purchase.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by May H. Moody and another against I. G. Zumwalt. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thomas Rutledge, of Colusa, for appellant.

Goodfellow, Eells, Moore & Orrick and R. W. Palmer, all of San Francisco, and Alva A. King, of Colusa, for respondents.

PER CURIAM. The following opinion, prepared by Mr. Justice Lawlor, is adopted as the opinion and decision of the court:

"This action was instituted by the plaintiffs to recover of the defendant the sum of $6,604.68 alleged to be owing as accrued interest under an option granted to the defendant to purchase certain real property owned by the plaintiffs and situate in the county of Colusa, for the further sum of $493 asserted to be due for taxes on said land for the year 1921, for a balance due for rent of said realty, and for interest on the above sums. The defendant admitted the amount due for rent and offered to permit entry of judgment for that amount. After trial, however, the court entered judgment for the plaintiffs for the full amount as prayed for, whereupon the defendant appealed particularly from that portion of the judgment which related to the recovery of the alleged accrued interest under the option and the tax item mentioned.

"It appears that the respondents owned a tract of 960 acres in the said county of Colusa which they had let to one W. H. O'Hair for a period of six years from November 1, 1916 at a rental of $960 per year. The lease to said O'Hair contained a covenant granting to said lessee the right and option within one year after the date of the lease to purchase the said premises at a price of $60 per acre. On December 12, 1917, the said lessee assigned his lease to the appellant, whereupon the respondents executed a document of even date therewith by which they ratified and consented to said assignment and in which, among other things, they granted to the appellant 'the exclusive option of purchasing the said land on or before the 1st day of November, 1919, at the price of $60 per acre. * * *' At subsequent dates the respondents by written agreements granted to the appellant five extensions of time within which he might exercise the option to purchase, these extensions being dated October 28, 1919, November 25, 1919, February 24, 1920, April 22, 1920, and December 28, 1920, respectively.

"The first of the foregoing enumerated written agreements between the parties to mention the payment of interest and taxes by appellant is that of February 24, 1920, which served to extend appellant's option sixty days from March 1, 1920. The pertinent part of said written agreement reads as follows: 'It is understood that said I. G. Zumwalt shall pay us 7 per cent. interest on the amount called for and due under said option from date hereof and also the taxes or other assessments levied on said land.' The extension of April 22, 1920, reads in part: 'I, G. Zumwalt must pay interest at 7 per cent. per annum for balance now due and also advance for us $900.00 due George Strickland for interest, which said $900.00 and $5,000.00 heretofore paid shall be deducted from the purchase price.' The last of the extensions above-mentioned, being that dated December 28, 1920, contains this declaration: 'Zumwalt to pay interest at 7 per cent. per annum as above stated. * * *'

"The appellant did not purchase the land as provided for in the option and the various extensions thereof. It is the appellant's contention that the quoted declarations touching the payment of interest and taxes by him and found in the later extensions of the option did not amount to an unconditional promise on his part to pay said sums but that said interest and tax sums were payable by him only in the event he exercised the option and purchased the realty in which case the sums mentioned were to constitute a part of the purchase price. On the other hand, the respondents urge that the agreements between the parties show an unconditional promise on the part of appellant to pay the interest and tax items regardless of whether or not he exercised the option and purchased the land.

[1-3] "A solution of the question presented involves an interpretation of the several extensions of the option granted by the respondents to the appellant and in which these sums are referred to. In our opinion, the above quotations taken from the agreements extending the option show an intention on the part of appellant to pay the interest and tax sums irrespective of his purchase of the premises covered by the option. There is nothing in the above agreements which restricts or even tends to restrict the payment of said sums by the option holder. His promise to pay said interest and taxes is not in express language confined to the event of his purchase of the realty. Nor is there a want of consideration to support this unconditional promise made by appellant. In addition to the consideration which the written agreements import there was a continuous extension of the time within which the option might have been exercised. This latter, in the absence of everything else, would be sufficient consideration to support the appellant's promise."

The judgment appealed from is affirmed.

---

78 Cal. App. 724

FREDERICK et al. v. LANDFIELD.
(Civ. 5133.)

(District Court of Appeal, First District, Division 1, California. July 17, 1926.)

Brokers ⚷49(3)—Salesmen held entitled to agreed commissions for sale of stock, notwithstanding unauthorized provision for deferred payments, where neither corporation nor its fiscal agent objected thereto.

Salesman, who obtained from purchaser binding contract to purchase stock, which purchaser was both financially able and willing to comply with, and to which neither corporation nor its fiscal agent ever objected by reason of deferred payments provided therein, contrary to terms of salesman's contract, until after other salesmen obtained additional subscription from purchaser, *held* entitled to agreed commission.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by A. Frederick and another against Philip E. Landfield. Judgment for plaintiffs, and defendant appeals. Affirmed.

Erwin C. Easton, of San Francisco, and E. B. Taylor, of Martinez, for appellant.

Sullivan, Sullivan & Theo J. Roche, of San Francisco, for respondents.

TYLER, P. J. This action was one brought by plaintiffs to recover the sum of $1,875 against defendant, a stock and bond broker, for services rendered in procuring a purchaser for 150 shares of the capital stock of the Golden Gate Ferry Company, a common carrier. Defendant Landfield was the fiscal agent of the company in the sale of an issue of its capital stock, and plaintiffs were employed by him as salesmen for the sale of these and other securities. As compensation for their services in selling the stock, defendant Landfield agreed to pay plaintiffs 12½ per cent. of the selling price of $100 a share. Under his agreement with the company, Landfield was authorized to accept 25 per cent. of the amount of each subscription, the balance to be paid at the office of the company. From this 25 per cent. Landfield was entitled to deduct his full commission. Under their employment with Landfield, plaintiffs were instructed as to the terms upon which sales could and would be made, and with this understanding they entered upon their duties as salesmen. In the month of October, 1921, and prior to the transaction in question, plaintiff Frederick, as broker in the employ of Landfield, had sold to one R. M. Horn, of Cloverdale, 40 shares of the capital stock of the ferry company. Subsequently, and on the 7th day of January of the following year, the plaintiffs called at the office of Landfield together, and asked him for the names of some persons who were likely to subscribe for or buy stock in the ferry company. They were informed by Landfield that, in his opinion, the Cloverdale district had not been properly canvassed, and that there was a good opportunity for business in that locality.

Acting upon this suggestion, plaintiffs repaired to the place in question and called upon Mr. Horn, to whom plaintiff Frederick had previously sold the amount of stock above mentioned. They succeeded in inducing Horn to subscribe for 150 shares of the stock. Plaintiffs requested him to pay one-quarter of the purchase price they were required to obtain. This was agreeable to Horn, but at this particular time he did not have the ready cash, but explained to plaintiffs that he was the owner of $33,000 registered Liberty bonds, and had a few days previous mailed a portion of these securities to Washington to be converted into coupon bonds, and he asked if it was possible to wait for at least 10 days until the bonds could be returned to Cloverdale, at which time he would mail a sufficient amount of the bonds direct to the company in payment of the required 25 per cent. Plaintiffs assented to this proposition, whereupon Horn signed the subscription agreement. Indorsed thereon was a memorandum of this agreement. Plaintiffs thereafter fully explained the transaction to defendant Landfield, and delivered to him the subscription agreement. There is testimony to show that Landfield was pleased with the transaction and complimented plaintiffs for their success in obtaining the business. The subscription agreement was thereupon turned over to the Golden Gate Ferry Company. The vice president of that company, at the suggestion of defendant Landfield, in a letter to Horn expressed his pleasure at the sale effected by plaintiffs. No question was raised at this time that plaintiffs were not entitled to their commissions by reason of the failure of Horn to make the actual initial payment of the customary 25 per cent. but, on the contrary, defendant Landfield caused to be delivered to plaintiffs a "pending slip" for their commissions, which was to be paid when the bonds were received.

On January 18, 1922, just two days before the date on which Horn agreed to make his part payment, two salesmen, one named Rosenberg, and the other Lichtman or Light, both of whom were employed by defendant, called upon Horn at his home in Cloverdale and demanded the bonds or money which Horn had agreed to pay upon his purchase of the 150 shares as above narrated. They represented to Horn that they had been sent by an officer of the company to make the collection. Horn informed them that he did not have the particular bonds with him, but if they would call the following day he would deliver other bonds to them. Rosenberg kept the appointment, and, accompanied by Horn, the two proceeded to the latter's bank where the bonds were deposited. Rosenberg, discovering that Horn possessed a larger amount of bonds than that called for by the agreement, proceeded to induce him to purchase an additional 50 shares. He succeeded in doing so, and left the bank with an agreement signed by Horn to purchase 200 shares of the stock, of the value of $20,000, and $5,000 in bonds; the same being 25 per cent. of the price which Horn agreed to pay for the same. The bonds were indorsed to the Golden Gate Ferry Company. Rosenberg delivered the application to the company and it was accepted by it. Horn had signed this new agreement under the distinct understanding that 150 shares of stock already subscribed for by him in his transaction with plaintiffs were included in the new subscription of 200 shares. There is testimony to show that defendant attempted to conceal from plaintiffs that payment upon the stock had been made by Horn in accordance with his agreement with them. Upon ascertaining that Horn had made the payment, plaintiffs demanded from defendant their earned commission. Defendant refused to pay the same, giving as his reason that they had not actually received the 25 per cent. of the purchase price of the stock at the time of its sale, and therefore were entitled to no commissions. This action followed, and plaintiffs recovered judgment for the amount of their claim.

We are asked to reverse the judgment upon the ground that the evidence shows that respondents did not comply with their contract by reason of their failure to actually procure the partial payment at the time of the sale. The testimony shows without conflict that respondents obtained from Horn a perfectly valid and binding contract, and one that Horn was both financially able and willing to comply with. It further shows that neither appellant nor the ferry company ever objected to the contract as procured, but, on the contrary, they were fully satisfied with and accepted the same, and defendant never made any objection to it, by reason of the deferred payment, until after Rosenberg and Light obtained the additional subscription mentioned. This variance in the terms of the sale, under such circumstances, cannot relieve appellant from his liability to pay the agreed commission, as he must be deemed to have assented to such variance. California Land Security Co. v. Ritchie, 40 Cal. App. 246, 180 P. 625; Borton v. Barnes, 48 Cal. App. 589, 192 P. 307; Merzoian v. Papazian, 53 Cal. App. 112, 199 P. 826. The case does not warrant further discussion.

Judgment affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 412

In re OGDEN'S ESTATE.

HOOK et al. v. OGDEN et al.

(Civ. 3148.)

(District Court of Appeal, Third District, California. June 17, 1926.)

1. Wills ⚷671—Will leaving residue to testatrix's nephews, to be paid interest until they reached 27, when they were to be given their share, held not to create trust.

Will leaving residue to testatrix's nephews, to whom interest was to be paid until they reached 27, whereupon each was to be given his share, created no trust, and court erred in directing distribution to executor as trustee for nephews, instead of directly to them.

2. Wills ⚷669.

Court has no power, independently of will, to create trust in executor for beneficiaries.

3. Wills ⚷440.

Question for court is not what testatrix intended to declare in will, but what she intended by what she did declare.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Final account and petition for distribution of the estate of Harriett C. Ogden, deceased, by G. W. Ogden and another, as executors. From so much of the decree as ordered distribution to G. Edward Hook as trustee for E. Ogden Hook and another, the latter appeal. Reversed with direction.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Donald McKisick, of Sacramento, for appellants.

Clifford A. Russell, of Sacramento, for respondents.

FINCH, P. J. The last will of the above-named decedent, after disposing of certain property, provided as follows:

> "I leave all the rest of my estate money in bank—bonds & real estate to my two nephews. E. Ogden Hook & Robert A. Hook the interest to be paid them until they have reached the age of—27—years—at the age of 27. each one is to be given his share— * * * I appoint my brother G. W. Ogden & my brother-in-law G. Edward Hook as executors of the estate without bonds—in case of their death I appoint my nephew—Ogden Hook."

In due course of administration, the executors named in the will filed their final account and petition for distribution of the estate. A decree was entered distributing certain property in accordance with the terms of the will, and then providing as follows:

> "Unto said G. Edward Hook, as trustee, for the use and benefit of E. Ogden Hook and Robert A. Hook, nephews of decedent, all of the rest, residue, and remainder of said estate, as described herein, and all other property of said estate, whether described herein or not; each of said beneficiaries to receive one-half the interest and revenue derived from the said trust property until he shall reach the age of 27 years, and, at the age of 27 years, each shall be given his one-half share of said trust property. * * * No bond shall be required of said trustee for performance of his duties in this behalf."

E. Ogden Hook and Robert A. Hook have appealed "from so much of said decree of distribution * * * which orders and decrees that the distributive shares in said estate of said E. Ogden Hook and Robert A. Hook, legatees, be distributed to said G. Edward Hook, as trustee, for the use and benefit of said E. Ogden Hook and Robert A. Hook."

[1-3] Respondents concede that the part of the decree from which the appeal is taken is erroneous. It is manifest that a trust was not created by the terms of the will. As was said in McCloud v. Hewlett, 135 Cal. 361, 368, 67 P. 333, 336, the court had no "power or jurisdiction to carve out a trust from anything to be found in the will and, independent of the will, it had no power to create the trust." It may be that the testatrix intended to create a trust, but the question for the court to determine is not what she intended to declare in her will, but what she intended by what she did declare therein. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14. The facts of this case are unlike those in Estate of Shaw (Cal. Sup.) 246 P. 48, where it was held that the terms of the will there in question were sufficient to create a trust, even though the word "trust" or "trustee" was not used. The property described in the residuary clause of the will herein should have been distributed directly to E. Ogden Hook and Robert A. Hook.

The parts of the decree appealed from are reversed, with direction to the trial court to distribute said residue of the estate in accordance with the views herein expressed.

We concur: PLUMMER, J.; NEEDHAM, Justice pro tem.

BLUMENTHAL v. LARSON et al.*
(Civ. 5661.)

(District Court of Appeal, First District, Division 1, California. July 16, 1926.)

1. Brokers ⟹4—Statute requiring bond of broker, conditioned upon faithful compliance "with provisions of law," held not to make bond liable for loss suffered by plaintiff by reason of broker's refusal to accept and pay for balance of stock ordered purchased for his account (Corporate Securities Act, § 5, subd. 3, as amended by St. 1923, p. 90, § 2).

Corporate Securities Act, § 5, subd. 3, as amended by St. 1923, p. 90, § 2, providing that broker's bond shall be conditioned upon faithful compliance "with the provisions of law" by applicant, and on failure to so comply he shall be liable "to any and all persons who may suffer loss," was enacted to prevent fraud in sale of securities, and hence did not make bond liable for loss suffered by plaintiff by broker's refusal to accept and pay for balance of stock ordered purchased for his account.

2. Statutes ⟹181(1), 190.

Statute is to be construed according to intent of lawmaking body, and if statute is plain and unambiguous there is no room for construction.

3. Statutes ⟹189—Mere literal construction of statute ought not to prevail, if opposed to Legislature's intention apparent by act itself.

Mere literal construction of statute ought not to prevail, if it is opposed to intention of Legislature apparent by act itself, and if words are sufficiently flexible to admit of some other construction it should be adopted to effectuate the intention.

4. Statutes ⟹184, 211.

Language of act should be construed in view of its title and its purpose, and when this is ascertained general words or phrases may be restrained to it, and those of narrower import may be expanded to effectuate the intent.

5. Brokers ⟹106.

Cause of action against broker for refusal to accept and pay for balance of stock ordered purchased for his account, which accrued long prior to 1925 amendment of Corporate Securities Act, was not affected thereby (St. 1925, p. 962).

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion 251 P. 241.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles J. Blumenthal, doing business under the name and style of the A. E. White Company, against J. W. Larson and others. From an order dismissing the action as against the defendant United States Fidelity & Guaranty Company, plaintiff appeals. Affirmed.

Harry O. Bocchio, of San Francisco, for appellant.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for respondent.

TYLER, P. J. Appeal from an order dismissing an action against a surety on a bond given under the Corporate Securities Act.

There is no dispute as to the facts. The complaint contained two counts arising out of the same transaction. The first is an open book account for securities bought and sold by plaintiff for the account of the defendant Larson, under which it is sought to recover the sum of $620. The second is for a breach of a contract for the sale and purchase of securities, sold by plaintiff and purchased by the defendant, and it alleges that by reason of such breach plaintiff was damaged in the sum of $620. The complaint further alleges in each count thereof that defendant Larson was an investment securities broker, duly licensed as such by the commissioner of corporations; that on the 30th day of June, 1924, the defendant United States Fidelity & Guaranty Company executed to the commissioner of corporations the bond required by the Corporate Securities Act to be filed by all applicants for certificates authorizing them to act as investment securities brokers at the time of filing their application therefor; that said bond was in the sum of $5,000 and was executed by defendant Larson, as principal, and by the defendant United States Fidelity & Guaranty Company, as surety, said bond being given to guarantee the faithful compliance with the provisions of law on the part of defendant Larson, and on the part of his salesmen, agents, and employees; that said bond was renewed on the 15th day of February, 1925, by said principal and surety, and during all the times mentioned in the complaint was in full force and effect. Defendant Surety Company interposed a general demurrer to the complaint, alleging that it did not state facts sufficient to constitute a cause of action against it. The court sustained the demurrer, and upon plaintiff's failure to amend entered judgment dismissing the action as to said defendant Surety Company. This is an appeal from the ruling on demurrer and from the judgment of dismissal.

The action in so far as it affects the Surety Company is bottomed upon subsection 3 of section 5 of the Corporate Securities Act as amended in 1923 (St. 1923, p. 90). The subdivision reads as follows:

> "At the time of filing an application for a broker's certificate, the applicant shall deliver to the commissioner of corporations, a good and sufficient bond for $5,000.00 payable to the state of California, to be executed by said applicant, together with a surety company, and to be approved by the commissioner of corporations. Said bond shall be conditioned upon the faithful compliance with the provisions of law by said applicant and by all agents representing the said applicant, and shall provide that upon failure to so comply the applicant shall be liable to any and all persons who may suffer loss by reason thereof."

The sole question here presented is the meaning to be given to two phrases contained in the above-quoted paragraph of the act in question, reading as follows: "Said bond shall be conditioned upon the faithful compliance with the provisions of law by said applicant, * * *" and "upon failure to so comply the applicant shall be liable to any and all persons who may suffer loss by reason thereof." It is appellant's contention that the phrase, "with the provisions of law," should be so construed as to include the transaction in question, and that, this being so, the bond is liable for the loss suffered by plaintiff by reason of defendant Larson's refusal to accept and pay for the balance of the stock ordered purchased for his account.

[1-4] While the phrase, "provisions of law," is a very broad and general one, we are of the opinion that it only refers to the provisions of the Corporate Securities Act. There are numerous rules of statutory construction to guide courts in ascertaining the true meaning of a statute. A statute is to be construed according to the intent of the lawmaking body. The intent is the vital part, and the primary rule of construction is to ascertain and give effect to that intent. If a statute is plain, certain, and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices, and there is no room for construction. The mere literal construction, however, ought not to prevail if it is opposed to the intention of the Legislature apparent by the act itself, and if the words are sufficiently flexible to admit of some other construction, it should be adopted to effectuate the intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. The language of an act should be construed in view of its title and its purpose. It is indispensable to a correct understanding of the statute to inquire first what is the subject of it and what object is intended to be accomplished. When this is ascertained the answer is found to all its intricacies. General words or phrases may be restrained to it, and those of narrower import may be ex-

panded to effectuate the intent. Guided by these rules, it seems plain to us that the phrase in question relates solely to the provisions of the Corporate Securities Act and not to all laws generally. The title of the act in question declares it to be one for the regulation and supervision of companies, brokers, and agents, to prevent fraud in the sales of securities, and it provides for the enforcement of the act and punishment for violation of its provisions. The manifest and declared purpose is to prevent fraud in the sale of securities. Here no fraud was alleged in the sale of any security. The defendant Larson did not fully comply with the terms of his contract of purchase. In a broad sense he may be said to have violated the law in breaching his contract of sale, but this is not the violation of the law for which the bond was given. To so construe the phrase would create a right of action under innumerable circumstances and conditions. The bond, in our opinion, was not given to insure on the part of Larson his proper adherence to all laws, substantive and otherwise, but rather for a compliance with the provisions of the statute, which was enacted for the purpose of preventing the formation of corporations and the sale of their stock without supervision of the corporation commissioner. This is the manifest intent and purpose of the act, and the bond beyond question was given for the purpose of securing compliance with its provisions. People ex rel. New York, etc., R. Co. v. Willcox, 200 N. Y. 423, 94 N. E. 212.

[5] There is nothing in the act to indicate any intention on the part of the Legislature to extend its meaning so as to include acts of the character in question. If it had been its purpose it would have been a simple matter for the Legislature to have so declared. In an amendment to the act in the year 1925 (St. 1925, p. 962), the Legislature did broaden its provisions, but, of course, the present controversy is not affected thereby, as the alleged cause of action arose long prior to this amendment.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 497

PEOPLE v. ROSNER. (Cr. 921.)

(District Court of Appeal, Third District, California. June 22, 1926.)

1. Criminal law 🔑981(2)—Trial court must exercise "legal discretion" in passing upon motion to submit question of defendant's sanity to jury (Pen. Code, § 1368).

Trial court, upon motion under Pen. Code, § 1368, to submit question of defendant's sanity to jury, must exercise legal discretion, which means discretion founded upon facts and circumstances presented to court, drawing a conclusion governed by law which requires that defendant is entitled to an unbiased, unprejudiced, and considerate judgment.

[Ed. Note.—For other definitions, see Words and Phrases, Legal Discretion.]

2. Criminal law 🔑981(2)—Motion to submit question of defendant's sanity to jury need not show facts establishing insanity, but doubt must arise in mind of court as to defendant's sanity (Pen. Code, § 1368).

Under Pen. Code, § 1368, where motion to submit question of defendant's sanity to jury was supported by affidavits, it was *held* that Code did not require that facts presented shall establish the insanity of defendant, but only required that a doubt must arise in mind of court as to defendant's sanity.

3. Criminal law 🔑1147.

Where trial court exercised its discretion, a clear case of abuse must appear before appellate court will disturb the conclusion.

4. Criminal law 🔑981(2).

Refusal to submit to jury question of sanity of one accused of issuing fictitious check *held* not abuse of discretion.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Don R. Rosner (true name Wayne D. Parkinson) was convicted of issuing a check without sufficient funds, and he appeals. Affirmed.

A. L. Hart and H. W. Rich, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty Gen., for the People.

PLUMMER, J. The defendant was convicted of the offense of issuing a check without sufficient funds in the bank upon which the check was drawn to meet the same, with intend to defraud, etc., and prosecutes this appeal from the judgment of conviction entered in said cause. The questions presented for consideration do not really affect anything other than certain proceedings taken and had between the time of conviction and the pronouncing of sentence thereon. The record shows that, when the defendant was arraigned upon the information charging the offense above referred to, the defendant appeared in court without counsel, and apparently without means to obtain counsel, and the court thereupon appointed one William Carragher, an attorney at law, to represent the defendant in all subsequent proceedings. Upon arraignment, the defendant pleaded not guilty, and the cause was duly set for trial. Upon the day set for trial, the defendant appeared in court with his counsel, and at that time the defendant objected to being represented by the counsel theretofore appointed by the court, stating in open court that he discharged him, and that he did not want "to go to court with Mr. Carragher." The jury having been excused, the following proceedings and colloquy took place:

"Mr. Carragher: If the court please, there is in my mind a question as to the sanity of this defendant.

"Defendant: I object, your honor; this man is crazy.

"The Court: You sit down.

"Defendant: I am not trying to pull anything; he is accusing me of insanity, and I say he knows it isn't true, and he knows it isn't so.

"The Court: Don't try to put any of that stuff over here.

"Defendant: I am not trying to put any stuff over on you; you are trying to put something over on me.

"The Court: You think you are smart, trying to pull that stuff around here. You may have got out of other penitentiaries in pulling that kind of stuff, but you can't pull that kind of stuff around here.

"Defendant: I am not interested in that at all, your honor.

"The Court: Proceed.

"Mr. Carragher: I am placed in a very embarrassing position. I talked with the defendant. He gave me an idea as to what his defense—he gave me a statement upon which I predicated his defense, and only yesterday, in talking with him, he just turns the reverse, and again this morning I talked with him and find him off both propositions. I have been given to understand that he has been examined; I don't know whether it was by a commission or not, but at least doctors have examined him, and, if there is some question as to his sanity, it seems to me that he had ought to be examined. If he is sane, he should not be forced to go on with me, because his ideas of a defense and my ideas of his defense don't coincide at all. I have been appointed to look out for his legal rights and propose to do so and will do so, to the best of my ability, and—however, he should at least enjoy my confidence and I should enjoy his, and, if your honor is satisfied that he is sane and should go along, some other counsel ought to be brought in to represent him, some one whom he would respect and listen to and be counseled by.

"The Court: Well, I appreciate your position, Mr. Carragher, but your client will not follow your directions. I am perfectly satisfied that you will properly protect his rights and give him a good defense, but, if he is one of those individuals that knows more than his lawyer, or thinks he does, I appreciate your embarrassing position, when he says that he doesn't wish you to defend him. You want to go to trial without an attorney?

"Defendant: I think that would be very unfair, your honor, but, if necessary, I will do it.

"The Court: It is not unfair, at all. The court appointed—Judge Pullen appointed Mr. Carragher to represent you.

"Defendant: And he advised me against my best thoughts.

"The Court: Very well, then; if you know better than your attorney, and you want to go to trial without an attorney, why, the court will release Mr. Carragher—if you know more about law and more about your defense than Mr. Carragher does. The court doesn't think you do. Mr. Carragher will protect your legal rights, but, if you are not satisfied with counsel the court appoints,—you are a pauper and unable to employ counsel; beggars should not be choosers—but, since you are dissatisfied with Mr. Carragher and do not desire him, if you desire, the court will release him, and you can proceed with your defense.

"Defendant: Will you give me an opportunity to get an attorney of my own and pay them?

"The Court: You had an opportunity to do that, and you haven't done it, and you said you couldn't do it, and the court appointed counsel to represent you, and it was not this court either; it was Judge Pullen appointed Mr. Carragher to represent you, and he appointed able counsel to represent you. Now, then, if you are not willing to follow his advice and feel you desire to dismiss him and to conduct your own defense—

"Defendant: He is fired. * * *

"The Court: Very well, then. Mr. Carragher, you are released from further service. The court desires to protect the defendant, but, if he does not want the service of counsel and is ready to proceed without counsel, why the case has been regularly set down for trial at this time, and we will proceed with the trial.

"Defendant: All right; I ask for a continuance.

"The Court: The motion is denied.

"Mr. Carragher: I subpœnaed the witnesses on behalf of this defendant.

"The Court: Very well. Proceed with the examination of the jurors."

The trial was then had, with the defendant conducting his own case. On the day set for pronouncing judgment, the defendant appeared with counsel representing him upon this appeal, and moved the court to submit to a jury the question of defendant's sanity, under the provisions of section 1368 of the Penal Code, which reads:

> "If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict," etc.

This motion was supported by two affidavits, one made by V. E. Parkinson, an attorney at law, stating that she was present during the trial of the action against the defendant and observed the demeanor of said defendant during a part of said trial; that during said time defendant conducted himself in a most jovial and boisterous manner, and showed a total ignorance of the fact to be determined at said trial, and acted as though the trial was not a real trial but a mock trial and occasion for merriment; that the defendant spoke of himself as a comedian and of the trial as a show; that, by way of argument to the jury, defendant sang a song that had no bearing upon the case, and announced that he had a better mind and more intelligence than any person in the court; that affiant therefore is of the opinion that the defendant was insane.

The second affidavit was made by H. W. Rich, a practicing attorney, who set forth that at the request of Mrs. V. E. Parkinson he interviewed the defendant at the county jail in Sacramento, and from that interview concluded that the defendant was mentally unbalanced; that the defendant had no understanding of the seriousness of the offense with which he was charged or the gravity of his situation, and was wholly incapable of consulting properly with counsel; that for the foregoing reasons affiant was of the opinion that at the time of the trial the defendant was incapable of defending himself either in person or by counsel, etc.

[1] It is urged upon this appeal that the court abused its discretion in not submitting to the jury the question of the defendant's sanity. With this in mind, we have read the entire transcript, first, for the purpose of determining whether there was not presented to the jury all that it could properly consider in determining the guilt or innocence of the defendant in relation to the offense for which he was being tried, and also for the purpose of reaching a conclusion as to whether the court had exercised that sound discretion with which it was charged in determining such matters, or whether the court had acted either capriciously or arbitrarily, as urged upon this appeal. The law is well settled that a trial court is not given an arbitrary discretion, but a discretion governed by certain fixed and well-established rules. These rules set forth that a court must exercise a legal discretion, which means a discretion founded upon the facts and circumstances presented to the court, from which it must draw a conclusion governed by the law which requires that the defendant is entitled to an unbiased, unprejudiced, and considerate judgment of the tribunal determining the issues presented. It would serve no useful purpose and would lengthen this opinion beyond all reasonable limits were we to set forth the evidence contained in the transcript and the trial as it took place following the colloquy which we have set forth, and, while the words used, which have been called to our attention with considerable earnestness, were not happily chosen, the entire trial thereafter shows a complete want of any really objectionable occurrences or anything whatever that would indicate that the defendant was not receiving a careful, conscientious, and proper determination, so far as the court and jury were concerned, of all the issues tendered concerning the guilt or innocence of the defendant and also of his alleged mental condition. That the defendant acted at times as though he did not fully appreciate his condition, or did not care what happened to him, or assumed an attitude of indifference and levity, does appear from the transcript. There is, however, impressed upon the reader the thought that the defendant to a considerable degree assumed an indifferent demeanor or attitude more for effect than from any mental aberration. So much for the trial.

[2-4] The court had abundant opportunity to study the defendant and come to a conclusion as to his mental condition. The two affidavits which we have set forth in substance contain really no facts upon which any one might predicate a conclusion that the defendant was insane. Section 1368, Penal Code, of course, does not require that the facts presented to the court shall establish the insanity of the defendant before such issue should be submitted to a jury, but only requires that a doubt must arise as to the defendant's sanity. This doubt, of course, arises in the mind of the court before which the cause is being tried, and if, upon the facts and circumstances, the court has no doubt as to the defendant's sanity, the issue tendered should not be submitted to a jury simply because the attorney making the motion or the parties signing the affidavits are of the opinion or think that the defendant is insane. And, when the court has exercised its discretion, a clear case of abuse thereof must be made to appear before an appellate court will disturb the conclusion reached by the trial court. The cold record presented to us does show that the defendant was wanting in his regard for the rights of others, that he had passed several checks and obtained some money in an easy manner, and also that the fact of being charged with a criminal offense made no very great impression upon his mentality, but we are not unmindful of the fact that there are several thousand persons, as shown by the criminal statistics of this state, who have exhibited the same traits, and respect neither the rights of persons nor property, and are little abashed when charged with crime. All these matters are evidences of criminality but not necessarily of insanity, and the record in this case shows as well an indifferent and criminal nature as anything else, and the court, having had an opportunity of studying the defendant personally, could better determine the question as to whether the defendant was simply indifferent and criminal in his instincts or influenced by such mental defects as justify submitting the question of his sanity to the jury. The colloquy set forth in this case between the court, defendant, and counsel, while it might, in part, have properly been omitted, does not establish, as argued by counsel, that the court was prejudiced against the defendant, or did not, when the issue was finally presented, use that legal discretion incumbent upon a court in passing upon the defendant's motion.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; NEEDHAM, Justice pro tem.

78 Cal. App. 326

LANE v. LANE. (Civ. 5573; L. A. 8285.)

(District Court of Appeal, First District, Division 2, California. June 11, 1926. Rehearing Denied July 10, 1926. Hearing Denied by Supreme Court Aug. 10, 1926.)

1. Divorce ⚷184(6).

In action for divorce, power to reconcile conflicts in evidence rested with trial court.

2. Divorce ⚷184(10).

In action for divorce, findings of trial court against defendant on charges of cruelty were conclusive on reviewing court.

3. Divorce ⚷184(6).

In action for divorce, weight of evidence was for trial court, whose conclusion may not be disturbed by reviewing court, unless trial court has abused its discretion.

4. Husband and wife ⚷278(1)—Agreement for settlement of property rights between husband and wife held void, as contrary to good morals, and as obtained by actual fraud (Civ. Code, §§ 158, 159, and section 1572, subd. 4).

Agreement for settlement of property rights between husband and wife, not authorized by Civ. Code, §§ 158, 159, but leaving husband free to inflict on wife marital wrongs, such as would compel her to obtain a divorce, secure in protection of his contract that $5,000 would satisfy all her claims against him, *held* void, as contrary to good morals, and as obtained through actual fraud, in view of Civ. Code, § 1572, subd. 4. (Supreme Court, in denying petition for hearing, expresses no opinion as to whether agreement was void, as contrary to good morals.)

5. Divorce ⚷184(12)—Any error in excluding evidence of estoppel of plaintiff to deny validity of agreement for settlement of property rights held harmless.

In action for divorce, any error in exclusion of evidence, setting up an estoppel of plaintiff to deny validity of agreement for settlement of property rights, *held* harmless, where evidence, if received, would not have constituted an estoppel against cause of action which wife had pleaded for divorce.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action for divorce by Ona E. Lane against Percy A. Lane, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Meserve & Meserve and Porter & Sutton, all of Los Angeles, for appellant.

John E. Biby and Harry C. Biby, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against her husband to obtain a decree of divorce. The trial court made findings in her favor, and from the judgment entered thereon the defendant has appealed, under section 953a of the Code of Civil Procedure.

After the defendant was served with process, he appeared and filed an answer, putting in issue the allegations of the plaintiff's complaint, and at the same time he filed a cross-complaint. The plaintiff answered the cross-complaint, and the trial in the lower court covered all of the issues made by all of the pleadings.

[1] The first point made by the appellant is that the plaintiff's charges were not sustained, were not true, and were not corroborated. In reply it is sufficient to state that in her complaint the plaintiff stated 11 specifications of cruelty, and that some of the specifications contained numerous different acts. No reason appears why any one of said allegations should be quoted. It is sufficient for the purposes of this opinion to state that some of the charges were charges of mental cruelty, and some of the charges were charges of physical cruelty. In presenting her case, the plaintiff introduced some evidence touching every one of the charges pleaded. She did not introduce corroboration regarding each and every charge, but she did introduce corroboration as to some of the charges of mental cruelty and some of the charges regarding physical cruelty. The trial court made findings in her favor. The utmost that can be said in behalf of the appellant is that there was a conflict as to some of the evidence. However, the power to reconcile the conflicts in the evidence rested with the trial court, and the appellant has not called our attention to any instance where the trial court abused its power.

[2] The appellant complains because the trial court ruled against him regarding the allegations contained in his cross-complaint. Before proceeding further, it is proper to state that the parties were married on the 9th day of August, 1921. This action was commenced by the filing of plaintiff's complaint on August 22, 1923. The cross-complaint was filed on the 28th day of September, 1923. In that paper, among other things, the defendant alleged that on the 25th day of November, 1921, the plaintiff commenced an action in divorce against him, and in her complaint set forth a large number of charges of extreme cruelty, which the appellant proceeded to quote, and then he followed with the allegation that said allegations were false and untrue. The appellant then asserts that the very act of one spouse, filing a complaint in divorce against the other, when the complaint consists of vile, improper, and false charges, is in and of itself an act of cruelty. Thereupon appellant contends that the cross-complaint should have been sustained.

The vice contained in this argument rests in the fact that, so far as this record is concerned, the charges appear to be true and not to be false. As stated above, the earlier action was one pleading a cause of action as for divorce based on the ground of cruelty. The complaint specified the acts. That action was dismissed. However, when this action was commenced, the plaintiff again pleaded the same allegations which she had inserted in her former pleading, and added some others. A trial was had in which proof was introduced both in support of all of those allegations and in contradiction of them. In so far as appellant's pleading was concerned, the trial court made findings against the appellant, which in effect was a holding that the allegations were true, and not false, and in the second place the trial court made findings on the allegations contained in the main complaint, in which the trial court held that the allegations in that pleading were true, and not untrue, as contended by the appellant. Regarding the allegations set forth in the cross-complaint, the most that can be said in favor of the appellant is that the evidence was conflicting. But, as the trial court made findings against the appellant, those findings are conclusive in this court.

[3] As to the allegations and denials contained in the respondent's pleadings, the appellant contends that they are not worthy of belief. In support of this contention the appellant has printed many passages from many letters written by the respondent. However, those letters are not conclusive evidence. Assuming that they were of great weight, the weight of the evidence was for the consideration of the trial court, and the conclusion of that court may not be disturbed by this court, excepting in those instances where the trial court has abused its discretion. There is nothing in the record before us showing that the trial court abused its discretion in any respect whatsoever.

[4] After one of their numerous difficulties, the parties were living separate and apart. While so living, certain conversations were had between the husband and wife regarding their property rights. Later the husband's attorney prepared a formal written instrument on that subject. Still later that written instrument was exhibited to the wife's attorney. Still later it was executed by both parties. By the terms of that instrument the husband agreed to pay the wife $5,000.

> "It is understood and agreed by and between the parties hereto that the payment of the sum hereinbefore mentioned shall be in lieu and place of any other support which the party of the second part [wife] might be entitled to by virtue of the marital relations existing between the parties hereto. * * * The party of the second part agrees that all property now owned by said party of the first part is his separate property, and she does hereby relinquish all claims or right to said property, to all future earnings of the party of the first part, and to all property which he may hereafter acquire in any manner, and said earnings and said property shall be and remain the separate property of said party of the first part. * * * It is further understood and agreed by both parties hereto that the provision hereby made for the party of the second part shall constitute a full and complete satisfaction of all claims and demands of the party of the second part against the party of the first part."

The instrument is entirely silent as to whether the parties were living together, or were living separate and apart, and is likewise silent as to whether said parties in the future intended to live together, or intended to live separate and apart. In framing her complaint the wife set forth the execution of said document, and pleaded the whole thereof in hæc verba. In connection with those allegations she set forth that, at the time the instrument was executed, the parties were living separate and apart without her consent, and that the husband promised, if she would execute the instrument, that thereupon he would return to her, and that thereafter they would live together continuously as man and wife; she further pleaded that said promise was so made by him without any intention of performing it, etc. All of the allegations made by the plaintiff were by the trial court found to be true, and as a conclusion of law that said agreement should be set aside. Thereafter the trial court, as a part of its interlocutory decree, made its order that the appellant should thereafter pay to the respondent "$500 when this judgment is entered, and the further sum of $500 quarter-annually thereafter." The appellant earnestly challenges the findings and judgment, in so far as they affect the validity of said agreement, and earnestly contends that said agreement should be upheld and enforced.

The respondent calls to our attention many of the facts recited above, and thereupon advances the contention that the written instrument was not that kind of a contract that is authorized by sections 158 and 159 of the Civil Code, but that the instrument left the husband free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that $5,000 would satisfy all her claims against him of a pecuniary nature, or in relation to his property, and that contracts of that kind are contra bonos mores. Pereira v. Pereira, 156 Cal. 1, 4, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. In this behalf we think the contention of the respondent is well founded. Moreover, the respondent cites the allegations of her pleading, her proof introduced in support thereof, and the findings of the trial court that the allegations are true—that the property settlement was made upon the promise of the appellant that the husband and wife should come together, and thereafter continue to live together as husband and wife, and that said promise was made by the husband without any intention of performing it. Thereupon the respondent advances the further contention that, if she is in error in relying upon the doctrine stated in Pereira v. Pereira, supra, nevertheless that the property agreement was invalid and unenforceable, because it was obtained through an act of actual fraud. Civ. Code, § 1572, subd. 4. We think the second contention so advanced is also supported by the facts contained in this record.

[5] The appellant relies on certain facts as constituting an estoppel. The alleged property settlement was signed January 6, 1922. This action was commenced August 22, 1923. On October 1, 1923, the trial court made an order pendente lite, directing the husband to pay the wife $200 per month. Thereafter, commencing January 4, 1924, the trial was had. On April 24, 1924, the appellant filed a cross-complaint, purporting to plead the alleged estoppel. Said pleading was as follows:

> "That, since the filing of his cross-complaint, defendant and cross-complainant has paid to plaintiff the sum of $1,500 under that certain agreement referred to in paragraph V of cross-complainant's cross-complaint; that said sum of $1,500 was paid in installments at the following times and following amounts, to wit: October 1, 1923, $500; November 1, 1923, $200; December 1, 1923, $200; December 31, 1923, $200; February 1, 1924, $200; March 19, 1924, $100; April 1, 1924, $100; that defendant and cross-complainant has made payment in full of the $5,000 called for by said agreement; that said payment of $100 made on the 19th day of March, 1924, as aforesaid, and said payment of $100 made on the 1st day of April, 1924, as aforesaid, were expressly made as payments on said agreement, and were accepted and received by said plaintiff and defendant to cross-complaint with full knowledge of all the facts alleged in her complaint and in her answer to defendant's cross-complaint, and are still retained by said plaintiff and cross-defendant; that said plaintiff and cross-defendant, by so accepting, receiving, and retaining said payments, and also the payments theretofore made on said agreement, is estopped from denying the validity of said agreement."

Thereafter, on the 19th day of May, 1924, the appellant in open court attempted to introduce letters and checks in support of the allegations of his supplemental cross-complaint. On the objection of the respondent, the proof was excluded. The appellant assigns that ruling as error. In support of the ruling the respondent cites and relies on the case entitled Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 668, 161 P. 116. Turning to page 673 (161 P. 119), respondent quotes as follows:

> "Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. 'If a party has no cause of action at the time of the institution of his action he cannot maintain it by filing a supplemental complaint found on matters which have subsequently occurred.'"

Thereupon respondent argues that for the same reason the appellant had no cause of defense, based on the alleged estoppel, when he filed his cross-complaint, and that he could not better his condition by waiting until after the cause had been tried and submitted, and then file a supplemental cross-complaint. We do not think it is necessary to pass on the point. Conceding, without deciding that an estoppel was pleaded, we are of the opinion that the proof offered in support did not in law support the pleading. The payment evidenced by a check dated February 1, 1924, was forwarded to respondent's attorney by appellant's attorney, together with a letter as follows:

> "Find inclosed herewith Mr. Lane's check in favor of your client, Mrs. Lane, $200. The order made in reference to alimony contains a provision that these payments of $200 were to be made up to only the time of the trial, so that Mr. Lane does not consider that he is under any legal obligation to pay Mrs. Lane at this time anything on account of alimony. However, we desire it distinctly understood that, in the event the property agreement is approved by Judge Burks, this $200 will apply as a payment on said agreement, and it is on this condition that we are making you this payment."

The conditions stated never arose. On March 19, 1924, Mr. Lane drew a check in favor of Mrs. Lane for $100. His attorney sent it to her attorney, with a letter as follows:

> "I have just received from Mr. Lane a check in favor of Ona E. Lane for $100 on account. I also inclose you herewith a copy of the letter he sent us."

In the Lane letter, a copy of which is referred to, the appellant states:

> "I am very much surprised to learn from you that, through her attorney, Mrs. Lane is asking for more money from me at this time, as heretofore I have advanced her some $300 more than is as yet due under our agreement of January 6, 1922. * * * However, I am inclosing herein check to Mrs. Lane for $100, and trust that on the 1st of next month I will be in a position to pay the balance then due her under our said agreement. * * *"

On April 1, 1924, appellant sent his check to his attorneys in a letter, and they in turn sent a check, with a copy of the letter, to respondent's attorney. That letter was:

> "Inclosed please find check to Mrs. Ona E. Lane for $100, being balance of the $5,000 which I agreed to pay her under our agreement of January 6, 1922."

If the evidence which was rejected had been received, such evidence would not, under the facts recited above, have constituted an estoppel against the cause of action which the wife had pleaded on August 22, 1923.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for hearing herein is denied. In denying said petition, we withhold our approval from that portion of the opinion of the District Court of Appeal wherein it is held that the agreement in question was void, as contra bonos mores, upon the authority of Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. As to that question we express no opinion.

---

78 Cal. App. 516

NASH v. CITY OF LOS ANGELES et al. (Civ. 5295.)

(District Court of Appeal, First District, Division 1, California. June 24, 1926.)

1. **Municipal corporations ⟹220(8)—Party seeking to recover salary must allege method of appointment prescribed in charter was followed, and cannot recover on quantum meruit.**

Where city charter prescribes civil service system for appointments and assignments, party seeking to recover salary for position within civil service must allege that prescribed method was followed, and, where prescribed method was not followed, no action on quantum meruit will lie, notwithstanding he performed services of such position.

2. **Municipal corporations ⟹220(1)—Right to salary of municipal position is attached to legal title to position and not to its occupation and exercise.**

Right to receive salary annexed to position under municipal government is an incident which attaches itself to the legal title to the office and not to its occupation and exercise.

3. **Municipal corporations ⟹249.**

Where charter prescribed manner of making contracts involving expenditure of $500 or more, there could be no recovery against city on theory of implied contract, where contract was not made in prescribed manner.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action for personal services by C. E. Nash against the City of Los Angeles and Charles H. Treat and others, as and comprising the Board of Public Works of said City. Judgment for defendants, and plaintiff appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for respondents.

KNIGHT, J. This is an action against the city of Los Angeles and the members of its board of public works, to recover the sum of $7,781.34 upon three rejected claims for personal services alleged to have been performed by plaintiff for the city. A demurrer to the complaint, and to each of the five counts set forth therein, upon the ground of insufficiency of facts, was sustained, with leave to amend, and, plaintiff having declined to amend, judgment of dismissal was entered. Plaintiff appeals.

In the first two counts it is alleged that between October 1, 1918, and December 1, 1922, plaintiff performed the duties and rendered the services of "senior cost accountant" of said city, for which he was entitled to compensation in the sum of $9,716.80; the only difference between the causes of action stated in these counts being that, in the first one, the claim for compensation is based upon a classification of employment established by municipal ordinances enacted pursuant to authority granted by the civil service provisions of the city charter, standardizing the salaries of the city employees, and in the second count the claim for such compensation is based upon a quantum meruit. In the third and fourth counts it is alleged that during the same period of time specified in the first two counts plaintiff performed duties and rendered services of "chief cost accountant," which entitled him to compensation in the sum of $11,040; the same distinction existing between the causes of action set forth in these latter counts as exists between the first and second counts. It further appears, however, from each of the four counts mentioned, that, during the particular period of time plaintiff claims to have rendered services as senior cost accountant and chief cost accountant, to wit, between October 1, 1918, and December 1, 1922, he was, and for several years prior thereto had been, employed in the engineering department of the board of public works of said city, for which employment he was regularly paid a salary aggregating $7,870. By the present action, therefore, so far as the first four counts are concerned, plaintiff seeks to recover only the difference between the sum already received by him and the greater sums claimed to be due under the higher classification of employment. It is further alleged that the claims sued upon were duly presented for payment to said board of public works, and were by said board rejected.

The charter of the city of Los Angeles prescribes a system of civil service for the employment and promotion of the greater number of the city employees, the provisions of which expressly include those employed in the engineering department. Article 23, Los Angeles Charter. Provision is made therein for promotional examinations and the creation of certified lists of those passing such

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

examinations and the rating to be given to the same, from which lists selection must be made for appointment to positions which are from time to time created. Sections 229 to 254, inclusive, Charter of Los Angeles. In this regard section 237 declares in part as follows:

> "The commission shall by its rules provide for the promotion in such classified civil service on the basis of ascertained merit and seniority in service and examination, and shall provide in all cases where it is practicable that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination; and it shall be the duty of the commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating. * * *"

Said charter also provides that:

> "The auditor shall not, nor shall any auditing or accounting officer of the city, approve any demand for the salary or wages of any person subject to the provisions of this article, for services as an officer or employee of such city, before the appointment of such person to the classified civil service has been certified. * * *" Section 252, Charter of the City of Los Angeles.

The complaint nowhere alleges, nor does plaintiff claim, that he was appointed, certified, or promoted, in the manner prescribed by the civil service provisions of the charter, to the positions to which are annexed the salaries he is seeking to recover; it being alleged in this respect merely that said services were rendered with the "full knowledge, acquiescence, and consent" of said city and "at the request of" said city and of the officers in charge of said department. Defendants therefore claim that, because of the absence of such allegations, the first four counts of the complaint are fatally defective. Answering this proposition, plaintiff contends that, regardless of provisions of the law of the municipality prescribing the method of appointment and promotion, "if plaintiff performed services * * * for which the compensation is greater than paid plaintiff, defendant (the city of Los Angeles) is bound in law as well as in conscience and good morals to pay plaintiff the reasonable value and worth of that service to defendant. * * *" In furtherance of this theory, plaintiff asserts that the law of implied contracts as it relates to private corporations applies with equal force to municipal corporations, citing in support thereof the cases of Argenti v. City of San Francisco, 16 Cal. 256, San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, and Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670.

[1, 2] This same theory was advanced and adversely ruled upon in the cases of Shaw v. City and County of San Francisco, 13 Cal. App. 547, 110 P. 149, and Burke v. Edgar, 67 Cal. 182, 7 P. 488, and we are of the opinion that the doctrine of those cases is controlling here. The substance of that doctrine is that, where the charter or the statute prescribes the method by which appointments or assignments to particular positions provided for under municipal government shall be made, it is an essential condition to a recovery of the salary annexed to such positions that the prescribed method of appointment or assignment be followed; and, where it is not followed, no action on quantum meruit will lie against the municipality upon the theory that the party seeking to recover said salary acted in the capacity and performed the services of such position. See, also, Murtagh v. City of New York, 106 App. Div. 98, 94 N. Y. S. 308; Dillon on Municipal Corporations (5th Ed.) vol. 1, p. 426, citing cases. The rule is grounded mainly upon the proposition that the right to receive the salary is an incident which attaches itself to the legal title to the office and not to its occupation and exercise. People ex rel. Dorsey v. Smith, 28 Cal. 21; Ward v. Marshall, 96 Cal. 155, 30 P. 1113, 31 Am. St. Rep. 198. In Shaw v. City & County of San Francisco, supra, it was said that to permit a liability to be imposed upon a municipality to pay for services rendered under appointments made contrary to the explicit provisions of the law "would be to fritter away the entire scheme for civil service appointments contained in the charter"; and it was further stated that those seeking to recover the salaries "were bound to see that their appointments were made according to the requirements of the charter. If they neglected this, or chose to take the hazard of accepting a void appointment, they were mere volunteers, and suffer only what they should have anticipated." The case of Argenti v. City of San Francisco, supra, upon which plaintiff strongly relies, is referred to in the Shaw Case, and, for the reasons therein stated, cannot be considered as an authority here. In the instant case the fact that the positions plaintiff claims to have occupied were created by ordinance enacted pursuant to civil service provisions of the charter rather than by the charter itself does not affect the situation, for, as already pointed out, the positions in question were promotional ones, which could be filled only in the manner prescribed by the charter, and this was not done. We conclude, therefore, as defendants contend, that, in the absence of allegations of an appointment or promotion of plaintiff, in conformity with the charter provisions, to the two positions mentioned in the first four counts of the complaint, each of said counts failed to state a cause of action, and consequently the demurrer thereto was properly sustained.

[3] The fifth count declares upon an implied contract for the payment to plaintiff of the sum of $2,764.54, claimed to be the balance due for services rendered by him as

civil engineer in making for the city, during the period of time he was employed in other capacities in the engineering department, an appraisal of a reduction plant. Section 207 of the charter provides, in substance, that every contract involving an expenditure of more than $500 shall be made only after certain preliminary proceedings which are specified in said section have been followed. There is no allegation in the complaint of a compliance with these requirements of the charter, nor does plaintiff make any pretense that an attempt was made to comply with them, his claim for compensation being based entirely upon the theory of an implied contract. The case of Gamewell Fire Alarm Tel. Co. v. City of Los Angeles, 45 Cal. App. 149, 187 P. 163, is decisive of this point, it being expressly held that, unless the charter provisions above mentioned, regarding the making of contracts, be observed, the city is not liable, and recovery cannot be had on a quantum meruit. The case of Higgins v. San Diego Water Co., supra, upon which plaintiff places much reliance, is not in point, as is clearly demonstrated by the decision in the case of Reams v. Cooley, 171 Cal. 150, 152 P. 293, Ann. Cas. 1917A, 1260, wherein the court said, in discussing the inapplication of the rule of quantum meruit against municipalities:

"This rule of implied liability is applied only in those cases where the board or municipality is given the general power to contract with reference to a subject-matter and the express contract which it has assumed to enter into in pursuance of this general power is rendered invalid for some mere irregularity or some invalidity in the execution thereof, where the form or manner of entering into a contract is not violative of any statutory restriction upon the general power of the governing body to contract nor violative of public policy. In the absence of such restriction on the mode or manner of contracting, the same general rule applies to such inferior political bodies as to individuals, and the former will be held responsible on an implied contract for the payment of benefits it receives under an illegal express contract not prohibited by law. This is the effect of the cases cited by appellant and relied on by him, notably Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670, Sacramento v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, and Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189. But, while the doctrine of implied liability applies where general power to contract on a subject exists and the form or manner of doing so is not expressly provided by charter or statute, the decided weight of authority is to the effect that, when by statute the power of the board or municipality to make a contract is limited to a certain prescribed method of doing so, and any other method of doing it is expressly or impliedly prohibited, no implied liability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode. * * * Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases"—citing the case of Zottman v. San Francisco, 20 Cal. 97, 81 Am. Dec. 96, and many others.

For the reasons hereinabove stated, we are of the opinion that the demurrer was properly sustained.

The judgment appealed from is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

78 Cal. App. 421

PEOPLE v. LUCAS. (Cr. 916.)

(District Court of Appeal, Third District, California. June 17, 1926. Hearing Denied by Supreme Court Aug. 16, 1926.)

1. Criminal law 🔑177—Overruling demurrer to first indictment prior to mistrial thereon, and thereafter sustaining demurrer and resubmitting case to grand jury, held not to bar another prosecution for same offense (Pen. Code, § 1008).

Court's action in overruling defendant's demurrer to first indictment prior to mistrial thereon, and after second indictment was filed in changing ruling and sustaining demurrer to first and second indictment, and ordering case to be resubmitted to grand jury, being in accordance with Pen. Code, § 1008, *held* not a bar to another prosecution for same offense.

2. Criminal law 🔑170.

Defendant is not in jeopardy, unless indictment or information is sufficient to sustain a conviction.

3. Criminal law 🔑1137(2)—Defendant, whose demurrer to first indictment was finally sustained, cannot contend that such indictment was sufficient, contrary to ruling he procured below, thereby placing him in jeopardy by mistrial thereunder.

Defendant, whose demurrer to first indictment was finally sustained by court, cannot, contrary to ruling which he procured below, be heard to contend that such indictment was sufficient, and that therefore he was placed in jeopardy by mistrial thereunder; it being immaterial that, when court changed its ruling, defendant objected on ground that court had no jurisdiction to make any order concerning original indictment, where he made no attempt to withdraw demurrer or to have it stricken.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

B. F. Lucas was convicted of making false entries in the books of a state bank, and he appeals. Affirmed.

George F. Jones, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. June 23, 1925, the defendant was indicted for the crime of making false entries in the books of a state bank. His demurrer to the indictment was overruled, and his motion to dismiss it was denied. He was duly placed on trial, but the jury impaneled in the case was discharged, because of inability to agree upon a verdict. October 30, 1925, a second indictment was presented and filed, charging the defendant with the same acts alleged in the first indictment and, in addition thereto, four acts of embezzlement. This was a new indictment, and did not purport to be an amendment of the first. The defendant made a motion to dismiss the indictment, and demurred thereto. Upon the submission of the motion and the demurrer, the court made the following order:

> "The motion to dismiss indictment is sustained, and the demurrer is sustained; the district attorney to go before the grand jury and amend the former indictment and bring in a second indictment as to the charges of embezzlement. * * * The court now orders that the order heretofore made, overruling the demurrer to the original indictment, be set aside; the demurrer to the original indictment is now sustained, and the original indictment, together with the second indictment, is now resubmitted to the grand jury. The court orders that the whole matter of the two indictments be referred to the grand jury for consideration."

Two indictments, purporting to be amended indictments, were thereafter presented by the grand jury and filed. One charged the making of the same false entries, and the other charged the embezzlements set forth in the second indictment. The defendant pleaded that he had been once placed in jeopardy on the charge of making the false entries. At the trial the court instructed the jury to find against the defendant on that plea. He was convicted of the crime of making the alleged false entries, and this appeal is from the judgment and the order denying a new trial.

Counsel for appellant says in his brief:

> "The defendant relies for a reversal of the judgment upon the sole proposition that the court erred in instructing the jury to return a verdict for the people on the pleas of once in jeopardy."

He contends that the first indictment was not defective in the respects set out in his motion to dismiss and his demurrer thereto. He conceded at the oral argument that, if the second trial had been had upon the first indictment, the plea of once in jeopardy would not have been available to defendant, and there are many decisions in this state to that effect. Why a different rule should prevail in a case such as this does not appear.

> "A nolle prosequi entered after a disagreement and discharge of the jury will not bar another prosecution for the same offense." 16 C. J. 249.
>
> "A defendant is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impaneled and sworn. His jeopardy is real, unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of the judge or a juryman, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant." People v. Hunckeler, 48 Cal. 331, 334.

See, also, In re Harron, 191 Cal. 457, 466, 217 P. 728; People v. Ammerman, 118 Cal. 23, 26, 50 P. 15.

In People v. Kerrick, 144 Cal. 46, 48, 77 P. 711, 712, after a disagreement and the discharge of the jury, the action was dismissed, on motion of the district attorney, on the ground of insufficiency of evidence to convict. Thereafter another information was filed, and the defendant entered a plea thereto of once in jeopardy. It was held on appeal that the second information charged a different offense from that alleged in the first. The court said, however:

> "Another reason * * * is found in the fact that each of the prosecutions was for a felony, and a judgment of dismissal on motion of the district attorney does not bar a second prosecution in case of a felony—even assuming that there was but one offense, or that the one offense was included in the other."

In People v. Disperati, 11 Cal. App. 469, 475, 105 P. 617, 619, after a disagreement and discharge of the jury, the information was dismissed on motion of the district attorney, and another complaint was filed, charging the defendant with the same offense. He was held to answer, and another information was filed, to which he entered a plea of once in jeopardy. The court said:

> "If there had been a conviction of the defendant upon the first information, it would indeed have been a bar to another prosecution, unless it had been set aside at his instance; but the case is entirely different where the jury disagree and are discharged by the court. Then the status is the same as though there had been no trial at all."
>
> "A mistrial is not a trial." In re Begerow, 133 Cal. 349, 356, 65 P. 828, 56 L. R. A. 513.

[1] Section 1008 of the Penal Code provides:

> "If a demurrer [to the indictment] is sustained and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury."

As stated, the court overruled the defendant's demurrer to the first indictment prior to the mistrial thereon. Thereafter, and after the second indictment was filed, the court changed the ruling, and sustained the demurrer to the first indictment, as well as that to the second, and ordered the case to be resubmitted to the grand jury. This action of the court was in accordance with the provisions of section 1008, and is not, under the terms of that section, a bar to another prosecution for the same offense.

[2, 3] A defendant cannot be said to have been in jeopardy, unless the indictment or information is sufficient to sustain a conviction. The defendant demurred to the first indictment, and the court finally sustained the demurrer. He cannot, therefore, be heard to contend, contrary to the ruling which he procured, that such indictment was sufficient and that therefore he was placed in jeopardy by the mistrial thereunder. 7 Cal. Jur. 947; People v. Lee Look, 143 Cal. 216, 220, 76 P. 1028; People v. Terrill, 133 Cal. 120, 128, 65 P. 303. It is true that, at the time the court changed the ruling upon the demurrer to the first indictment, the defendant objected "to this at this time, on the ground that the court has no jurisdiction to make any order concerning the original indictment at this time"; but he made no attempt to withdraw the demurrer, or to have it stricken from the files.

> "It is a common occurrence for a trial court to change its rulings upon questions of law during the progress of a trial, and a ruling on demurrer occupies no better position in this regard than any other ruling from which an appeal cannot be taken." 21 Cal. Jur. 124; De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717.

In any view of the case, the instruction of which complaint is made was properly given.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; NEEDHAM, Justice pro tem.

---

78 Cal. App. 415

PEOPLE v. AVILA. (Cr. 908.)

(District Court of Appeal, Third District, California. June 17, 1926. Hearing Denied by Supreme Court Aug. 16, 1926.)

1. Criminal law 🔑829(9, 18)—Refusal of instructions on reasonable doubt and presumption of innocence, covered by court's given instructions, held not error.

Refusal of instructions that, if any juror entertained a reasonable doubt of defendant's guilt, it was his duty not to vote for a verdict of guilty, and relating to presumption of innocence attending defendant in a criminal prosecution, *held* not erroneous, where same subject-matter was covered by court's given instructions.

2. Criminal law 🔑369(6)—Admitting evidence of finding of liquor on defendant's premises prior to commission of offense charged in information held error.

In prosecution for possession of intoxicating liquor, admitting evidence of finding of liquor on defendant's premises prior to commission of offense charged in information, and which liquor was not shown to have been lawfully or unlawfully possessed, *held* error.

3. Criminal law 🔑1186(4)—Error in admitting evidence of finding intoxicating liquor on defendant's premises prior to commission of offense charged in information held not prejudicial, in view of defendant's admission (Volstead Act, tit. 2, § 33 [U. S. Comp. St. Ann. § 10138½t]; Const. Cal. art. 6, § 4½).

In prosecution for possession of intoxicating liquor under Volstead Act, tit. 2, § 33 (U. S. Comp. St. Ann. § 10138½t), error in admitting testimony of finding of liquor on defendant's premises prior to commission of offense charged in information *held* not prejudicial, within Const. Cal. art. 6, § 4½, where defendant admitted possession of such liquor and its intoxicating character prior to admission of objectionable testimony.

4. Criminal law 🔑742(1).

Credibility of witnesses is for jury.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Joe Avila was convicted of the unlawful possession of intoxicating liquor, and he appeals. Affirmed.

V. F. Gant, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the offense of unlawfully having in his possession intoxicating liquor, and sentenced to pay a fine of $600; this being a second offense. The information charges the commission of the offense on or about the 23d day of May, 1925. The information also contained a second count, charging the offense of maintaining a nuisance. This count, however, was dismissed. Upon this appeal the appellant urges two specific errors as grounds for reversal: (1) That the court erred in refusing certain instructions requested by the defendant; (2) that the court erred in admitting evidence of a prior search of the premises occupied by the defendant. The evidence in the case tended to show that the place of the commission of the offense was occupied by the defendant as his private dwelling. The intoxicating liquor, for the possession of which the defendant was prosecuted, was found in the bathroom of the premises occupied by the defendant, contained in a jug wrapped with a newspaper, and concealed behind the bathtub in the bathroom. The instructions requested by the defendant and not given by the court are as follows:

> "If, after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of the juror so entertaining such doubt not to vote for a verdict of 'guilty,' nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of 'guilty.'"

"In this case, as in every criminal case, the guilt of the defendant must be established to a moral certainty, and beyond a reasonable doubt, before he can be convicted, and the burden of proof rests upon the people to prove the defendant guilty, as charged in the information, to a moral certainty, and beyond a reasonable doubt, and, unless the people so prove every material allegation in the information, you must find the defendant not guilty. Each defendant is by law presumed to be innocent of the crime charged, and this presumption remains with every defendant throughout the trial, and during your deliberation on your verdict it is your duty, if it can consistently be done, to reconcile all the evidence in this case upon the theory that the defendant is innocent, and so long as any one of you have from the evidence in the case a reasonable doubt of the guilt of the defendant, such defendant cannot be convicted. If any one of you, after a full consideration of all the evidence in this case, has a reasonable doubt of the guilt of the defendant, said defendant cannot be convicted."

"You are further instructed that, if you find that the prosecution in this case has failed to establish any one single material element of the offense charged, then under such finding you shall render a verdict of not guilty and acquit the defendant."

[1] The reasons assigned for the refusal to give the foregoing instructions are that the substance thereof was included in other instructions given by the court to the jury. An examination of the record shows that the jury in this case was very fully instructed as to the law applicable thereto. The jury was advised in a number of instructions that the defendant could not be convicted, unless the jury was satisfied from the evidence beyond a reasonable doubt as to the guilt of the defendant, that the burden of proof rested upon the prosecution to so satisfy the jury concerning every element necessary to constitute the offense, and that the concurrence of 12 jurors was necessary before a verdict could be rendered. While it has been held several times that an instruction framed along the line of the first one set forth herein is proper to be given to the jury, from the fact that the jury in this case was instructed so many times that conviction could be had only when the jury was satisfied beyond a reasonable doubt from the testimony as to the defendant's guilt, we think that no substantial injury resulted to the appellant from the failure of the court to give the instruction in the language requested by the appellant. The jury was also very carefully instructed that the defendant could not be convicted upon proof of the mere fact of the possession of intoxicating liquor; that the testimony must go further, and show that the possession was unlawful. Without setting forth the instructions in detail, it is sufficient to say that in this case the instruction given by the court to the jury included all the salient features of the refused instructions, and were prepared with as much care and set forth the law applicable to the case as fully and completely as ordinary characterize cases of much graver import.

[2] Upon the trial of the case the court permitted the prosecution to prove over the objection of the defendant that on or about the 12th day of January, 1925, an officer searched the premises occupied by the defendant and found therein intoxicating liquor. This ruling of the court is assigned as error. No evidence was introduced tending to show whether the liquor so found was either lawfully or unlawfully possessed. The mere fact of finding liquor only appears in the testimony. The trial court apparently took the view that, upon the trial of one charged with the unlawful possession of liquor, prior possession of liquor might be shown. In this ruling we think the court was in error. The unlawful possession of liquor does not involve a continuing offense, such as the maintaining of a nuisance. In prosecutions for the unlawful sale of liquor, it has been held by our courts that the testimony of prior and subsequent sales to the one upon which conviction is sought is not admissible. We see no difference in principle between the offense of unlawful sale and unlawful possession. Neither involves the idea of continuity. The very moment one acquires unlawful possession of intoxicating liquor, that moment he is subject to prosecution. The very moment one unlawfully sells intoxicating liquor, for that offense he is immediately subject to prosecution. They are offenses complete in themselves. We think this case is governed by the principle of law set forth in 8 Cal. Jur. p. 59, § 167, where it is said:

> "The universally recognized rule is that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information. It is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. Such evidence is inadmissible, either to show a disposition on the part of the defendant to commit such offenses as he is charged with, or as corroborative of the testimony directed to the proof of the specific offense for which he is on trial."

This rule is clearly set forth in the case of People v. Smith, 64 Cal. App. 344, 221 P. 405, where the offense charged was that of selling intoxicating liquor. See, also, People v. Morales, 45 Cal. App. 553, 188 P. 58, People v. Amort, 60 Cal. App. 29, 212 P. 50, People v. Pagni, 67 Cal. App. 303, 227 P. 972, and People v. Mori, 67 Cal. App. 442, 227 P. 629.

[3] Our view, however, that such testimony is not admissible, is not determinative of this case. As we have said, the testimony erroneously admitted by the court simply was to the effect that intoxicating liquor was found in the dwelling house occupied by the defendant. There was no attempt made to show the character of possession. Upon the trial of this case the defendant admitted the posses-

sion of the liquor in question, and the intoxicating character, prior to the giving of the objectionable testimony herein referred to. The only question presented to the jury for determination was whether the defendant had unlawful possession of the intoxicating liquor under the provisions of section 33 of title 2 of the Volstead Act (U. S. Comp. St. Ann. § 10138½t), which reads:

> "But it shall not be unlawful to possess liquors in one's private dwelling, while the same is occupied and used by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

This section must be read in connection with all the other sections of the act, and especially in connection with section 3 thereof, making it unlawful to manufacture, barter, sell, or possess intoxicating liquor for beverage purposes after the date therein mentioned. While this point has not been expressly decided in this state, the matter has been passed upon in a civil case by the Supreme Court of the United States, wherein it is held that the only instances where intoxicating liquors can be lawfully possessed for beverage purposes is where the intoxicating liquors were obtained prior to the date mentioned in section 3 of title 2 of the Volstead Act (U. S. Comp. St. Ann. § 10138½aa). Cunard Steamship Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306.

We think that section 33 of title 2 of the Volstead Act, relative to the possession of intoxicating liquors for beverage purposes, which may be lawful, refers to and must be held to refer to intoxicating liquors procured prior to the date mentioned in section 3. We find no provision of the Volstead Act making lawful the possession of intoxicating beverages commonly known as and called "bootleg whisky" and "jackass brandy." If this interpretation of the Volstead Act is correct, then by the admission of the defendant of the possession for beverage purposes of the intoxicating liquor found in his residence, and also the intoxicating character thereof, as admitted by his counsel in open court, the case for the prosecution was practically established. The trial court, however, went into the question of unlawful possession, and admitted testimony tending to show acts and conduct from which the jury might infer unlawful possession, and, as the case was tried, there was presented to the jury the sole question of unlawful possession. The sole question for the jury was thus narrowed to the issue of the character of the possession, and the court very carefully, pointedly, and particularly directed the attention of the jury to this one fact, and that it was incumbent upon the people to prove the unlawful possession and not upon the defendant.

We are thus brought to a consideration of the proof. The testimony in this case shows that two witnesses, residing 27 feet from the building occupied by the defendant, which building appears to have been occupied by the defendant alone, testified at great length to the occurrences taking place at the premises occupied by the defendant, the coming and going of people at unusual hours, the fact that they came there apparently sober and went away apparently intoxicated, that intoxicated people were frequently seen with the defendant at his place of residence, and covering such a period of time and showing such circumstances that the jury could not very well avoid coming to the conclusion which it reached in this case. The people who came and went to defendant's premises included both men and women. The testimony of the prosecution is, when examined, practically uncontradicted. The defendant himself admitted possession of the intoxicating liquor, and simply stated that he did not sell or give it away. The defendant also introduced one witness who stated that the rear of the house occupied by the witness was about 150 feet from the rear of the house occupied by the defendant; that there was a garage and two-story tank house and a barn between his dwelling house and the building occupied by the defendant; that he had not seen anything or heard anything indicating the improper use of liquor upon the defendant's premises; and that he did not know whether he would have heard such occurrences or not. There was testimony also introduced by the defendant that his employer never knew of his being intoxicated.

[4] The appellant argues that the testimony of the witness for the prosecution was exaggerated. This was a question wholly for the jury to determine. The testimony of the defendant's witness that he heard nothing and saw nothing, and was really situated and living where he would probably see nothing and hear nothing, does not rise to the dignity of contradictory evidence. Under these circumstances, we think that the error of the court in admitting testimony simply of prior possession comes within the rule announced in section 4½ of article 6 of the state Constitution, and that the defendant suffered no prejudice through the admission of such testimony.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

78 Cal. App. 395

PEOPLE v. STEVENS et al. (Cr. 1315.)

(District Court of Appeal, Second District, Division 2, California. June 17, 1926. Hearing Denied by Supreme Court, Aug. 16, 1926.)

1. Conspiracy 🔑47—Evidence received against one defendant only held insufficient to prove commission of alleged overt act by codefendants.

Evidence received against one defendant alone, as to purchase of weapon, *held* insufficient to prove that his codefendants, in trial for conspiracy to kidnap, committed alleged overt act of causing former to purchase revolver.

2. Conspiracy 🔑43(5).

In alleging overt act, it is sufficient to charge that it was performed in furtherance or pursuance of conspiracy.

3. Criminal law 🔑1032(7)—Proof of different intent than alleged in indictment for conspiracy presents no more than variance, unavailable on appeal without objection to evidence or presentation of question to trial court.

As defendants in conspiracy trial could not have been prejudiced by failure to prove alleged specific intent in committing overt act charged, proof of different intent presented no more than variance, not available on appeal, in absence of objection to evidence on such ground, or presentation of question to trial court.

4. Conspiracy 🔑27.

Defendants' stationing of themselves before prosecuting witness' studio, pursuant to conspiracy to kidnap her, *held* an overt act.

5. Conspiracy 🔑45—Evidence of proposals and consideration of plans to kidnap held admissible, though remote in time and effect.

In trial for conspiracy to kidnap, testimony as to proposals and consideration of plans to kidnap several persons, including prosecuting witness, during period of over two years before culmination of plot charged, *held* admissible, though remote in time and effect.

6. Criminal law 🔑1043(1).

Whether evidence, objected to as not admissible at all, was receivable against one defendant, cannot be considered on appeal.

7. Conspiracy 🔑45—That evidence of formation of conspiracy begins at time long before wrongful meeting of minds is no objection.

That evidence, showing gradual formation of criminal concord in conspirators' minds, begins at time long before wrongful meeting of minds, is no objection thereto.

8. Conspiracy 🔑45.

Criminal conspiracies being generally proved by circumstantial and piecemeal evidence, great latitude must be given state in producing its evidence.

9. Criminal law 🔑530.

Defendants' signed confession *held* admissible as against objection that it could be used at most to refresh witness' recollection.

10. Criminal law 🔑768(1)—Instruction that laws may as well be stricken from statute books unless jury did duty held not error as telling them it was their duty to convict.

Instruction that jury must consider people's rights to have laws properly executed, and that, "unless you do your duty, laws may as well be stricken from the statute books," *held* not error as telling them it was their duty to convict, especially in view of succeeding instruction to be just to accused as well as people.

11. Criminal law 🔑823(2)—Instruction that sufficiency for jury of evidence of corpus delicti is for court held not error, in view of other instructions as to jury's duty.

Instruction that it is for court to say whether there is sufficient evidence of corpus delicti to go to jury *held* not error as confusing and invading jury's province, in view of other instructions as to their functions and duty.

12. Criminal law 🔑823(4).

Instruction in conspiracy case, that overt act is outward act done in pursuance and manifestation of intent or design, *held* not error, though not requiring finding that act was done to effect object of conspiracy, in view of other instructions.

13. Criminal law 🔑1172(1)—Correct instruction, giving authority, however weighty, for definition of term, is not prejudicial error.

Giving authority, however weighty, for correct definition of term, is not prejudicial error as giving "false and misleading weight" to instruction.

14. Criminal law 🔑766.

List of authorities supporting proposed instructions should not be given jury, if result would be merely loss of time.

15. Criminal law 🔑1137(3)—Defendants, proposing instructions with authorities appended, cannot object to reading of name of authority for instruction given.

Defendants, proposing instructions with authorities appended, cannot object to reading of name of dictionary to jury as authority for definition of term in instruction given.

16. Criminal law 🔑1130(5).

Error in instruction, merely quoted with statement that it was erroneous, without argument or citation of authority, cannot be decided.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Charles Z. Stevens, Claude Arthur Holcomb, and Adrian J. Wood were charged with, and the two first named defendants convicted of, conspiracy to kidnap, and the convicted defendants appeal. Affirmed.

Hewitt, Ford, Crump & Penn, and Hewitt, Ford & Crump, all of Los Angeles, for appellant Stevens.

John A. Holland, of Los Angeles, for appellant Holcomb.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WORKS, J. Defendants were charged with a conspiracy to kidnap Mary Fairbanks, known also as Mary Pickford. Defendant Wood was acquitted. Defendants Stevens and Holcomb were convicted. The convicted defendants appeal from the judgment and from an order of the trial court denying their motion for a new trial.

[1] After charging the formation of the conspiracy, the indictment set forth the following allegation, as an averment of one of the overt acts relied upon for a conviction: That, "in pursuance of such conspiracy, the defendants did, on or about the 5th day of May, 1925, cause the said Adrian J. Wood to purchase a revolver to be used for the purpose of intimidating the said Mary Fairbanks, also known as Mary Pickford, and compelling her to submit to such taking and restraint." It is contended by appellants that the evidence was insufficient to prove against them the commission of the overt act thus alleged. The Attorney General concedes that this point is well taken, and, after an examination of the record, we are satisfied that the concession is properly made. There are several reasons which justify this action of the Attorney General, but one only of them need be stated: All evidence concerning the purchase of the weapon mentioned in the indictment was received for some reason against defendant Wood alone; in other words, that evidence, by the ruling of the trial court, was expressly excluded as to appellants.

[2, 3] The only other overt act charged in the indictment was thus set forth: That, "in pursuance of such conspiracy * * * the said defendants did, on the 30th day of May, 1925, cause said Charles Z. Stevens and Claude Arthur Holcomb to station themselves in an automobile in front of the Mary Pickford Studio, * * * with intent then and there to seize, capture, and restrain the said Mary Fairbanks, also known as Mary Pickford, and thereafter keep her under restraint until" a ransom for her release was paid. It is undoubtedly the law that, in alleging an overt act in conspiracy cases, it is sufficient to charge that the act relied upon was performed in furtherance or in pursuance of the conspiracy. People v. George (Cal. App.) 241 P. 97; 12 C. J. 624. Here, however, the pleader who drew the indictment did more. He charged the specific intent with which the act was performed. It is admitted by the Attorney General—and a perusal of the record demonstrates that no other course could properly have been taken by him—that there is a lack of evidence to prove the specific intent alleged. The act was sufficiently proven, beyond a doubt, but the intent with which the act was performed was shown to have been entirely different from that which was charged. Upon this state of the record it is insisted by appellants that the evidence fails to support the charge as laid. It is said by them that, the prosecution having elected to color the charge that the overt act was done in pursuance of the conspiracy by the allegation that it was committed with a specified intent, the prosecution must have proven that intent, and could rely on no different intent. On the other hand, respondent contends that the allegation that the overt act was committed with a specific intent on the part of the conspirators may be disregarded as surplusage, and that the charge is satisfied by any proof that the act was performed in pursuance of the conspiracy. These contentions we shall proceed now to examine.

The question as to what allegations in an indictment or information may be regarded as surplusage has been before the courts of this state in several cases. In one of these, the defendant was charged with the crime of procuring and allowing a certain individual to be registered as a voter in the precinct register of a precinct in which he was not entitled to be registered. The defendant was a deputy registrar of voters, and it was alleged in the information that he committed the crime with which he was charged "as such deputy registrar of voters." Under a chain of circumstances which it is not necessary here to state, it became proper for the court to determine what was the effect of the allegation. It was said in the opinion that:

> "The charge in the information that, 'as deputy registrar,' defendant committed the offense is the merest surplusage. It was meaningless in averment and unnecessary in proof. The statute is not directed against official misconduct, nor limited in its application to public officers. 'Every person who willfully causes, procures, or allows' false registration is punishable under it. Every act embraced within its terms may be done by a private citizen as well as by a public officer, and the official character of the offender under this law is of no possible importance." People v. Sternberg, 111 Cal. 3, 43 P. 198.

It must be confessed that there is great doubt whether this adjudication gives us material aid in determining the question which is here presented for our consideration. The specific allegation in the information under scrutiny in the cited case, to the effect that the defendant committed the crime with which he was charged as a deputy registrar of voters, was swallowed up in the general allegation that he committed it, for the statute denouncing his crime was directed at all persons and not merely at public officials. The specific allegation therefore added nothing to the charge, nor did it explain or color it. Here, however, the specific allegation that appellants stationed themselves outside the Mary Pickford Studio, with intent then and there to kidnap her, is not included in the general allegation that they so stationed themselves in pursuance of the conspiracy. The specific allegation therefore in a sense makes addition to and colors the general allegation. We state these differences between People v. Sternberg and the present case for the purpose of indicating more clearly the point which is before us for determination. There are other decisions of our courts which come nearer to the question that confronts us. In one of them the defendant was charged with arson. It was averred in the information that the building which was alleged to have been burned was the property of a certain individual. There was no proof of the allegation of ownership, and it was contended, because of the omission, that the evidence was insufficient to sustain the conviction. The court said:

> "The rule, with reference to the proof required to support an information or indictment, is that every fact or circumstance necessary to constitute the crime charged is material, and must be alleged and proved. But the allegation of a fact or circumstance not legally essential to the charge is mere surplusage, and may be disregarded. There are allegations, however, not necessarily essential, and which may be dispensed with; but, when they are laid in the information or indictment, they become material, and must be proved in all cases when descriptive of the identity of that which is necessary to the charge. In the case before us, the name of the owner, although alleged, was immaterial, because it was not a necessary part of the description of the crime charged, therefore not necessary to be proved." People v. Handley, 100 Cal. 370, 34 P. 853.

In another case the defendant was charged with the larceny of a steer, and the information alleged that it was taken from the possession of a particular individual. The court said:

> "The allegation in the information that the animal was taken 'from the possession of one George L. Wallace' may be treated as surplusage. * * * The possession of the owner * * * was neither a necessary element of the offense nor any part of the description of the property alleged to have been taken. * * * Its presence in the information neither added to nor detracted from the force and effect of that pleading." People v. Hutchings, 8 Cal. App. 550, 97 P. 325.

A similar question has arisen in two burglary cases. In the first of these the court said:

> "There was a request for an instruction directing the jury to acquit on the ground of variance between allegation and proof, in this: The information charged a burglary in entering, etc., a building at St. Helena, in the county of Napa, while the proof was that the building is situated a mile and a half from St. Helena. It does not appear that a designation of the local vicinage of the building was at all important for its identification, and, unless necessary for that purpose, it was surplusage to allege or prove its situation further than that it was in the county of Napa." People v. Geiger, 116 Cal. 440, 48 P. 389.

In the second burglary case occurs language which seems at first glance to support the contention of appellants here:

> "It may be admitted that, where the prosecution does particularize by specific allegation the location of the place where a burglary has been committed, or as to the particular person owning the building, they cannot show that the ownership was otherwise than that alleged or the location different, without rendering their case open to the objection as made by appellant here of a variance between the allegations and proof." People v. Redman, 39 Cal. App. 566, 179 P. 725.

It seems, for several reasons, that the expressions in this latter case cannot influence our decision of the question here presented. In the first place, taking the entire context of the opinion, the language is plainly obiter. Then, too, it is possible that the court "admitted" the point only for the purpose of argument, and did not intend to express a decided view upon it. Further, the language quoted seems not to accord with the decision of the Supreme Court in People v. Geiger, supra, for there the court expressly decided that it was surplusage "to allege or prove" more than that the burglarized building was in the county of the jurisdiction, where the allegation was that it was in a certain town, and the proof showed that it was a mile and a half from the town.

From a review of all these authorities, it seems plain that the point now urged by appellant would be fruitless, if the prosecution had made no attempt whatever to prove any specific intent with which appellants stationed themselves outside the Mary Pickford Studio. This much seems to be settled by the rulings in People v. Handley, supra, and People v. Hutchings, supra. Under these decisions, and under the general principles upon which they are based, we can perceive no prejudice or injury to the rights of appellants which could have resulted from a mere failure to prove the specific intent with which it was alleged that two of the parties to the conspiracy had stationed themselves outside the studio. If the prosecution had deserted absolutely the allegation in making its proof, and had attempted to prove no other specific intent, we do not see how appellants could have been misled by the mere fact that a specific intent was alleged. But a specific intent, other than that alleged, was proved by the prosecution. One witness testified to an admission by appellant Holcomb that he "went out to the studio * * * to look for Mary Pickford." This statement was received as against Holcomb alone. Appellant Stevens made a statement to the police after his arrest, in the form of question and answer. It was afterward reduced to writing, and was signed by him. The following excerpts are made from the statement, which was received as to Stevens alone:

"Q. What did you go out there [to the studio] for? * * * A. Well, it was possibly to see if Mary Pickford came out out there.

"Q. I don't want any possibility about this, I want the truth. A. To see if she did come out. * * * It was to get information; further than that I can't say.

"Q. Get information for what? A. As to her movements.

"Q. What was the purpose of getting information as to her movements? You had planned to kidnap her, hadn't you? A. Why, if it was possible. * * *

"Q. What were you doing out there? A. Just as I stated there, I went out to look over the ground.

"Q. To see what possibilities were of kidnapping her? A. Yes. * * *"

In a similar statement made by appellant Holcomb, and received as against him alone, the following occurs:

"Q. And what were you doing out there [at the studio] at the time of your arrest? A. Well, we went out there to see if Mary Pickford would come out and go home."

The presence of this showing in the record would seem to offer a question different from those treated in People v. Handley, supra, and People v. Hutchings, supra. The point which appellants advance seems now to approach more nearly that decided in People v. Geiger, supra, but we need not pause to say whether the present question is ruled by that case or whether there is such a difference between the respective sets of circumstances in the two cases that the rule stated there is inapplicable here. We have already seen that the rights of appellants could not have suffered if the prosecution had made no proof whatever of a specific intent with which appellants stationed themselves before the studio, and had relied alone upon the proof of the conspiracy as a basis for an inference by the jury that the act of the conspirators in stationing themselves before the studio was one in furtherance of the conspiracy. That being so, no more than a question of variance was presented when the first item of proof was offered which tended to prove a specific intent different from that alleged in the indictment, if we grant for the sake of argument, without deciding, that such a question then arose. No objection was made to the specific items of evidence which we have quoted from the respective statements of appellants, nor does the record show that the question of variance was presented to the trial court at any time or in any way. This situation is exactly met by a case lately decided by this court. We said in the opinion then rendered:

"It is insisted that the judgment should be reversed for the reason that the charge was that the defendants attempted to rob T. Tschanz, while the evidence shows that the name of their victim was Simon Tschanz. This variance appears from the record, it is true, and, if we concede without deciding that it was a material variance, we at once observe that no objection was made at the trial to any of the evidence on the ground of variance, nor in fact was the point in any manner presented at the trial, or on motion for a new trial. It has been determined, under a statute to the effect that only questions presented at the trial can be reviewed on appeal, that the claim made in a criminal case that there was a variance between charge and proof cannot first be presented to the appellate court (State v. Padilla, 18 N. M. 573, 139 P. 143), and in this state it has been held many times that the point that there is a variance between pleading and proof in civil cases cannot first be made on appeal (Stockton C. H. & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 P. 565; Robson v. O'Toole, 60 Cal. App. 710, 214 P. 278). In the opinions in the two cases cited, and in the many others referred to in them, the reason given for the rule in civil cases is that an amendment of pleadings may be allowed and justice thus be done if the point be made in the trial court. There appears to be an equally cogent reason for the application of the principle in criminal cases. If the question be raised in the trial court, the pending charges may be dismissed and a new indictment be found, or a new information be filed, thus aiding the administration of substantial justice and wiping out what are sometimes exceedingly technical defenses. It is to be remembered, too, that the general rule is that courts of review pass only upon questions presented at the trial. This rule has often been applied in criminal as well as in civil cases. People v. Taminago, 35 Cal. App. 238, 169 P. 696; People v. Walton, 53 Cal. App. 35, 199 P. 824. We therefore decide that the point that there was a variance between charge and proof was waived." People v. Gonzales, 69 Cal. App. 609, 231 P. 1014.

See, also, Swallow v. Francisco (Cal. App.) 239 P. 95.

We conclude that the point made by appellants, and arising from the allegation in the indictment that one of the overt acts charged was committed with a specific intent, is without merit.

[4] It is contended by appellants that their act in stationing themselves before the Mary Pickford Studio was not an overt act within the meaning of the statutes of this state upon the subject of criminal comspiracy. In disposing of this point, we deem it sufficient to refer to People v. George, supra. We think the act here shown was an overt act within the rules laid down in that case. This conclusion presupposes, of course, that the conspiracy here charged was formulated before appellants made their trip to the studio gates. Whether it had been formulated before that event is a point later to be considered.

[5] The prosecution proved by various witnesses that defendants, during a considerable period of time, had discussed plans for the kidnapping of several celebrities of the cinema world and several children of wealthy residents of Los Angeles. Some of these discussions occurred before Mary Pick-

ford was mentioned as a possible victim of the rapacity of defendants. One of the witnesses who testified to these earlier occurrences was one Harney. His testimony, which was received over the objections of appellants, went back more than two years, the Pickford plot having finally culminated in May of 1925. He testified that in December, 1922, or in January, 1923, appellant Stevens "mentioned of taking a party and holding until he collected the ransom"; that the "party" then spoken of was Pola Negri; that conversations between him and Stevens on the same subject "went on for probably one year," and that at some time during the conversations Mary Pickford was mentioned as a possible victim of a kidnapping enterprise; that Stevens said that she could be picked up "either at her house, as she was coming home, or on the road" and that she could be held until her husband, Douglas Fairbanks, paid a ransom for her release; that in March or April, 1925, Stevens asked the witness if he remembered their earlier conversations about kidnapping; that Stevens then said that he had talked about the same thing with appellant Holcomb; that he and Holcomb had "planned out where they could get the party, the subject, and didn't name any names at all, just the subject"; that Stevens soon thereafter mentioned Jackie Coogan as a possible victim of a kidnapping plan, and said that he, Holcomb, and defendant Wood were considering such a plan; and that Stevens, in April, 1925, said he had given up the plan.

[6] It is now contended that the trial court erred in receiving the testimony of Harney, but the contention is most sparingly argued, and no authority is cited to support it. We shall, however, assume that the question is fully presented and argued, and shall therefore decide it. As a preliminary to a disposition of the point, it is to be observed that no contention is made that the evidence was improperly received as against Holcomb. The general question is presented only that it was not admissible at all. We do not decide, of course, that it was not receivable against Holcomb, but merely point out that such a question is not before us.

[7] A conspiracy may have a very small and a very remote beginning. Like a gigantic member of the forest, it may originate in a tiny tendril, which requires a long time and a persistent nurture to be developed into the matured monarch of the grove. It is for this reason that it is said in a standard publication that, in conspiracy cases—

> "it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before the alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate fact at issue." 12 C. J. 635.

An examination of the record before us shows that the entire evidence in the cause, including the testimony of Harney, discloses a practically continuous chain of circumstances, commencing at least as early as the date of the events related by Harney, and ending with the arrest of appellants at the gate of the Mary Pickford Studio. This chain of circumstances showed the gradual unfolding of the plot to kidnap the individual for whom the studio was named. To employ again the simile of which we have already made use, it shows the gradual growth of the illicit enterprise from tendril to maturity.

[8] In our opinion there is no valid objection to evidence in conspiracy cases which tends to show, step by step, the gradual formation of a criminal concord in the minds of those charged with the illicit combination, merely because the evidence begins at a time long anterior to the wrongful meeting of minds. It is necessary only that the evidence, in all its parts, tends to prove the formation of the conspiracy. In a case in which, it is true, the only issue was as to the identity of one of the alleged parties to a conspiracy, the court said:

> "From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are most always proven by circumstantial and 'piecemeal' evidence; and, in consideration of this fact, in such cases great latitude must of necessity be given the commonwealth in the production of its evidence." Jenkins v. Commonwealth, 167 Ky. 544, 180 S. W. 961, 3 A. L. R. 1522.

The opinion in this case, to our minds, correctly states a rule which fits the facts of the present controversy. In a civil action for damages wrought by a conspiracy, it is said, as to one of the defendants, that:

> "It was immaterial when his acts and declarations occurred, if they related to the transaction out of which his liability arose." Exchange Bank v. Moss, 149 F. 340, 79 C. C. A. 278.

One court has said, in another civil case, in quoting from an earlier opinion rendered in the same jurisdiction:

> "And in the admission of circumstantial evidence upon a charge of conspiracy, great latitude is allowed. The jury should have before them, and are entitled to consider, every fact which has a bearing on and a tendency to prove the ultimate fact in issue which would assist them in arriving at a satisfactory conclusion, and it is no objection that the evidence may tend to prove many different transactions extending over any particular period of time, provided that all the facts proven have some bearing on and a tendency to prove the ultimate fact in issue. The limits to which evidence of this kind may be admitted should be left to the discretion of the trial court, and its ruling should not be disturbed, when the evidence admitted tends, even remotely, to establish the ul-

timate fact of conspiracy." Democrat Printing Co. v. Johnson, 71 Okl. 128, 175 P. 737.

Practically the same rule is followed in the criminal cases of Jelke v. United States, 255 F. 264, 166 C. C. A. 434, and Welch v. Commonwealth, 189 Ky. 579, 225 S. W. 470.

The purpose of the evidence in conspiracy cases is to establish a mental state—an illicit concord of the minds of several persons. Such being the question involved, the unfoldment of the evidence is to be governed by the rules which prevail in those cases in which the endeavor is to ascertain the sanity or insanity of an individual. The mental state of an individual may change slowly. The joint state of mind of conspirators, finally merging into a criminal concord under the law of conspiracy, may develop gradually from a condition of innocence to one of the blackest guilt. Therefore, in addition to the cases above noted, we may justly rely, in support of our views, upon the well-known rule that, in order to determine sanity or insanity—the mental state of an individual—an investigation into the mental activities of the subject under inquiry may reach back over a long period of time. This rule is so well known that we do not pause to cite the cases which announce and support it. On the whole, we conclude that the evidence of Harney showed a proper part of the series of circumstances in which, by the verdict of the jury, appellants have become enmeshed. His testimony, although remote in time and perhaps also in effect, nevertheless tended to prove the formation of the conspiracy. It was admissible under the liberal rules touching upon the production of evidence in conspiracy cases.

[9] As we have already observed, the trial court received in evidence a signed confession of appellant Stevens in the form of question and answer. It is contended that the contents of this paper were erroneously received, but, in arguing the point, appellants merely say:

> "At the most, this memorandum could only have been used for the purpose of refreshing the recollection of a witness who might be interrogated concerning the subject of the conversation."

We can perceive no merit in this argument. By signing the papers, Stevens made it his as fully as if it were a letter which a typist had produced from his dictation and to which he had appended his signature.

[10] It is claimed that the trial court erred in giving the following instruction:

> "The importance of your duties requires that you consider the rights of the people of the state of California to have the laws properly executed, and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime, and, unless you do your duty, laws may as well be stricken from the statute books."

It is said that by this instruction the jury was told that "laws should be stricken from the statute books if they do not convict," and that it was the duty of the jury to convict. This part of the instruction was not as carefully drawn as it might have been, but we think it contains language that saves it from the condemnation which is now sought to be placed upon it. The jury was told that the duty of its members was to see that the laws were properly executed. This language informed the jury, in effect, that it was to discharge its duties under the law as given in the entire instructions of the court. The jury was also told that it was its duty to determine the guilt or innocence of the defendants, and that, in effect, unless this duty was performed, laws might as well be stricken from the books. As thus viewed, we think the instruction was proper. It was not greatly different in legal effect from some parts of the instruction approved by us in People v. Selby (Cal. App.) 245 P. 792. It must also be observed that the court gave to the jury, in connection with and following the language upon which appellants base their claim of error, this further statement:

> "You should also ever keep in mind the importance to the accused of the result of your deliberations, and be just to him, as well as to the people of the state of California. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case, and give to each your conscientious judgment, and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be."

This language, taken together with that to which appellants take exception, made the instruction eminently fair.

[11] Appellants also object to the following portion of an instruction which was given by the court:

> "Prima facie evidence of the corpus delicti is sufficient; and it is for the court to say whether there is sufficient evidence of the corpus delicti to go to the jury, precisely as in the case of any other material fact."

Appellants admit that it was the duty of the court to determine what evidence was admissible to establish the corpus delicti, but they say that:

> "It is the sole duty of the jury to determine the weight and the sufficiency of the evidence, and their instructions upon their duties should not have been confused by the court reading a lecture on what the powers of the court were."

We cannot perceive, in the language to which appellants take exception, the evil which they see in it. The jury was merely informed that it was a function of the court to determine what was sufficient evidence of the corpus delicti "to go to the jury." Other instructions which went to the trial body plainly informed its members what were their functions and duty in dealing with all evidence which the court, in the exercise of its functions, permitted them to hear. We can see no error in the giving of the instruction to which objection is now made.

[12] The record shows the following, among the instructions given by the trial court:

> "You are instructed that an overt act in law is some act actually done in execution of a criminal intent as distinguished from mere threats or words, or an outward act done in pursuance and manifestation of an intent or design; the mere design or intent not being punishable without such act. Webster's Unabridged Dictionary."

It is contended that the instruction was erroneous in that portion of it which follows the expression "mere threats or words," for the reason that "it does not follow from this definition that the act must be one which is done to effect the object of the conspiracy." If it be conceded, without deciding, that this objection is tenable as directed alone at the particular language of the instruction which is sought to be condemned, we must at once observe that the objection falls to the ground, in view of other instructions which were given. The jury was told, for instance, that, if it found beyond a reasonable doubt that the conspiracy was proven and that either of the overt acts alleged in the indictment was committed by the defendants "in pursuance of said conspiracy" or "in furtherance of said conspiracy," it was the duty of the jury to convict. On the whole, we think the objection which appellants made to the particular language of the instruction which they have selected for their assault is not well taken.

[13-15] It is also objected that it was error for the court to give Webster's Unabridged Dictionary as authority for the definition of the term "overt act," for it is said the mention of this well-known authority gave a "false and misleading weight" to the instruction. The obvious answer to this objection is that, if the instruction was correct—and appellants have not shown us that it was not—no damaging weight could be imparted to it by the statement of any authority for it, however weighty the authority itself might be. We doubt, however, whether the court gave to the jury the name of the dictionary as authority for the definition, or whether we are bound to assume that it was given, merely because the title of the ponderous lexicon is affixed to the definition in the record. It is the usual custom to append to proposed instructions a list of the authorities which are relied upon as a sanction of their correctness. Many instances of the custom appear in the present record. These lists of authorities should not be given to the jury, of course, if we consider alone the fact that valuable time would be lost in such a course. If the name of the dictionary was read to the jury, however, it would appear that appellants have waived the right to urge the reading as error. Several instructions which were proposed by them, and which were given by the court, are found in the record with authority for their correctness appended to them. Appellants cannot object to a sin in others which they have themselves committed.

Appellants contend that the evidence was insufficient to prove the conspiracy alleged in the indictment. Ordinarily we should meet such an objection by stating enough of the evidence in a cause to show that the point is without merit, but we do not here find such a course to be necessary. The record in this action consists of 2,000 pages, and we have read it in its entirety. We think it sufficient to state that there was ample evidence from which the jury could have inferred that the conspiracy was proven. It is inadvisable to spin out an already lengthy opinion for the purpose of demonstrating a thing which to us appears to be obvious.

[16] Appellants contend that a certain instruction given by the court was erroneous, without arguing the point or citing authority in support of it. Only the instruction is quoted, with the statement that it was erroneously given. Under such circumstances there is nothing for us to decide. Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838.

Other points are made by appellants, but they are answered in our discussion of questions which are treated above.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

78 Cal. App. 508

TRUITNER v. KNIGHT et al. (Civ. 5664.)

(District Court of Appeal, First District, Division 1, California. June 23, 1926. Hearing Denied by Supreme Court Aug. 19, 1926.)

New trial ⟹137—Notice of intent to move for new trial, so denominated, held sufficient, though words "for a new trial" were omitted from body of notice.

Notice of intention to move for a new trial, so denominated, and which read, "You * * * will please take notice that the defendant * * * intends to move the court in the above entitled action on the following grounds, to wit," *held* sufficient, though words "for a new trial" were omitted from context of body of notice; opposing counsel not being misled.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action for personal injuries by Rose Truitner, by her guardian ad litem, J. L. Truitner, against Charles M. Knight and others, where-

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in defendant Clifford Truitner appeals. On motion to dismiss the appeal. Motion denied.

Ford, Johnson & Bourquin, of San Francisco, and Carling & Cummings, of Fresno, for appellant.

G. Levin Aynesworth, of Fresno, for respondent.

TYLER, P. J. Motion to dismiss appeal. The facts out of which the proceeding arises show that plaintiff, a minor of the age of 12 years, brought an action to recover damages against defendants for injuries suffered by her in an automobile accident. The case came on regularly for trial before a jury. Plaintiff recovered a verdict in the sum of $1,000. Thereafter defendant Truitner filed a certain notice in writing upon plaintiff, which was expressly denominated in its heading as being "Notice of Intention to Move for New Trial." The notice reads as follows:

> "You and each of you will please take notice that the defendant Clifford Truitner intends to move the court in the above entitled action on the following grounds, to wit: (1) Irregularity in the proceedings of the court, jury, and adverse parties, by which defendant was prevented from having a fair trial. (2) Misconduct of the jury. (3) Accident and surprise, which ordinary prudence could not have guarded against. (4) Newly discovered evidence, etc. (5) Excessive damages appearing to have been given under the influence of passion and prejudice. (6) Insufficiency of the evidence. * * * (7) Errors in law. * * *"

The notice further recited that it would be based upon affidavit and also upon the minutes of the court. Indorsed upon the notice was an admission of service by the attorney for the respondent in words and figures following:

> "Due service of the within notice of intention to move for new trial and receipt of a copy thereof acknowledged this the 26th day of February, 1926."

It will be noted that the words "for a new trial" are omitted from the context of the body of the notice itself. The motion was denied by operation of law, and an appeal was regularly taken. The contention of respondent in support of the motion to dismiss the appeal is that no notice of intention to move for a new trial was ever filed, by reason of the omission of the words "for a new trial" in the body of the notice, an omission it is claimed which has the effect of completely nullifying the notice. The main question here presented is whether or not the notice as given was sufficient to satisfy the statutory requirement. There can be no question that the attorney for respondent was not misled or deceived concerning the object of the notice, and in fact he admits that he was not. He insists, however, that, notwithstanding this fact, the statute demands a literal compliance with its terms, failing in which the notice is a mere idle act having no force or effect.

In support of the motion we are cited by respondent to numerous cases involving the insufficiency of notices of appeal as being authority upon the question. No useful purpose would be subserved by a review or analysis of these decisions. It is sufficient to say with reference thereto that they present no analogy to the instant proceeding. The precise question here involved has received consideration by our Supreme Court. In the case of O'Connell v. Main, etc., Hotel Co., 90 Cal. 515, 27 P. 373, the sufficiency of a notice of intention to move for a new trial was under consideration by that court. The objection to the notice was, as here, that it did not formally give notice that a new trial would be asked for. The notice recited that defendant "intends to and will move this court to set aside the decision and judgment heretofore rendered, entered and made in said cause," and it set out, as a basis for the relief sought, various grounds specified in the Code of Civil Procedure for a new trial. It also recited that the motion would be made upon a statement of the case. It further appeared that respondent's attorney had stipulated to give the defendant further time "within which to prepare and serve his statement on motion for a new trial." The notice was held to be sufficient as a notice of intention to move for a new trial. In discussing the case the court took occasion to say that notwithstanding that the notice did not formally advise respondent that a new trial would be asked for, it distinctly and unmistakably gave that information. It was there pointed out that no possible case could be conceived where, under the grounds stated, the motion could refer to any other relief, except the granting of a new trial, and that respondent's attorneys could not possibly be misled, since they stipulated giving further time to defendant to prepare and serve its statement on motion for a new trial.

Precisely the same condition here obtains, and, in addition thereto, the notice is much more explicit, for it is denominated "Notice of Intention to Move for a New Trial." It further recites that it will be made by affidavit and upon the minutes of the court, which recital further indicates the character of the notice. As in the O'Connell Case, the grounds of the motion are stated and they apply only to a motion of this character. No other conceivable motion could be bottomed upon these grounds.

As above indicated, counsel could not possibly have been deceived, and, in fact, he admits, as indeed he must, considering his acknowledgment of service, that he was not misled. As was said in Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65:

> "The disposition of the courts is to hear appeals upon their merits, and the sections of the

Code relating to the subject should be liberally construed, with a view of promoting such purpose."

We are of the opinion that the notice so construed is amply sufficient to satisfy the statute. The record further shows that, after the denial of the motion for a new trial by operation of law, appellant filed his notice of appeal within proper time.

The motion to dismiss the appeal is denied.

We concur: CASHIN, J.; KNIGHT, J.

78 Cal. App. 801

J. L. TRUITNER and Alice Truitner, Plaintiffs and Respondents, v. Charles M. KNIGHT et al., Defendants; Clifford Truitner, Defendant and Appellant. (Civ. 5665.)

(District Court of Appeal, First District, Division 1, California. June 23, 1926. Hearing Denied by Supreme Court Aug. 19, 1926.)

Motion to dismiss appeal by defendant from a judgment of the Superior Court of Fresno County, C. E. Beaumont, Judge, in an action for damages for personal injuries. Motion denied.

Ford, Johnson & Bourquin, of San Francisco, and Carling & Cummings, of Fresno, for appellant.

G. Levin Aynesworth, of Fresno, for respondents.

TYLER, P. J. Plaintiff recovered a judgment against defendant in the sum of $4,000. The action was one for damages for personal injuries arising out of an automobile accident. Defendant appealed.

It is claimed that the appeal was not taken within the time allowed by law. There is no merit in the contention. The precise questions here presented were passed upon in the case of Rose Truitner v. Knight et al. (No. 5664) 248 P. 702, this day decided.

Upon the authority of that case, the motion to dismiss the appeal is denied.

We concur: CASHIN, J.; KNIGHT, J.

78 Cal. App. 802

Ethel TRUITNER, Plaintiff and Respondent, v. Charles M. KNIGHT, H. K. Mahakian and Clifford Truitner, Defendants; Clifford Truitner, Defendant and Appellant. (Civ. 5666.)

(District Court of Appeal, First District, Division 1, California. June 23, 1926. Hearing Denied by Supreme Court Aug. 19, 1926.)

Motion to dismiss appeal by defendant from a judgment of the Superior Court of Fresno County, C. E. Beaumont, Judge, in an action for damages for personal injuries. Motion denied.

Ford, Johnson & Bourquin, of San Francisco, and Carling & Cummings, of Fresno, for appellant.

G. Levin Aynesworth, of Fresno, for respondent.

TYLER, P. J. Plaintiff obtained a judgment against defendant in the sum of $300. The action was one for damages for personal injuries arising out of an automobile accident. Defendant appealed.

It is here claimed in support of the motion that the purported appeal was not taken within the time allowed by law for the taking of an appeal. The precise questions here presented have been passed upon in the case of Rose Truitner v. Knight (No. 5664) 248 P. 702, this day decided.

Upon the authority of that case, the motion to dismiss the appeal is denied.

We concur: CASHIN, J.; KNIGHT, J.

78 Cal. App. 582

FINKELSTEIN v. COSGROVE et al. (Civ. 5454.)

(District Court of Appeal, First District, Division 1, California. July 1, 1926. Hearing Denied by Supreme Court Aug. 26, 1926.)

Appeal and error ⚷659(1).

Under Code Civ. Proc. § 953a, where papers are through mistake, inadvertence, or neglect omitted from transcript, and not made part of record by trial court, application for relief should be made in first instance in trial court.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action by Jacob Finkelstein against John E. Cosgrove and another. On motion for diminution of record on appeal by plaintiff from judgment rendered. Motion denied.

G. C. Ringole and Samuel Hamburg, both of San Francisco, for appellant.

Sloss, Ackerman & Bradley and Sloss & Ackerman, all of San Francisco, for respondents.

CASHIN, J. A motion upon suggestion of diminution of the record, to insert in the transcript now on file in this court instructions offered by the parties at the trial of the action, in order that the record shall show at whose request certain of the court's instructions to the jury were given. The record on appeal was prepared under the provisions of section 953a of the Code of Civil Procedure, and the motion is accompanied by copies of forms of instructions certified by the clerk of the trial court to be true copies of "defendants' instructions" filed in his office.

These papers, in order to be available on appeal, should have been included in the reporter's transcript and made a part of the record, by the action of the trial court including them therein and certifying them to be correct. Tracy Brick & Art Stone Co. v. Wurster, 44 Cal. App. 652, 187 P. 125; Martin v. Pac. Gas & Elec. Co., 195 Cal. 544, 234 P. 321. As held in the case last cited,

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

if through mistake, inadvertence, or neglect they were omitted therefrom, application for relief in the first instance should have been made in the trial court, and in the absence of its action thereon the insertion of the papers in the transcript would add nothing to the authentic record on appeal.

The motion is denied.

We concur: TYLER, P. J.; KNIGHT, J.

MIX v. YOAKUM et al. (Civ. 5566.)*

(District Court of Appeal, First District, Division 2, California. June 25, 1926. Hearing Granted by Supreme Court Aug. 23, 1926.)

Executors and administrators ⟹443(7)—Complaint in action against executors to recover sum alleged to have been held in trust by deceased for plaintiff, without alleging demand on trustee, held not to state cause of action.

Complaint in suit against executors to recover sum alleged to have been held in trust by deceased for plaintiff, in which no demand was alleged to have been made on trustee during his lifetime, *held* not to state a cause of action, despite allegation of filing of claim with executor.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Charles M. Mix against F. E. Yoakum and another, as executors of the last will and testament of Finis E. Yoakum, deceased. From a judgment of dismissal, plaintiff appeals. Affirmed.

Newby & Palmer, of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, for respondents.

LANGDON, P. J. This appeal is by the plaintiff from a judgment of dismissal, entered after a demurrer to his amended complaint had been sustained, and he had declined to amend further.

The complaint alleged a confidential relationship between plaintiff and Finis E. Yoakum, based upon the fact that up to the time of his death Yoakum was the pastor of a church to which the plaintiff belonged. It is alleged that the plaintiff had an invalid child, and Yoakum promised to effect a cure of her disorders through prayer; that Yoakum obtained a great influence and control over plaintiff, and plaintiff had the greatest confidence in the integrity and benevolence of the said Yoakum; that in May, 1906, plaintiff was about to leave California because he could not secure employment here; that Yoakum became aware of such intention, and also of the fact that plaintiff had some money on hand, and "Yoakum then and there represented to the plaintiff that, if plaintiff would remain in California, he would continue to pray for plaintiff's said daughter, and that, if plaintiff would deliver to him the said funds, the said Finis E. Yoakum and one D. M. McDonald would hold the funds for plaintiff as a trust fund, to be by them loaned to various persons such as they should elect, and that such trust funds would earn plaintiff not less than 12 per cent. per annum; that they would pay the plaintiff such interest as his money would earn from time to time; and that they would repay to him the principal at such time as he should demand the same."

It is further alleged that the plaintiff, believing and relying upon said representations, delivered to Yoakum various sums, amounting in all to $3,300, for which he received receipts, which are set out in the complaint, and which are signed by D. M. McDonald and F. E. Yoakum; that the said Yoakum and McDonald paid to plaintiff the interest upon said sum of $3,300 at the rate of 12 per cent. per annum, which they represented to plaintiff was earned by said loan, up to and until the 4th day of May, 1915. It is alleged that Yoakum died testate on the 17th day of August, 1920, and defendants were duly appointed executors of his last will and testament; that there is due to plaintiff from the estate of said Finis E. Yoakum, deceased, the sum of $3,300, with interest at the rate of 12 per cent. per annum from the 4th day of April, 1914. It is alleged that a notice to creditors was duly published in the matter of the estate of Finis E. Yoakum, deceased, and that, in compliance therewith, on April 25, 1921, plaintiff duly filed his claim with the executors for money held by Yoakum in trust for plaintiff; that said claim has never been allowed nor rejected by said executors.

Plaintiff asks judgment for $3,300, together with interest at 7 per cent. per annum from April 4, 1915. In support of the ruling of the trial court, respondents urge that the complaint cannot be regarded as stating a cause of action to recover trust funds, because, in order that a suit may be regarded as one in equity to recover a specific trust fund, it is necessary for the plaintiff to allege that the identical trust property, or its substituted form, was traceable into the estate of decedent, and thus into the possession of his representatives. Roncelli v. Fugazi, 44 Cal. App. 249, 186 P. 373; Reed v. Reed, 178 Cal. 187, 172 P. 600.

This statement of principle is conceded by appellant to be correct, but he contends that he is relying upon the personal liability of the trustee for breach of trust, and that a failure to repay the money on demand was a breach of the trust. No demand is alleged to have been made upon the trustee during his lifetime, but it is argued that the filing of the claim with the executor was a demand sufficient to put the trustee in default. We think

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion of Supreme Court, see 254 P. 557.

there is a fallacy in this reasoning. Plaintiff is suing upon an alleged claim against the decedent; that claim was fixed and certain at the time of the death of Yoakum. According to the allegations of the complaint, there had been, at that time, no demand made upon Yoakum which he had refused, and he was not guilty of a breach of trust, therefore, in failing to repay the money upon demand. There are no allegations that any of the representations of decedent were false upon which to predicate an obligation upon this theory.

Two other theories of procedure were open to plaintiff: First, to trace the trust property, if he could; second, to allege, if he could, that decedent had mingled the trust property with his own, so as to make it impossible for the beneficiary to follow and identify it, which would constitute a breach of the trust and form the basis for personal liability. Estate of Dutard, 147 Cal. 253, 81 P. 519. Plaintiff has adopted neither theory in his complaint. Application of the rule of liberal construction of pleadings, for which appellant contends, does not remedy the defects in this complaint.

We must conclude, with the trial court, that the complaint does not state a cause of action. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

78 Cal. App. 460

ELMORE v. TINGLEY. (Civ. 2953.)

(District Court of Appeal, Third District, California. June 21, 1926.)

1. Pleading 🔑350(3)—On motion for judgment on pleadings, nothing can be considered but complaint itself.

On a motion for judgment on the pleadings, nothing can be considered but complaint itself, and all facts alleged are admitted for the purposes of the motion, and court is to determine whether such facts constitute a cause of action.

2. Pleading 🔑35—Complaint in action on note alleged delivered to plaintiff by defendant and partnership held good, notwithstanding unnecessary allegations as to dissolution of partnership.

Complaint in action on promissory note alleged to have been delivered by defendant and partnership *held* to state cause of action, notwithstanding unnecessary pleading of agreement dissolving partnership relation existing between plaintiff and defendant.

3. Pleading 🔑330—Demand for account of indebtedness set up in defendant's counterclaim, made by serving carbon copy of original and signed by attorney for plaintiff in typewriting, held sufficient compliance with statute (Code Civ. Proc. § 454).

In suit on promissory note, in which defendant by counterclaim set up an alleged indebtedness of plaintiff, demand of plaintiff for an account, made by serving a carbon copy of the original, which was unnecessarily filed in office of clerk of court, and being signed by attorney for plaintiff in typewriting, *held* sufficient compliance with Code Civ. Proc. § 454.

4. Pleading 🔑330—Defendant's failure to deliver to plaintiff, within time required, copy of account on which counterclaim was based, justified exclusion of his evidence tending to prove account (Code Civ. Proc. § 454).

In suit on promissory note, failure of defendant to deliver to plaintiff on request, within time required by Code Civ. Proc. § 454, copy of account on which counterclaim set up in answer was based, justified trial court, in exercise of its discretion, in refusing defendant permission to introduce evidence tending to prove account.

5. Trial 🔑382.

It is function of trier of facts to settle evidentiary conflicts.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by W. W. Elmore against J. M. Tingley, in which defendant filed a counterclaim. Judgment for plaintiff, and defendant appeals. Affirmed.

Clyde Thomas, of Chico, for appellant.

James T. Matlock, of Red Bluff, for respondent.

HART, J. This is an action on a promissory note, alleged to have been made and delivered to the plaintiff by the defendant and "Tingley & Elmore." Certain payments were made upon the note, which reduced the principal sum claimed to be due thereon at the time of the institution of the action to the sum of $600, for which sum, with interest, judgment was prayed.

The plaintiff and the defendant, for a number of years prior to the making of the note in suit, were engaged as partners in a mercantile business in Los Molinos, Tehama county. On March 12, 1921, the parties executed a written agreement dissolving said partnership. This agreement, it seems, was at least a part of the consideration for the dismissal of a suit or an action brought in the superior court of Tehama county by Tingley against the plaintiff herein and certain other parties. The nature or the specific object of said suit or action is not explained by this record. However, the agreement referred to provided for the dissolution of the copartnership relation between the plaintiff and the defendant in the prosecution of the mercantile business adverted to above, and further provided:

That defendant "has bought from W. W. Elmore" the said mercantile business, together with the store building in Los Molinos in which said business was conducted, the lot on which said building stood, and all the merchandise, book accounts, good will and all other assets pertaining to said business; that defendant was to "assume and save the said W. W. Elmore and D. A. Elmore and his wife, from all obligations now owing by the said firm of Tingley & Elmore," except a certain account held against the firm by one Buffum; that Elmore was to receive, and "has received from said J. M. Tingley and Henrietta Tingley, his wife, a deed" to certain described lots situated in the "L. W. Nelson tract," and in the town of Anderson, Shasta county, said lots being at the time of the dissolution owned by the firm of Tingley & Elmore; that the defendant "has paid to the said W. W. Elmore and D. A. Elmore, his wife, a certain $2,000, now held by Andrew Schafer in compliance with that certain memorandum executed on the 27th day of January, 1920, the receipt of which is hereby acknowledged, and has executed to the said W. W. Elmore and D. A. Elmore, his wife, a second mortgage for $1,000 on the property now held by Mrs. Tingley in Anderson," describing the same.

There are some other stipulations in the agreement, which it is not deemed necessary to recite herein. The complaint, besides pleading the promissory note and alleging payment of certain sums thereon, and nonpayment of the balance alleged to be due by reason thereof, sets out said agreement in hæc verba, but contains no reference by averment to the agreement, unless the following may be so construed:

> "That, on the 12th day of March, 1921, the defendant agreed in writing to assume all obligations legally owed by the firm of Tingley & Elmore."

The defendant filed an answer, together with what is designated in his pleading as a "cross-complaint." The answer denies the execution and delivery of the note set forth in the complaint by Tingley to plaintiff, and also denies other of the essential allegations of the complaint. The so-called cross-complaint alleges the fact that plaintiff and the defendant for many years prior to and up to March 12, 1921, conducted a business as copartners at Los Molinos; that during the existence of such partnership "and on the 29th day of December, 1920," plaintiff became and was indebted to said copartnership in the sum of $1,020.51 "for goods, wares, and merchandise, consisting of groceries, dry goods, general merchandise, and cash advanced, sold, and delivered by the said partners of Tingley & Elmore to the said W. W. Elmore," etc. That averment is followed by allegations to the effect that the said partnership existing between the defendant and the plaintiff was, by the written agreement pleaded in the complaint, dissolved on the 12th day of March, 1921; that by the terms of said agreement all assets, including book accounts, belonging to the said firm, "were sold, assigned, and set over to J. M. Tingley, defendant herein," and that "among the accounts thus sold and assigned to the said J. M. Tingley by the said agreement was the account above referred to, owing from the said W. W. Elmore to the firm of Tingley & Elmore"; that no payment or payments has or have been made by said Elmore (plaintiff) on said account, etc. The agreement is by the so-called cross-complaint annexed to and made a part thereof. A "second cause of cross-complaint" is set up in said pleading upon information and belief, and is to the effect that, since the termination of the copartnership theretofore existing between said Tingley and the plaintiff, as above explained, the plaintiff "has collected and converted to his own use certain accounts owing to the firm of Tingley & Elmore and which were by said agreement sold and assigned to Tingley," particularly the sum of $230.08 owing to said firm by one Mrs. L. E. Little, and which sum, it is alleged, plaintiff has never paid or accounted for to said J. M. Tingley. The prayer is that "the plaintiff take nothing by his action and that he, the said defendant, be given judgment against said W. W. Elmore, plaintiff herein, for the sum of $1,250.59."

No answer was interposed to the so-called cross-complaint; the trial court holding that the "pleading" filed in connection with the answer involved counterclaims, and that, consequently, no answer was necessary—a proper ruling, if the premise is correct. Judgment passed for the plaintiff for the amount sued for, and the defendant appeals upon a record prepared in accord with section 953a of the Code of Civil Procedure.

[1, 2] When the case was called for trial, and before the taking of testimony was begun, defendant moved for judgment on the pleadings, basing the motion on the ground that both the complaint and the answer showed that the obligation evidenced by the note declared upon grew out of and constituted a partnership transaction, and that an action cannot be maintained by one partner against another involving the partnership affairs, in the absence of allegations in the complaint showing that there has been an accounting and settlement of the partnership accounts, citing Dukes v. Kellogg, 127 Cal. 563, 564, 60 P. 44. The motion was denied, and properly so. The settled rule is that, upon a motion for a judgment upon the pleadings, nothing can be considered but the complaint itself. Nothing dehors the complaint, nor any defense thereto set up in the answer, can be taken into account in disposing of such a motion; "but the motion is to be determined upon the same principles as would be a demurrer to the complaint upon the same ground. All the facts alleged * * * are admitted for the purposes of the motion, and the court is to determine whether these facts constitute a cause of action. If the necessary facts are contained in the complaint, the objection that they are defectively set forth, or are in an ambiguous or uncertain form, will be unavailing. There must be an entire absence of some fact or facts essential to constituting a cause of action." Hibernia S. & L.

Socy. v. Thornton, 117 Cal. 481, 482, 49 P. 573, 574; see, also, Kelley v. Kriess, 68 Cal. 210, 212, 9 P. 129; De Toro v. Robinson, 91 Cal. 371, 373, 27 P. 671.

The complaint here states a good cause of action on the promissory note set out therein. Every fact essential to the statement of such a cause of action is alleged, to wit: That defendant and the partnership executed and delivered the note to plaintiff; that plaintiff is the owner and holder thereof, and that the balance remaining due on the principal sum thereof, after deductions of certain payments, is now due and payable; and that defendant has refused and still refuses to pay the same, although demand for such payment has been made. The pleading in the complaint of the agreement dissolving a partnership relation existing between the plaintiff and the defendant was not necessary to the statement of a cause of action for the relief sought, but the effect of the agreement as pleaded was neither to add to nor detract from the force of the facts constituting the statement of a cause of action for the recovery of the balance alleged to be due on the note. The agreement, as it is pleaded, is surplusage, so far as the action on the note is concerned. In view of the obvious object of the action, and the manner in which the agreement is pleaded, if it may properly be said to be "pleaded," it is puzzling to determine the reason or the purpose for inserting it in the complaint. If, however, the purpose of incorporating it in the complaint was to show the circumstances under which the obligation arose or originated (which was not necessary to the statement of a cause of action on the note), as set forth in the complaint, it falls far short of accomplishing that purpose. In other words, if it be assumed that the pleading of the agreement was or is material or necessary to show that such was its purpose, the complaint would be wholly wanting in the statement of the purpose or the fact that the note sued on grew out of the transaction referred to in the agreement.

There is in the complaint no explanation whatever disclosing any connection between the note and the matter with which the agreement is concerned. There is no averment to the effect that the making and delivery of the note to plaintiff was the culmination of the agreement of dissolution of the partnership, if it be assumed that that fact would have any material bearing on plaintiff's cause of action on the note. The only allegation in the complaint from which, by some stretch of the imagination, it might be inferred that the note was the outgrowth of the transactions mentioned in the agreement, is the following:

> "That on the 12th day of March, 1912, the defendant agreed in writing to assume all the obligations of the firm of Tingley & Elmore."

But that allegation neither directly nor even inferentially involves the statement that the obligation sued on is or was among the obligations of the firm which were assumed by defendant. But, as stated in the outset, the agreement would be out of place in the complaint, even if it be true (as the evidence shows is the fact) that the note in suit was among the obligations concerned with the agreement dissolving the partnership, since, manifestly, the fact of the making of the agreement and the terms and conditions thereof can be in their nature evidentiary only, or matters to be proved and not to be pleaded, assuming that they have in one way or the other any material relation to the obligation upon which this action is founded or to the right of plaintiff to recover thereon.

The point next made by defendant arose below as follows: As seen, the defendant filed, with his answer, a document which he designated therein as a "cross-complaint," and which the court below held to involve nothing more than the pleading of counterclaims. There is no point made here that the court erred in so holding. Hence we will treat the claims set up in the part referred to of defendant's pleading as counterclaims. It will be noted that the counterclaim first set up by defendant is founded upon an alleged indebtedness of plaintiff to defendant in the sum of $1,020.51, alleged to be due "said copartnership of Tingley & Elmore" for "goods, wares, and merchandise, consisting of groceries, dry goods, general merchandise, and cash advanced, sold, and delivered by the said partnership * * * to the said W. W. Elmore," etc. On the 8th day of October, 1924, the plaintiff, through his counsel, served or caused to be served on defendant, through his counsel, a typewritten demand, dated October 24, 1924, that said defendant, within five days from the date of the service thereof, deliver to plaintiff "a copy of the account and moneys referred to in the counterclaim set forth in your answer in this action, in accordance with section 454 of the Code of Civil Procedure."

It appears from the record—in fact, by admission of counsel for plaintiff—that an original and a carbon copy of the demand were prepared; that counsel for plaintiff caused the original to be filed in the office of the clerk of the court with the papers and files of the action, and the carbon copy, with the name of plaintiff's attorney, typewritten, at the end of or underneath the demand, to be served on defendant. Due service of this copy on the 8th day of October, 1924, was attested by the affidavit of the office clerk of plaintiff's attorney. In fact, the attorney for defendant admitted that he was served with the purported demand. But no heed was paid thereto by the defendant or his counsel. In other words, a copy of the account upon which the counterclaim first alleged in defendant's answer was founded was not furnished or delivered to plaintiff or his attorney by defendant or his attorney. When defendant, at the trial, offered evidence to prove said alleged counterclaim, objection by counsel for plaintiff to any evidence being given or received in support of said claim, on the ground that the demand for a copy of the account out of which said claim arose was not complied with by defendant, was sustained by the court.

Defendant here vigorously contends that the demand was wholly void and of no effect for two reasons, and that he was not required to furnish a copy of the account upon a purported demand, which in law was no demand at all. The two reasons are: (1) That the law contemplates that the original, and not a carbon or other copy, of the demand shall be served upon the party setting up the claim and from whom a copy of the account is demanded; (2) that the law requires that the party entitled to and making the demand for a copy of the account shall subscribe in his own handwriting his name to the demand. So much of section 454 of the Code of Civil Procedure as is pertinent to the present inquiry reads:

> "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof."

[3] The above section does not, as will be noted, prescribe a particular form of the demand which must be served upon the party from whom a copy of the account is demanded; but it must, of course, be in writing, as the section so declares, and, although the section does not expressly so provide, it should either be signed by the party making the demand, or contain some other clear indication that the party making it is the party against whom the account is set up, since, obviously, the party upon whom the demand is made is entitled thus to be furnished with information from which he can determine whether the demand is made by a party entitled to be furnished with a copy of the account upon which the cause of action stated in the complaint is based. Nor is it necessary to file the demand in the office of the clerk of the court, with the files and papers in the action, or at all, since the statute does not so provide. But it is difficult to find a substantial reason for holding that the document served upon defendant by plaintiff as a demand for a copy of the account from which the counterclaim first set up in the answer arose is not sufficient as such a demand merely because it was a carbon copy of the original document or demand prepared by the plaintiff. The object of the demand is, obviously, to secure to the party making it reasonable notice of the items constituting the claim which he is required to meet, so that he may prepare for trial. Ames v. Bell, 5 Cal. App. 1, 4, 89 P. 619.

The Code section, as stated, prescribes no set form for the demand; nor is there anything therein about "original" and "copies" of the demand to which it refers. In other words, there is nothing in said section which, in terms, provides for the making of an "original" written demand or a "copy" of a written "original" demand. While, of course, the party making it may make a copy for his own convenience and use, a matter which he is to determine for himself, there is, so far as the object of the demand or the law authorizing it to be made is concerned, no occasion for both an original and a copy of the demand, since, as seen, the demand is not required to be filed. It is plainly apparent, therefore, that where the demand has been written on two different sheets of paper, one directly on a sheet, and another reproduced from the other by carbon process, it is entirely immaterial which of the two is served on the party upon whom the demand is to be made. When served, the one is as much the original as the other, so far as the purposes of the service are concerned. In other words, either will effectually serve the purpose contemplated by the statute.

As before suggested, all that is required by the statute, under a rational construction thereof, is that the party counting upon the account be given such notice of what is demanded of him by the adverse party as will clearly inform him of the particular account referred to in the demand, and enable him to know that it is the one pleaded by him, and that the party demanding the copy is the adverse party in suit, and therefore entitled to such copy. This being done, it is wholly immaterial whether the demand is in typewriting, or in the handwriting of the demandant, or in point of fact a carbon or other reproduction of an original draft of the demand. The case of Edelman v. McDonell, 126 Cal. 210, 58 P. 528, cited by appellant as supporting the proposition that the "original" and not a copy of the demand must be served on the party suing on the account, is not an authority for the position thus taken. In fact, that case makes no reference to the demand for a copy of the account therein sued on, except to say that:

> "We have no legal evidence that such bill [of particulars] was ever *demanded* by or delivered to the adverse party."

The particular language of the opinion in that case which counsel seems to think directly supports his contention that, to make the demand legal, the "original" and not a carbon "copy" of the demand must be served upon the party declaring upon an account alleged in a general way, is the following:

> "The statute requires that it shall be delivered to the adverse party, and not a copy thereof, and does not require, or expressly authorize, it to be filed."

In using that language the court was referring to the bill of particulars, and not to the demand for the bill or a copy of the account sued on.

Nor do we think that the fact that the attorney for the plaintiff caused his name to be attached to the demand in typewriting, rather than subscribing it thereto in his own handwriting, made the demand or the service thereof any the less legally effective. The demand contained the title of the court and the cause, and underneath the typewritten name thereon of counsel for plaintiff were the words "attorney for plaintiff," indicating that the said attorney was regularly acting for plaintiff in the litigation and for the latter had the legal right to make the demand. The necessity, if it be necessary, that the demand be subscribed by the party making it, is deducible by implication only, since section 454 does not expressly require the name of the demandant to be subscribed to the document. For this reason we think that the adoption by the attorney for plaintiff of the typewritten method of attaching his name to the demand at the bottom thereof was sufficient (Ligare v. California S. R. R. Co., 76 Cal. 610, 611, 18 P. 777), and that the demand thus signed by the attorney served the purpose of such a document as fully and effectually as it could have done, had the name of the attorney been subscribed to the document in his own handwriting. It would be idle to argue that the attorney for defendant did not know what the demand meant or was intended to accomplish, or what was expected and required thereby of him or his client.

[4] The failure of the defendant to deliver to the plaintiff within the time required a copy of the account upon which the counterclaim first set up in the answer was based justified the trial court, in the exercise of its discretion, in refusing to allow defendant to introduce evidence tending to prove the account. As to the counterclaim secondly set up by defendant, the trial court ruled that the said demand had no reference or application thereto, and therefore permitted defendant to introduce evidence in support thereof.

It is next insisted that it was error to deny the motion for a nonsuit by defendant, made on the close of the plaintiff's case, upon the ground that it was by plaintiff's evidence shown that the obligation which is the basis of the cause of action stated in the complaint "was a partnership obligation and that this was a suit between partners." This contention cannot be sustained. Indeed, it is not consistent with the defendant's own statement in his brief of the facts developed by the evidence presented by the plaintiff. That statement is:

> "On the trial it developed, over the objection of the defendant, that the plaintiff and defendant had for a great many years been associated together as partners in business in Tehama county; that during the said time certain moneys had been advanced for the use of the firm by W. W. Elmore, one of the partners; and that, as proof of said moneys advanced, defendant, J. M. Tingley, had executed a note for and on behalf of the copartnership, and had given it to the plaintiff, W. W. Elmore, which note is the basis of this action."

The foregoing statement, candidly made by counsel for the appellant, is in accord with the evidence introduced by the plaintiff, and clearly shows that the court was legally without authority to grant the motion for a nonsuit. It will not be doubted that, upon the situation as to the evidence so disclosed, the plaintiff, no less than a stranger to a partnership to which he has loaned or advanced money, has the right to maintain an action against the partnership for any money he in his individual capacity loaned to it. The action upon the claim would, of course, be subject to any defense which the partnership might be able legitimately to interpose against recovery thereon, or the right of the partnership to set up any counterclaim or offset that it might be able to set up against recovery by plaintiff on his claim, either in whole or in part.

[5] The findings are sufficiently supported. There was testimony, offered by defendant and received into the record, tending to establish the counterclaim secondly set up in the answer. The defendant also testified that the obligation evidenced by the note in suit was covered by another obligation in favor of plaintiff, and against the defendant and the partnership, which had been paid and satisfied. All this evidence, however, was contradicted by the plaintiff, and thus there was created the evidentiary conflict upon those matters which it is always solely the function of the trier of the facts to resolve and settle.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

DICKEY v. WALROND et al. (Civ. 5540.)*

(District Court of Appeal, First District, Division 2, California. July 2, 1926, as Modified, July 31, 1926. Hearing Granted by Supreme Court Aug. 26, 1926.)

1. Wills 🔑1.

Testator can dispose of his property by will as he sees fit, pertinent statute being enacted to enable the court to ascertain his intention.

2. Wills 🔑529—Under will providing that if widow should die before termination of trust her share should go to her "heirs," children and surviving husband shared equally (Civ. Code, §§ 779, 1334, 1335, 1386).

Under will providing that, on death of widow before termination of trust, her share should "go to her heirs at law," the devise to her heirs was both a donation and limitation, and by terms of Civ. Code, § 1335, section 1334 does not apply, and the statute of succession (section

---

*Superseded by opinion of Supreme Court, see 253 P. 706.

1386) merely determined the heirs, and under section 779 the will determined the proportions, and widow's children and surviving husband shared equally.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

3. Wills ⚷440.

In construing will court may ascribe to testator, so far as his language permits, the common impulses of human nature.

4. Wills ⚷529.

Gift to a class, postponing possession to a future period, in absence of language or circumstances showing a contrary intention, is shared by the members equally, in view of Civ. Code, § 1337.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action to quiet title by Frank Fletcher Dickey against E. A. Walrond and others. From the judgment, F. P. Roberts, individually and as administrator of the estate of Marchisi Roberts, deceased, appeals. Affirmed.

Walter H. Linforth and Edwin V. McKenzie, both of San Francisco, for appellant.

Harding & Monroe, of San Francisco, for respondent Frank Fletcher Dickey.

A. E. Shaw, of San Francisco, for respondents Frank Fletcher Dickey, William James Dickey, and Robert Bernard Dickey.

PER CURIAM. The opinion filed July 2, 1926, is modified to read as follows:

W. J. Dickey died on the 5th day of July, 1912. He left him surviving his wife, Marchisi Josephine Dickey, and two minor sons, William James Dickey, Jr., and Robert Bernard Dickey. This plaintiff was not his son, but was the son of his wife by a former marriage and had had his name changed to Dickey. The decedent left a will. By the terms of the will certain specific bequests were made and then as to the balance of the property the will provided that it should pass to his executors, Bernard Faymonville, E. A. Walrond, and M. B. Harris, as trustees. By the terms of the trust the trustees were to hold the property until the two minor sons should reach the age of 21 years. Thereupon the remainder of the estate should pass as follows: To his wife an undivided one-half part thereof, and to each son an undivided one-fourth thereof. The will further provided that:

> "In the event of the death of my said wife during the life of this trust, then the undivided one-half part that would otherwise have gone to her shall go to her heirs at law."

The language of the will was carried into the decree of distribution. After the death of W. J. Dickey his widow intermarried with Frank P. Roberts. Thereafter, on the 28th day of January, 1923, she died, leaving a last will and testament. At the time of her death William James Dickey, Jr., and Robert Bernard Dickey, the sons of the trustor, were both living and both were under the age of 21 years. Her son, Frank Fletcher Dickey, and her husband, Frank P. Roberts, also survived.

Frank Fletcher Dickey commenced an action to quiet title, and in his complaint he made the surviving trustees defendants and also included Frank P. Roberts as an individual, Frank P. Roberts as the executor of the estate of Marchisi Roberts, deceased, and he also included William James Dickey and Robert Bernard Dickey. The defendants answered and a trial was had in the trial court before the court sitting without a jury. Among other things, the trial court made a finding as follows:

> "That as heirs of the said Marchisi Roberts, deceased, the said plaintiff and the defendants Robert Bernard Dickey, William James Dickey, and Frank P. Roberts are the owners subject to the trust hereinafter mentioned in equal shares of the undivided one-half of the property of said W. J. Dickey, deceased. * * *"

Being dissatisfied with the portion so decreed to him, Frank P. Roberts took this appeal under section 953a of the Code of Civil Procedure. The appellant presents one point, and that is that as a conclusion of law the trial court should have entered a decree finding that appellant is the owner of an undivided one-third of the property, that would have gone to Mrs. Roberts under the will of W. J. Dickey, deceased, if she had not died during the life of the trust, and that the three children of Mrs. Roberts are the owners of the remaining two-thirds in equal proportions.

[1] There is no doubt that in this state a testator has the right to dispose of his property by will as he sees fit. It is not contended that we have any statute, pertinent to the facts of this case, restraining him from doing so or directing to whom and in what amount the property shall be devised or bequeathed. Any and all such pertinent statutes were enacted for the purpose of carrying into effect, and to enable the court to ascertain, the intention of the testator. Estate of Murphy, 157 Cal. 63, 69, 106 P. 230, 137 Am. St. Rep. 110. In the will of W. J. Dickey he named definitely and specifically the beneficiaries. Having done so, and to provide what should be done if any one of the beneficiaries died during the life of the trust, he named again each one and provided that in the event of the person's death the share devised to said beneficiary should "go to his (or her) heirs at law." That phrase is used in the clause under attack and it is used in reference to the possible death of each son

and then as to the possible death of both sons. As the testator stated in his will, he did not make any direct devise or bequest to this plaintiff because he felt confident that the testator's wife would provide for the plaintiff. There is nothing showing that the testator ever contemplated that his widow would remarry or, if she did, that she would marry the appellant.

[2, 3] W. J. Dickey was not inclined to deal loosely with his bounty. Thus he did not directly devise anything to his stepson, this plaintiff, but confined his bounty to his own sons and his wife. Although by his will he disposed of separate property aggregating in the neighborhood of $500,000, he did not give to those outside of his sons and wife but $25,000, and that sum did not include a single personal bequest. It is likewise clear that in the expression "his (her) heirs at law," the testator had no individual specially in mind. At the date he made the will the possible heirs of his wife were: (1) Her three sons; (2) the child or children of each one of the sons; (3) the son's child or children. Contemplating these contingencies, it is clear that in certain events any certain individual might or might not be an heir, and that, under the law of succession, the amount would be as varying as the event or events.

It thus appears that from the words of the will, taking into view the circumstances under which it was made, that the persons who were to take after the death of Mrs. Dickey during the life of the trust are definitely and certainly designated, but that as to the proportions in which they were to take, nothing is specifically mentioned. Especially is it true that there is nothing expressly to the effect that the heirs shall take otherwise than in equal shares.

Contending that the testator used the word "heirs" without other words of qualification, and that the terms were used as words of donation, the appellant cites and relies on section 1386 and section 1334 of the Civil Code. The first is the general statute of succession. The other section, omitting irrelevant parts, provides:

> "A testamentary disposition to 'heirs' * * * of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession."

If that rule is followed, then we are assuming that the testator intended by his will to provide that, under the circumstances which we have recited, the third husband of the testator's widow was to receive a larger portion than the portion which each of the testator's sons would receive and a larger portion than the testator's stepson would receive. But there is nothing on the face of the will showing any such intention.

The respondent controverts the appellant's contention and makes the claim that the above sections are not applicable and that the "heirs at law" constitute a class and each one in the class should share and share equally. The trial court took the latter view and entered its judgment to the effect that the heirs took in equal shares. In doing so we think there was no error. In Estate of Wilson, 65 Cal. App. 680 at page 690, 225 P. 283, 287, the court quotes with approval as follows:

> "In construing a testator's will as executed by him the court may ascribe to the testator, so far as his language permits it, the common impulses of human nature."

We think it can be said, taking into view all of the circumstances under which the will of W. J. Dickey was made, that it clearly appears that it was not his intention to provide in his will, by using the words "her heirs at law," that his wife's third husband should, as her heir, take a larger portion than each of his own sons or his stepson, also heirs of the testator's wife, should take. It was not a "common impulse of human nature" to ascribe to him.

Before the Code the rule in Shelly's Case obtained in this state. Norris v. Hensley, 27 Cal. 439. That rule included these propositions:

> "At common law, a devise of an estate to heirs which they would have taken by descent, was void, and the heirs took as heirs and not as purchasers." Page 446. "If the law will not admit of all possible heirs, etc., taking the inheritance after its inception by a freehold in the ancestor otherwise than by descent, it follows that wherever the limitation to the heirs, etc., after a freehold to the ancestor is admitted to reach the whole denomination or class of heirs described, they must take by descent and not by purchase." Page 447.

Knowing the existence of those rules, the Legislature, on adopting the Codes, enacted Civil Code, § 779, which reads:

> "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life."

Later, when the question was before it, in the case entitled Barnett v. Barnett, 104 Cal. 298, at page 301, 37 P. 1049, 1050, the Supreme Court said:

> "By section 779 of the Civil Code the term 'heirs' is changed from the word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was creat-

ed for them at the execution of the deed to him."

At the same time the Legislature adopted section 1334, Civil Code, as follows:

> "A testamentary disposition to 'heirs' * * * of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this Code."

And it adopted section 1335, Civil Code, as follows:

> "The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person."

As the decedent did not give his property directly to the appellant the devise to him was not necessarily one of "donation and not of limitation." Civil Code, § 1335. An examination of the will discloses that the devise to the appellant, as an heir, was *both* a donation *and* a limitation and therefore Civil Code, § 1334, does not apply.

It follows that resort may be had to the statute of succession for the purpose of ascertaining who were the heirs of the widow of the deceased. Having done so, that statute ceases to be a factor. To ascertain the proportions in which each heir takes the respondent was entitled to rely on the instrument creating the remainder. Civil Code, § 779, supra. As that instrument, when fully and completely construed, contains no expression to the contrary each member of the class shares and shares equally. Burke v. Modern Woodmen of America, 2 Cal. App. 611, 84 P. 275; Cooper v. Wilder, 111 Cal. 191, 43 P. 591, 52 Am. St. Rep. 163; De Laurencel v. De Boom, 67 Cal. 362, 7 P. 758.

Estate of Watts, 179 Cal. 20, 175 P. 415, is not helpful. The will in that case did not involve a life estate and a remainder over. The devise was direct. Hence Civil Code, §§ 1334 and 1335, both applied. Moreover, the will was so worded as, in effect, to adopt section 1334. It was "to my heirs *and to be distributed to them according to law.*"

Estate of Marshall, 176 Cal. 784, 169 P. 672, is not helpful because the words of that will are "to my own family who I think are all in Mexico," thus qualifying the word "family."

Estate of Wilson, 184 Cal. 65, 193 P. 581, is not helpful because the language of the will before the court was "shall be distributed among my heirs, as provided by the laws of the state of California, the same as if I had died intestate." This language adopts section 1386—the law of succession. See page 70, 193 P. 583,.

[4] Where, as here, a gift is made of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, such fact is a circumstance indicating a gift to a class. Where, as here, the devisees are described as a body, their names not being mentioned, and there is nothing to indicate a gift to individuals, that fact is a circumstance indicating a gift to a class. Estate of Fisk, 182 Cal. 238, 241, 242, 187 P. 958. And when it has been ascertained that the gift was made to a class and possession was postponed to a future period, the gift includes all persons coming within the description before the time to which possession is postponed (Civ. Code, § 1337), and they take in equal shares in the absence of language or circumstances showing a contrary intention.

The judgment is affirmed.

The petition for a rehearing is denied.

---

78 Cal. App. 683

PEOPLE v. JONES. (Cr. 920.)

(District Court of Appeal, Third District, California. July 13, 1926.)

Burglary ⟹10—Burglary in first degree held not shown, where defendant entered railroad caboose, not armed with deadly weapon or assaulting any person; "inhabited dwelling house or building" (Pen. Code, § 459, and section 460, as amended by St. 1923, p. 747).

A railroad caboose not being an "inhabited dwelling house or building," within Pen. Code, § 460, as amended by St. 1923, p. 747, in view of Pen. Code, § 459, and evidence not showing that defendant removing articles therefrom was armed with a deadly weapon at any time, or that he assaulted any person, *held*, that conviction for first degree burglary was not sustained.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inhabited Dwelling House.]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Tom Jones was convicted of burglary in the first degree, and he appeals. Reversed.

Arthur M. Bundy, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

NEEDHAM, Justice pro tem. The defendant was charged with the crime of burglary, and the jury found him guilty of burglary in the first degree. He appeals from the judgment and order denying his motion for a new trial. The salient facts in the case are that on the night of October 27, 1925, a freight train of the Sacramento Northern Railroad Company was standing in the yard of that company at Marysville; the rear car of the train was a caboose, within which the train crew kept certain personal effects in lockers. The train crew, consisting of two men, had locked the caboose and gone to the depot. Thereafter one A. H. Hale, a railroad detective, arrested the defendant and marched him down the track toward the depot. The two members of the train crew testified that the defendant had in his possession, when they met him in custody of Hale, the detective, certain personal property belonging to one or the other of them, which they had left in the caboose, and that they thereafter went back to the caboose and found a locker broken.

The defendant urges several grounds for reversal, and we have carefully examined each of them. We do not think they merit detailed consideration, other than the one ground, which we consider, and which ground we feel will require a reversal of the case.

As stated, the defendant was convicted of burglary in the first degree. There was no testimony that the defendant was armed with a deadly weapon while in the commission of such burglary, or that in the commission of such burglary he assaulted any person. Neither can it, we think, be claimed that the caboose at the end of the train should be classified as an "inhabited dwelling house or building," as used in section 460 of the Penal Code. Section 460 of the Penal Code reads:

> "1. Every burglary of an inhabited dwelling house or building committed in the nighttime, and every burglary whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.
>
> "2. All other kinds of burglary are of the second degree. * * *" (Amendment approved 1923; Stats. 1923, p. 747.)

We think that a caboose is a railroad car. See section 459, Pen. Code. The information in the case charges that the defendant "did * * * enter that certain railroad car commonly known as a caboose," etc. It would seem that both the trial court and the district attorney, when the verdict was returned, overlooked the amendment to section 460 of the Penal Code, adopted in 1923, changing the definition of the degrees of burglary in this state. As the caboose, under the facts in proof in the case, cannot be classified as an "inhabited dwelling house or building," and as there is no testimony that the defendant in this case was armed with a deadly weapon at any time, and as there is no claim that the defendant assaulted any person, the evidence at most could only sustain a conviction of burglary in the second degree, and the court erred in denying the defendant's motion for an order setting aside the verdict of the jury and granting a new trial.

For the reasons given, we are brought to the conclusion that the evidence in this case does not sustain a verdict of first degree burglary, and it follows that the order and judgment appealed from must be reversed. It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

78 Cal. App. 615

PEOPLE v. HILL. (Cr. 896.)

(District Court of Appeal, Third District, California. July 7, 1926. Hearing Denied by Supreme Court Sept. 2, 1926.)

Criminal law ⚿1071—Failure to comply substantially with statute requiring statement of grounds of appeal in application for transcript is fatal (Pen. Code, § 1247).

Pen. Code, § 1247, requiring appellant to state grounds of appeal or points relied on in application for transcript, is mandatory, and failure to comply substantially therewith is fatal.

Appeal from Superior Court, El Dorado County; George W. Thompson, Judge.

Seymour Hill was convicted of maintaining a common nuisance by selling and keeping for sale intoxicating liquors at his hotel, and he appeals. On motion to dismiss appeal. Appeal dismissed.

Thomas Maul, of Placerville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the offense of maintaining a common nuisance from August 26, 1924, to and including the 11th day of July, 1925, at his hotel, "in that said defendant did then and there willfully and unlawfully sell, barter and keep for sale on the premises aforesaid intoxicating liquor for beverage purposes." He filed notice of appeal and application for a transcript of the reporter's notes in the following terms:

> "To the Clerk of the Above-Entitled Court; to Abe Darlington, District Attorney of the County of El Dorado.
>
> "Notice is hereby given that the above-named defendant intends to and does hereby appeal from the judgment, entered by the above-entitled court, upon the verdict of the jury, which tried the above-entitled case, finding the said defendant guilty of the crime of maintaining a common nuisance. Said appeal is taken from the order permitting the district (attorney) to amend the indictment, from the order of the court overruling the demurrer of the defendant, from the verdict of the jury, and from every order, ruling, and decision of the court in each and every proceeding in the above-entitled case, and from the order of the court denying defendant's motion for a new trial. The clerk of the above-entitled court is hereby instructed and requested to have a transcript of every proceeding had in said case, including the arraignment,

pleading, and trial of the above-entitled case and all testimony taken at each and every proceeding, including statements of counsel, statements, and rulings of the court and everything transpiring at each and every proceeding."

The Attorney General has moved to dismiss the appeal on the ground that the application for a transcript does not state the grounds of the appeal or the points upon which the appellant relies. Section 1247 of the Penal Code provides that, upon taking an appeal, the appellant "must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken." It is clear that no attempt was made in the application to state the grounds of the appeal or the points upon which the appellant relies. It has been held uniformly that the provisions of section 1247 are mandatory and that failure to comply substantially therewith is fatal. People v. Flaherty, 61 Cal. App. 775, 215 P. 699; People v. Sanders, 60 Cal. App. 742, 214 P. 246; People v. Ali, 38 Cal. App. 544; People v. Measor, 20 Cal. App. 406, 129 P. 469; Rhodes v. Sargent, 17 Cal. App. 54, 118 P. 727.

The appeal is dismissed.

We concur: PLUMMER, J; NEEDHAM, Justice pro tem.

---

78 Cal. App. 595

GILLESPIE v. ANDREWS, Judge.
(Civ. 5307.)

(District Court of Appeal, Second District, Division 2, California. July 6, 1926.)

1. Divorce ⚷245(1).

Order, more than six months after entry of final decree of divorce, purporting to modify it as to alimony, on which subject it was silent, *held* void, notwithstanding stipulation of parties or Civ. Code, § 138.

2. Judgment ⚷297.

In absence of statutory authority, courts have no jurisdiction to alter their final judgments.

3. Courts ⚷23.

Parties cannot, by stipulation, confer on court a jurisdiction which the law has denied it.

Application by George S. Gillespie for writ of prohibition to be directed to Superior Court of San Diego County, C. N. Andrews, Judge thereof, to restrain enforcement of modified decree of divorce and assessment of penalty on petitioner for failure to comply therewith. Writ granted.

Arthur F. H. Wright, of San Diego, for petitioner.

Crouch & Sanders, of San Diego, for respondent.

CRAIG, J. It appears from the petition in this proceeding that on October 18, 1920, an interlocutory decree of divorce was made and entered in favor of Clara Gillespie and against George S. Gillespie, petitioner herein, and that on October 19, 1921, a final decree was entered dissolving the bonds of matrimony theretofore existing between the parties, and reciting:

> "That said plaintiff, and said defendant and each of them be and they are hereby free from each and all of the obligations thereof." The final decree also provided, as did the interlocutory judgment, "that the plaintiff herein, Clara Gillespie, be and she is hereby given the care, custody and control of George S. Gillespie, Junior, the son of the parties hereto."

[1] On September 22, 1922, the parties signed and filed in the original divorce action a stipulation in writing by the terms of which they agreed:

> That the interlocutory decree, and the final decree, "may be modified and amended with reference to the custody, care, education, maintenance, and support of the minor child of said parties in accordance with the modified decree, a copy of which is hereto attached."

Thereafter both parties appeared before the superior court, evidence was introduced, and an order entitled "Modification of Final Decree of Divorce," dated October 16, 1922, was made and entered. It provides that both parties desire "that said decree be modified so as to settle and dispose of the respective property rights of the parties;" that a property settlement was made between them prior to the rendition of the interlocutory decree, but that neither decree contained any provisions concerning the property rights of the plaintiff or defendant. It then proceeds, in part, as follows:

> "Now, therefore, it is hereby ordered and decreed that said decree of divorce be modified and amended" to award to the defendant custody of the boy, and that "*in lieu of said property settlement* heretofore entered into said defendant shall pay to said plaintiff within sixty (60) days from the date of *this modified decree* the sum of one thousand dollars ($1,000.00), *for the care, support and maintenance of the plaintiff*," $1,000 annually to and including the year 1926, and certain specified amounts each month, "until the marriage or death of said plaintiff."

Payments were not made as directed, and, pursuant to an affidavit and order to show cause, a hearing was held on January 11, 1926, at which time the matter was continued to January 25, 1926, and the court indicated that it would then punish the defendant for contempt. This proceeding was thereupon instituted, praying a writ of prohibition restraining the superior court from enforcing its so-called modified decree, and from assessing any penalty against the petitioner for failing to comply with its requirements. It is contended that the court exceeded its jurisdiction in attempting to alter or amend the final judgment by directing the payment of alimony.

[2] Section 138 of the Civil Code authorizes the modification, when necessary, of an order providing for the custody, care, education, maintenance, or support of minor children of the parties to a divorce action, regardless of stipulation. But, in the absence of statutory authority, courts have no jurisdiction to alter their final judgments. The final decree in question did not attempt to establish any of the property rights of the parties, or to direct the payment of any alimony; it was final in form and substance, and contained no reservation. The case is in this respect similar to Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70, wherein a final decree was entered which made no mention of alimony. Thereafter, upon petition of the plaintiff, an order was made "that defendant pay to plaintiff the sum of one hundred dollars per month" until the further order of the court. Certain property rights were there asserted by the complaint, and adjusted by the court in its final decree, but we do not think that fact is material to the question here presented. Upon appeal from the order directing the payment of alimony the Supreme Court said:

> "A judgment in a divorce suit settling the property rights of the parties, after the time for appealing therefrom has expired, is as final as any other kind of a judgment, except so far as the power to modify it is given by statutory provision. Of course, when we speak of a final judgment, we mean one which does not upon its face reserve jurisdiction (when that can be done) to make a supplemental decree, in which case it is not final. In the case at bar there was no such reservation; it was final in form and substance. And there is no statutory provision giving jurisdiction to make the order appealed from. * * * After the judgment granting the divorce, the plaintiff was no longer the wife of the defendant; and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. In the case at bar the judgment became final without any award of alimony; and, of course, the court could not afterwards 'modify' what never existed."

Other cases in this state announcing the same rule are O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225, McKay v. McKay, 125 Cal. 68, 57 P. 677, O'Brien v. O'Brien, 130 Cal. 409, 62 P. 598, Harlan v. Harlan, 154 Cal. 348, 98 P. 32.

[3] It follows, therefore, that, as more than 6 months had elapsed since the entry of both the interlocutory decree and the final decree, respondent had no jurisdiction to modify either by adding a provision for alimony for the support of the plaintiff, when each of those decrees was silent upon the subject, and hence that its order of October 16, 1922, was void. This being true, "the parties could not by stipulation confer upon the court a jurisdiction which the law has denied it." Bacigalupi v. Bacigalupi (Cal. App.) 238 P. 93; Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582.

It is ordered that a peremptory writ of prohibition issue in accordance with the views herein expressed.

We concur: FINLAYSON, P. J.; WORKS, J.

78 Cal. App. 223

PEOPLE v. EISEMAN et al. (Cr. 1206.)

(District Court of Appeal, First District, Division 1, California. June 1, 1926. Hearing Denied by Supreme Court July 30, 1926. Rehearing Denied and Opinion Modified July 1, 1926.)

1. Licenses 🔑40.

Fraudulent, fictitious sale and purchase of securities in another state will not enable accused to avoid penalties of Corporate Securities Act on subsequent unlicensed sales.

2. Licenses 🔑40.

Evasion of law in and of itself is not crime, but may be considered in determining whether acts and conduct of defendants were intended to and did violate Corporate Securities Act.

3. Conspiracy 🔑47—Licenses 🔑42(4).

Evidence *held* sufficient to establish conspiracy to violate and violation of Corporate Securities Act.

4. Criminal law 🔑423(2)—In prosecution for conspiracy to violate Corporate Securities Act, defendants' statements out of presence of each other and communications in making sales, agents' representations to purchasers, and transactions with company through which sales passed held admissible.

In prosecution for conspiracy to violate Corporate Securities Act, defendants' statements out of presence of each other and communications in making sales, agents' representations to purchasers, and transactions with company through which sales passed *held* admissible, after foundation was laid tending to establish conspiracy, as tending to connect different defendants with conspiracy and as being in aid of common design.

5. Conspiracy 🔑45.

In prosecution for conspiracy to violate and violation of Corporate Securities Act, anonymous letter warning buyer to withdraw from enterprise, expressly referred to in one of defendant's letters, *held* admissible.

6. Conspiracy 🔑45—Licenses 🔑42(4).

In prosecution for conspiracy to violate and violation of Corporate Securities Act, evidence as to transfer of proceeds from sale of securities to accounts of defendants *held* admissible.

7. Criminal law 🔑395.

Evidence seized under search warrants is not inadmissible because warrants were defective.

8. Witnesses 🔑204(2).

In prosecution for conspiracy to violate and violation of Corporate Securities Act, employee of corporation may testify as to its correspondence and papers, though she was also secretary to defendant who was attorney, notwithstanding Code Civ. Proc. § 1881, subd. 2, where testimony did not relate to knowledge acquired in latter capacity.

9. Licenses 🔑42(4).

In prosecution for violating Corporate Securities Act, character of certificate given in payment for certain stock *held* immaterial, where indictment related to other securities.

10. Licenses 🔑18½, New, vol. 12A Key-No. Series.

Certificate issued and given in payment for Class B stock *held* "securities" of corporation, within meaning of Corporate Securities Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Security.]

11. Criminal law 🔑829(1).

Refusal of instructions substantially embodied in court's given charge *held* not error.

12. Conspiracy 🔑48—Licenses 🔑42(5).

In prosecution for conspiracy to violate and violation of Corporate Securities Act, question whether sale of securities to defendant in another state was valid *held* for jury, under instruction as to legal effect of purported contract of sale.

13. Licenses 🔑40.

One selling corporate stock without permit, contrary to Corporate Securities Act, is guilty of an offense, regardless of whether he knew he was violating law.

14. Criminal law 🔑822(7)—That part of instruction not requiring guilty knowledge for conspiracy to violate Corporate Securities Act, if error, held not prejudicial, where as a whole it indicated that corrupt motive was essential.

That part of court's instruction submitting question of whether defendants conspired to violate Corporate Securities Act, regardless of guilty knowledge, if error, *held* not prejudicial, where instruction as a whole indicated that corrupt motive was essential element of crime of conspiracy.

15. Criminal law 🔑829(3).

In prosecution for conspiracy to violate and violation of Corporate Securities Act, instructions emphasizing different testimony bearing on intent *held* properly refused, where general instruction told jury to consider all facts and circumstances disclosed by evidence.

16. Conspiracy 🔑48—Licenses 🔑42(5).

In prosecution for conspiracy to violate and violation of Corporate Securities Act, instruction relating to "common occurrences" of organizing corporations outside state to evade law *held* properly rejected, as embodying immaterial matter.

17. Jury 🔑103(3)—Disallowing challenge for cause as to juror whose answers as to whether he had formed opinion were conflicting held not error.

Disallowing challenge for cause as to juror whose answers as to whether he had formed opinion were conflicting *held* not error, question presented to court being one of fact, as to which answer revealed state of talesman's mind.

18. Licenses 🔑42(4).

Evidence *held* sufficient to show venue as to allegations of sales of corporate stock without permit contrary to Corporate Securities Act.

19. Licenses 🔑42(3).

Indictment alleging that securities issued by foreign corporation were brought into state by defendants and sold without permit *held* to state offense, under Corporate Securities Act, it not being necessary to allege defendants' connection with corporation.

20. Conspiracy 🔑28.

Conspiracy to violate Corporate Securities Act is crime.

21. Constitutional law 🔑46(3).

Constitutionality of Corporate Securities Act, § 14, declaring all securities sold in violation thereof to be void, not being involved in prosecution for conspiracy or violation of act, will not be considered.

22. Constitutional law 🔑62, 80(2).

Corporate Securities Act *held* not unconstitutional as illegally delegating judicial functions and legislative powers to corporation commissioner.

23. Licenses 🔑7(1).

Corporate Securities Act *held* not unconstitutional as being invalid exercise of police power.

24. Constitutional law 🔑230(1) — Licenses 🔑7(1).

Provisions of Corporate Securities Act *held* not unreasonable, arbitrary, oppressive, discriminatory, or in restraint of trade so as to make it unconstitutional.

25. Conspiracy 🔑37—That parties to conspiracy succeeded in perpetrating acts constituting crime they conspired to commit held not to relieve them of liability for conspiracy (Pen. Code, § 182).

That parties to conspiracy succeeded in perpetrating acts constituting crime they conspired to commit *held* not to relieve them of liability for conspiracy under Pen. Code, § 182, since crime of conspiracy is distinct offense from actual commission of crime forming object of conspiracy.

26. Licenses ⚿8(2).

There was no hiatus in operation of Corporate Securities Act, § 2, par. 3, at time of its repeal in 1923, since existing law remained in force till amendment took effect.

27. Criminal law ⚿42.

Defendants in prosecution for conspiracy to violate and violation of Corporate Securities Act *held* not entitled to immunity because they gave evidence before corporation commissioner, where they did not claim privilege of not giving testimony, and subpœna was not directed to them but to corporation, in view of Corporate Securities Act, § 17, as amended by St. 1923, p. 91, § 4.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

J. J. Eiseman and others were charged with conspiracy to violate and violation of the Corporate Securities Act. During the first trial, in which the jury disagreed, charges against defendant John I. Pankratz were dismissed. On second trial J. J. Eiseman was convicted of both offenses. Alexander R. Abrams was convicted of violating the act, and Holmes Ives and another were convicted of conspiracy, and they appeal. Affirmed.

Joseph A. Brown and R. P. Henshall, both of San Francisco, for appellant Eiseman.

Nathan C. Coghlan, of San Francisco, for appellant Abrams.

Joseph McInerney and Stanislaus A. Riley, both of San Francisco, for appellants Ives and Whelan.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Robert E. Fitzgerald, Deputy Dist. Atty., both of San Francisco, for the People.

KNIGHT, J. The defendants, J. J. Eiseman, Alexander R. Abrams, Holmes Ives, N. J. Whelan, and John I. Pankratz, were jointly indicted by the grand jury of the city and county of San Francisco for the crimes of conspiracy to violate and of having violated the California Corporate Securities Act (St. 1917, p. 673), which declares in part that "no company shall sell, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do * * *" (section 3); and that "every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes, or assists in causing to be issued, executed, or sold, any security * * * contrary to the provisions of this act * * * is guilty of a public offense * * *" (section 14).

The indictment contained eight counts, the first charging a conspiracy to violate said act, and the seven subsequent counts charging unlawful sales of corporate securities. The defendants were tried jointly, and during trial the charges against Pankratz were dismissed; as to the other defendants the jury disagreed. Upon second trial Eiseman was convicted on all eight counts; Abrams was found guilty on the seven counts charging actual violations of said act, but the jury disagreed as to the conspiracy charge; Ives was convicted on the conspiracy charge, the jury having failed to agree upon the remaining ones; and Whelan was convicted on the conspiracy charge and acquitted as to the others. All of the convicted defendants have appealed, and, with the exception of Ives and Whelan, who join in their defense, are represented by different counsel and have filed separate briefs. The legal contentions advanced by the respective appellants are substantially the same, however, and therefore the separate appeals may be considered together. Aside from the claim that the evidence as a whole is insufficient to constitute the offenses charged, no question of disputed facts has arisen, but a statement of the evidence seems necessary to a correct understanding of the conspiracy charge and of the numerous legal problems presented. The record on appeal is voluminous, containing some 4,500 typewritten pages of reporter's transcript and more than 500 pages of printed and typewritten briefs; and, although we shall attempt to relate only the essential facts, the summarization of them will necessarily be somewhat extended.

The transactions which eventually resulted in the indictment and conviction of appellants had their inception in a legitimate effort to aid in the financial affairs of an automobile tire company operating under California law, but developed into the consummation of a fraudulent scheme conceived by appellant Eiseman, in the promotion and profits of which his coappellants shared, whereby the worthless securities of a corporation organized by appellants in another state purposely to circumvent the effect of the California Corporate Securities Act, were, in violation of said act, brought into this state and sold to the stockholders of said tire company in particular, and to any one else in general who might be induced to buy them.

During the year 1922 said tire company was and for some time prior thereto had been engaged in the manufacture and sale of automobile tires, Ives being its president and Whelan its vice president and chairman of the board of directors. It had issued and sold a large amount of its stock throughout California, but early in the year 1922, in order to increase its working capital, undertook a further stock selling campaign, in which it enlisted the services of Eiseman, who at the time was a duly licensed stockbroker. The campaign was not successful, and during the summer of 1922 Eiseman's connection with the enterprise ended. He then went to Los Angeles, where he followed the brokerage business in connection with establishments unrelated to the tire company until his certificate as a broker was revoked for cause by the state corporation commissioner. Having learned while selling stock for the tire company that its stockholders were generally dissatisfied with their investments, Eiseman returned to San Francisco and unfolded to one Max I. Smith, then a licensed broker and since deceased, a plan to develop a Utah coal mining corporation and to trade its stock to the stockholders of the tire company, of whom he had a complete list, for their stock in the latter company and certain cash considerations. Smith did not look upon the plan with favor, however, and declined to enter into it. Eiseman then suggested that a so-called finance company be formed for the ostensible purpose of financing the tire company by discounting the latter's trade acceptances and loaning it money upon the security of customers' accounts, Eiseman predicting that the stock and other securities issued by such a company could be readily disposed of to the dissatisfied stockholders of the tire company for their stock in the latter company at par and a like amount in cash or its equivalent. Smith encouraged the scheme, and in furtherance thereof Eiseman, accompanied by Smith and one Carroll, a licensed salesman of corporate securities, visited the tire company's plant, where he conferred privately with Ives in regard to it. At the conclusion of the conference Eiseman informed Smith and Carroll that the proposition had been favorably received and if consummated he, Eiseman, would eventually be the owner of the tire company's factory. Thereupon, in the early part of September, 1922, Eiseman consulted with Roy Bronson, his attorney, as to the feasibility of the formation of the proposed finance company under the laws of the state of Delaware, so as to evade the effect of the California Corporate Securities Act and allow such company to operate and to sell its stock and securities in this state without the necessity of obtaining a permit for that purpose from the corporation commissioner. Bronson prepared an outline of such a company, together with a plan for the sale of its stock and securities in that state to Eiseman, and advised that such proceedings would be legal and if carried out would allow said stock and securities to be disposed of in this state by licensed brokers without interference or permit from the California corporation commissioner. Bronson's plans were later approved at a conference attended by Eiseman, Ives, and Whelan, and on December 19, 1922, at the request of those mentioned, he caused said projected company to be incorporated in Delaware, under the name of "Bankers' Mortgage & Discount Company," with three "dummy" directors and an authorized capital of $2,500,000 of Class A common stock of the par value of $100 per share, and 5,000 shares of Class B common stock of no par value. Immediately after organizing, the directors in Delaware authorized the issuance to Ives and Whelan of the entire Class B stock in purported consideration of services rendered by them in organizing the new company, and also authorized the issuance of $1,000,000 of 6 per cent. "income gold debentures" of the denomination of $100 each. Thereupon, in accordance with the Bronson plan, and on December 20, 1922, the directors entered into a contract purporting to sell to Eiseman $1,000,000 of its Class A stock and $500,000 of its debentures in units of two shares of stock and one debenture of the aggregate face value of $300 a unit for the sum of $120 a unit, making a total purchase price of $600,000, of which $25,000 was to be paid upon the execution of said contract and the balance in installments ranging in amounts from $25,000 to $300,000, the last installment falling due on June 1, 1925. Negative evidence was introduced by the prosecution sufficient to establish the fact that neither the initial payment of $25,000 above mentioned nor any of the others were ever made.

As part of the same transaction the directors executed a trust and escrow agreement pursuant to which the stock and debentures mentioned in the Eiseman agreement were afterwards deposited with a San Francisco firm to be delivered to Eiseman upon payment or evidence of payment of sums equivalent to the agreed purchase price. Immediately thereupon the principal place of business and in fact everything belonging to the Delaware corporation was moved to California, where the "dummy" directors were succeeded by a new board consisting in part of Eiseman, Ives, and Whelan; Ives becoming president and Eiseman vice president and managing director. In February, 1923, upon presenting the incorporation documents to the California secretary of state for filing, it was learned that the "Bankers' Mortgage & Discount Company" could not be domesticated in this state because the local Bank Act (St. 1909, p. 87, as amended), prohibited the use of the word "bankers" by a corporation engaged in a business not falling within the scope of such act. Another corporation was then organized under the laws of Delaware known as "California Mortgage & Discount Company," with a capitalization of 100 shares of the total value of $10,000, the entire stock of which was purported to have been purchased by "Bankers' Mortgage & Discount Company" in consideration of the transfer to it of 1,000 shares of the tire company stock; but neither transfer was ever made. California Mortgage & Discount Company was then moved to and domesticated in California, the personnel of its officers and board of directors being substantially the same as those of its companion Delaware company, and was thereafter represented as being an operating subsidiary of the last-named corporation, with like objects and purposes, and occupied the same offices in San Francisco.

Early in January, 1923, Eiseman revealed to Carroll the method by which and the time when he expected to realize large sums of money from the operation of his enterprises. He stated that in April, 1923, the finance company would declare a "dividend," which he intended should be paid out of the money received from previous stock sales (which dividend was in fact declared and paid in part as planned), and that as a result of the "reload," meaning as he said that those who had already bought securities would make further and greater purchases, the "blow-off" would come, and that with the large sums of money received he would be able to retire and live in Italy.

During the middle of December, 1922, which was prior to the date of the conversation just mentioned and before the date of the incorporation of the finance company in Delaware, and notwithstanding that said company was at that time wholly unauthorized to transact any business, plans were laid to sell its securities in this state, and many sales were actually made in Santa Clara, Napa, and Sonoma counties. A public meeting was held in San Jose which was attended largely by the tire company stockholders residing in the Santa Clara valley in response to notices prepared and sent by Eiseman under the name of the tire company and Ives as president. An address, illustrated by moving pictures taken for that purpose, was delivered by Whelan regarding the operation of the tire company's plant and the manufacture of its products, after which Eiseman elaborated upon the objects and purposes of Bankers' Mortgage & Discount Company. Smith and Carroll remained over a few days after the meeting to close initiated sales, while at the same time Eiseman and Whelan canvassed the owners of tire company stock and others in the Napa and Sonoma valleys. In January, 1923, Eiseman, accompanied by Carroll, visited and made sales among the tire company stockholders in the vicinity of Santa Cruz, their arrival being preceded by introductory telegrams purporting to come from Ives, but which were in fact sent by Eiseman. In making these sales and at the San Jose meetings false statements were made which clearly proved a deliberate design to impose grossly on those who might be induced to invest in said finance company. It was represented generally that the business of said company would be to supply the tire company with working capital, upon the security of customers' accounts and through the discount of trade acceptances; that thereby the tire company would be placed in a prosperous condition; and Eiseman emphasized the dual advantage which he said would accrue to those tire company stockholders who would surrender their stock in part payment of the new company's securities.

Among those purchasing in San Jose was one John Scherr, who, on account of illness, had been incapacitated from work for six years, making it necessary for his wife to earn the livelihood for both. Scherr and his wife were told that the finance company's securities would pay dividends of 6 per cent. every three months, and that the profits the Scherrs would receive therefrom would soon be enough to make it unnecessary for Mrs. Scherr to work. The Scherrs turned in their 100 shares of stock in the tire company, and, in addition, Mrs. Scherr was persuaded to call in an outstanding 7 per cent. loan of $1,500 and invest that money in these securities. Later, when a check for $90 was delivered to the Scherrs in payment of a "dividend," the agents told them that further "dividends" would be paid at intervals of about every three months, and that they would soon be able to purchase a fine automobile like the one the agents were then taking them to ride in. They were then asked if they had any other securities to invest, such as Liberty bonds, to which Mrs. Scherr replied that all they had left besides their home was a life insurance policy for $1,000. She was induced to part with this policy, but after retaining it for several weeks it was returned with the explanation that it was not convertible. In Sonoma county Eiseman and Whelan, on December 18, 1922, called upon a man named Trubody, and under the same misrepresentations as to the purposes of the finance company obtained from him 400 shares of the tire company stock at a valuation of $5,000 and 50 shares of Great Western Power stock with a like valuation of $5,000 as payment for 200 shares of the finance company stock. To another stockholder named Mastrup the additional representation was made that Eiseman was a banker and had formed a new company to do a banking and financing business in aid of the tire company, and from him they obtained 5 shares of the tire company stock and 5 shares of Dusenberg automobile stock, the latter stock being taken in as the equivalent of cash; but unintentionally he omitted to indorse the stock. It was returned to him with the request that he do so promptly that he might participate in the coming dividend. He complied with the request, later received the "dividend," and purchased more securities. One Arthur Forni of Napa county, although not a stockholder in the tire company, was induced to give his promissory notes aggregating $25,000 in payment of 250 shares of Class B stock and debentures of the face value of $25,000 upon the assurance of Eiseman, supported by a fictitious telegram, that Forni would be made a director and the vice president of the finance company. He became neither.

A purchaser named Hitchings, residing in Santa Cruz, testified that Eiseman represented to him that the finance company was in process of formation; that it already had money in the treasury and would pay a dividend on April 1st; that the money received from the sales of Class B stock was to be held until the "end of the financing period" and then returned; that subscribers for that stock were to be made associate directors of the company so as to keep in touch with the company's affairs and if dissatisfied could withdraw and receive back the money and stock they had paid in. The real financing of the company, it was represented, was to come from the sale of Class A stock and the debentures. Hitchings was induced to subscribe for 241 shares of Class B stock, giving in payment thereof an assigned note and mortgage for $8,000 and 405 shares of tire company stock.

Shortly after the trip to Santa Cruz a disagreement arose between Eiseman and Carroll, as a result of which Carroll severed his connection with the Eiseman schemes; but before doing so he threatened to advise Hitchings and others of the fraudulent character of Eiseman's enterprises. Thereupon Eiseman wired Hitchings that Carroll had been discharged "for very good cause," and warning Hitchings of Carroll's threat to "spread venomous propaganda," and a few days afterwards called upon Hitchings personally regarding the same matter. About this time Smith became seriously ill and withdrew from further association with Eiseman. His place as the broker for the finance company was filled by appellant Abrams, who had theretofore been sharing the Eiseman offices, although until Smith's death apparently was not interested in the promotion of said finance company. He had been doing business pursuant to a broker's license under his own name, Alexander R. Abrams, as well as under the fictitious names of Alexander & Co. and Bankers' Security Company. Under this latter designation and for an overriding commission of 2½ per cent. on all sales he consented to act as the broker for the sale of the securities of the Bankers' Mortgage & Discount Company.

Thereafter, about the middle of February, 1923, the active campaign for the sale of the finance company's securities commenced. Salesmen were sent out with letters of introduction signed by Eiseman and Ives. Preparatory circular letters and prospectus were mailed to all stockholders of the tire company containing Ives' indorsement of the new company and recommendations to purchase its securities. Sales were plentiful, the purchasers buying mostly units of Class A stock and debentures for which they paid one-third cash or its equivalent in convertible securities, one-third in tire company stock at par, and the balance in unsecured promissory notes. It was following Abrams' connection with the affairs of the finance company that the sales were made to the individuals named in the seven counts charging actual violation of the statute.

Under date of February 18, 1923, Hitchings wrote to Ives about a phone message from Carroll in which Carroll had said that upon investigation he had ascertained that "the story that Mr. Eiseman was connected with the notorious Alexander & Co.," was true; also that the finance company was not a California corporation, had not complied with the laws of this state, and consequently was without authority to sell any stock in California; that for those reasons he, Carroll, had withdrawn from the company and advising him, Hitchings, to protect himself. Hitchings added that "this story about Mr. Eiseman * * * had been circulating around town for some time" and was "bad for both companies," and that he would like to have Ives send him "a plain statement of facts as he knew them regarding Eiseman's connection with Alexander & Co.," also as to "Eiseman's reputation and standing in the financial and business world." The reply to this letter was signed and mailed by Ives, but was in fact written by Eiseman on one of the tire company's letterheads, Ives having delivered Hitchings' letter to Eiseman for that purpose. The reply was in part as follows:

> "My Dear Mr. Hitchings: Your personal letter to me bespeaks the acme of my desire. I have always been glad to hear from the stockholders directly. Relative to your inquiry regarding Mr. Eiseman's reputation and standing in the business world, it gives me great pleasure to inform you that I have personally known Mr. Eiseman for more than two years, during which time he has been in the active management of the finances of our company. The results that he brought us speak in the highest and most laudatory terms for themselves. We have always found him honorable, truthful and unequivocally honest. His financial standing, personal and property liabilities would be jealously coveted by men much older than he. Before coming to our company I personally made an exhaustive research into his antecedents, and the recommendations I received were of the highest. You, nor any one else need have any apprehension over any dealings entered into with Mr. Eiseman. At any time that you should find it possible to visit with me at my offices, I shall be glad to go into detail in eulogizing Mr. Eiseman's past and present status. Regarding Alexander & Co., permit me to state, with emphasis, that Mr. Eiseman was at no

time connected with that firm. On the other hand, when he discovered that they were handling our stock he immediately put forth every effort and succeeded in squelching their activities."

It was further stated that Eiseman was justified in dispensing with the services of Carroll on account of the latter's "chicanery in the San Jose deal." Any suspicions entertained by Hitchings were thus dispelled, and he became an ardent supporter of the new company. In March, 1923, Eiseman stated to another subscriber, who had been referred to Eiseman by Whelan, that the tire company had about $1,000,000 worth of business, of which about 60 per cent. had been available to the finance company since its organization out of which the finance company had already made a net profit of about $80,000.

On March 23, 1923, the finance company passed a resolution declaring a "dividend" payable April 1, 1923. On April 2, 1923, under authority granted by the Corporate Securities Act, the corporation commissioner issued a subpœna directed to Bankers' Mortgage & Discount Company, Alexander & Co., Bankers' Securities Company, and Coast Syndicate Company to appear on April 12, 1923, and report as to the securities issued and sold by Bankers' Mortgage & Discount Company. Up to that time said companies had done no business whatever except to sell stock and debentures, but after the service of said subpœna there was a manifestation of business activity. On April 10, 1923, an account was opened in the Bank of California in the name of the California Mortgage & Discount Company, and certain securities which had been theretofore received from purchasers of stock were placed in the bank for sale and to the credit of that account. On that same date two checks for $2,500 each were drawn against the account payable to the account of the tire company, and on April 30 another check was drawn for $5,000 payable to the same company. The purpose of these payments was not disclosed by the evidence, but if made as loans no trade acceptances, notes or other securities were ever received by said company as security nor did the tire company ever acknowledge receipt of the amounts of said checks. The evidence shows that after the service of said subpœna changes were made in the Abrams' records, carried under the name of Bankers' Securities Company, so as to make the entries agree with the theory of a sale by said finance company of its stock and securities to Eiseman and a resale by Eiseman to Abrams. Orders were also issued to the escrow depositary in San Francisco to deliver shares of stock and debentures to purchasers whose subscriptions had been paid up, although evidence of the payment of cash or its equivalent for these purchases never reached said escrow depositary.

Responding to said subpœna a verified return accompanied by a so-called "consolidated balance sheet" prepared by the finance company and its subsidiary company was filed by Abrams containing erroneous statements of operations and misrepresentations of the assets of said subsidiary company. There was also prepared and filed with said commissioner an application for a permit to issue and sell the securities of the finance company.

On May 25, 1923, the records of Eiseman and Abrams and of the finance company and its subsidiary, in San Francisco, were seized and their offices closed by the district attorney acting under the authority of search warrants. It appears from the records thus seized that during the operation of these enterprises there had been sold to purchasers 1,439 units of the finance company's securities aggregating a sale price of $431,700, of which amount $139,163.41 was accepted in unsecured purchase notes, $119,315 in tire stock at par, and the balance was in cash and securities other than the notes and tire stock already mentioned. The total amount of all cash received as initial cash payments and from the sale of convertible securities was $148,035.83. In addition the receipts from sales of class B stock made up of cash, purchase notes, tire stock, and other securities amounted to $120,427, of which amount there was in cash and convertible securities $48,402.

In the meantime, and after the service of said subpœna, the subsidiary company issued a check for $2,000 payable to Ives, with no explanation being made therefor; Eiseman sold to said company an unsecured note given by one Peasley, a purchaser of Class B stock; large sums of cash received from purchasers were transferred from the account of Bankers' Security Company to the personal account of Eiseman in another bank; other remittances were made to Ives by Eiseman with explanatory letters to the effect that the same constituted Ives' share of cash received from the purchases of class A stock and debentures; Eiseman, through Abrams, caused the assignment or transfer of various mortgages and other securities received as portions of the purchase price of Class A stock and debentures to be made to Eiseman's mother-in-law under the names of Mrs. James Burns and Mrs. Elizabeth Burns, and to his wife under her maiden name, Joyce Ivy Burns. So that as a result of these numerous payments and transfers there was left on hand at the time of the seizure under the search warrants the sum of $97.28 in cash, various delinquent and overdue mortgage notes and shares of stock of no marketable value, and a number of untransferred certificates representing shares of stock of the tire company which had been received from purchasers. The evidence further shows that no trade acceptances were ever received by either of the Delaware companies from the tire company; no loans were ever made to the tire company other than the sum of $10,000 represented by the checks already mentioned which were issued after the service of said subpœna; and no promissory notes or other evidence of the indebtedness were ever assigned or transferred to said Delaware companies by the tire company; and, furthermore, no record could be found of any transfer by either Eiseman or Abrams to either of the Delaware companies of any purchasers' notes or shares of tire stock turned in by them in payment of Delaware securities.

One of appellants' principal contentions is that the plan adopted and executed by them in the organization of Bankers' Mortgage & Discount Company and the subsequent sale of its stock and securities in this state, as such plan was established by the uncontroverted evidence adduced by the prosecution, did not constitute a violation of the Corporate Securities Act, and that therefore they are not guilty of the crimes of which they were convicted. This contention is based mainly upon the theory of a valid sale to Eiseman in the state of Delaware of the securities mentioned in the Eiseman agreement, to which the charges in the indictment exclusively relate. Appellants claim that as a result of corporate action taken in that state Eiseman acquired title therein to said securities, and that consequently a resale of the same in this state in repeated and successive transactions by brokers duly licensed by the corporation commissioner was permissible under subdivision A of section 2, par. 9 of said act (as amended by St. 1923, p. 87, § 1). In behalf of Ives and Whelan it is asserted, in effect, regarding the Class B stock, the title to which stands substantially upon the same ground as the securities covered by the Eiseman agreement, that the motive underlying the transfer of securities in a foreign state may not be inquired into in this state; that even though the acts resulting in the transfers be "tinctured with a malign purpose, yet, having been done outside the state of California, and beyond its jurisdiction, the legal effects would be the same." In furtherance of their theory of a valid sale to Eiseman in Deleware, appellants, at the trial, proposed a number of instructions which they claim embodied the law as it is declared in many cases in this state, among them being Hughes Manufacturing & Lumber Co. v. Elliott, 178 Cal. 181, 172 P. 584; Laurence v. Pacific Oil & Lead Works, 27 Cal. App. 69, 148 P. 964; Provident Gold Mining Co. v. Manhattan Securities Co., 168 Cal. 304, 142 P. 884; Lund v. Ganahl, 22 Cal. App. 103, 133 P. 501. The court refused to give these proposed instructions, and in lieu thereof instructed the jury in substance as follows: That no title passed to Eiseman solely by reason of the execution of said agreement; that the recitals contained therein as to payment of the purchase price for said securities were not binding upon the people of the state of California; that the legal effect of said agreement was that title should not pass until there was paid an amount equivalent to the agreed purchase price; that consequently, if the jury found that no payments were made, then title did not pass to Eiseman, but if it was found that some payments were made, title to such portion of said securities as were paid for and no more passed to and vested in him. Appellants claim that the law as thus given to the jury is contrary to the rule adhered to in the cases above mentioned as well as in the cases of Hart-Wood Lumber Co. v. Bonaly, 192 Cal. 180, 219 P. 432, Gopcevic v. California Packing Corp., 64 Cal. App. 132, 220 P. 1078, and Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199; that therefore the giving of those instructions constituted reversible error.

[1] Even though it be assumed that appellants' interpretation of the law of sales of personal property, with special reference to the question of passing title prior to the payment of the purchase price be correct, we are of the opinion that the rule contended for by them may not be invoked in a situation like the one here presented, where the evidence shows the object of the contract was not to provide for a legitimate sale and transfer of title to property, but to all intents and purposes was to create a mere fiction of law, constructed upon a collusive and fraudulent intent and design to violate and defeat the provisions of a penal statute. Under such circumstances we do not believe that such a transaction can be resolved into a legal contractual relationship so as to be controlled by legal rules of ownership applying to legitimate contracts of sale. In all of the cases cited by appellants the contracts considered were founded upon bona fide sales, free from the element of a fraudulent intent to defeat the operation of an existing law, and the controversies were confined to the parties related to the contracts. Here the evidence shows that the purported sale of these securities was in effect one from Eiseman to himself, based upon no consideration whatever, and manifestly the product of a criminal design. When such a contract is presented for recognition in this state, as being legally sufficient to place the parties claiming under it beyond the scope of the law of this state, the state itself becomes an interested party to the contract to the extent at least of having the right to inquire into the bone fides of the transactions upon which the contract is founded. Fraud vitiates all transactions into which it enters (12 Cal. Jur. 721), and in view of the evidence disclosed by the record upon this subject it would scarcely be contended, we think, that in an appropriate proceeding instituted by

an interested party the purported contract of sale in question would not be declared void. We believe, therefore, that by reason of the circumstances surrounding the purpose of this contract appellants may not shield themselves behind a salutary legal principle which ordinarily would be applicable to the case of a genuine sale. In the case of People v. McCalla, 63 Cal. App. 783, 220 P. 436, the defendant was found guilty of a violation of the Corporate Securities Act in that he sold without permit securities issued under a subterfuge, and it was said:

> "The case falls within the letter and the spirit of the act, and it would be a reproach to the administration of the law if the perpetrators of such a thinly veiled attempt to circumvent the manifest purpose of this salutary legislation should go unwhipped of justice."

The language quoted does not seem inappropriate here. True, the jury was instructed that fraud was not an issue in the case, but this instruction, as appears from the context, was manifestly given for the sole purpose of preventing the jury from becoming confused with the idea that the prosecution was being had under subdivision 4 of section 182 of the Penal Code instead of subdivision 1 of said section, and had no reference to that part of the indictment charging that appellants did "falsely, *fraudulently*, and corruptly and feloniously * * * conspire" to violate the Corporate Securities Act. (Italics ours.) If it be a fact, as appellants contend, that 208 units of said securities were actually delivered to Eiseman in Delaware, the status of the transaction is not altered, if for no other reason than that several hundred thousand units were brought into the state, and 1,439 of them were actually sold here. In this connection it is to be noted that at no time during the sale of these securities was it intimated that privately owned stock was being disposed of.

[2] The trial court carefully and correctly informed the jury that "evasion of the law in and of itself is not a crime," but further stated that if it was proved beyond a reasonable doubt that the acts and conduct charged in the indictment were true, and "were instituted with intent of evading the law of California, *and by such evasion to violate the Corporate Securities Act of California*" (italics ours), then such acts and conduct were in violation of the penal statute under which appellants were being prosecuted; also that all of the acts proved should be considered by the jury in determining whether or not they constituted an entire or part of a scheme, system, plan, or design by which the Corporate Securities Act "was to be evaded and *violated*" (italics ours), and that if the jury entertained any reasonable doubt as to the existence of any of the essential facts or features of the crime of conspiracy as they had been enumerated by the court, a verdict of guilty should not be found against any defendant as to whom such doubt existed. The instructions given upon the question of passing of title, which appellants assail, may be readily reconciled with the theory that if the jury found as a fact that the payments were made by Eiseman as recited or called for in the agreement, such fact might be taken as proof of the good faith of the transactions, in which event, as already pointed out, the chief element of the offense with which appellants were charged, namely, a fraudulent design to violate the statute, would doubtless be effectively destroyed.

The recent case of People v. Pace (Cal. App.) 238 P. 1089, cited by appellants, does not aid them. There the defendant, president of a California corporation actually engaged in the candy business, made a bona fide purchase from the corporation for a cash consideration of a certain unpaid promissory notes given to the company in payment of the purchase of stock, the stock for which the notes were given being held by the company as collateral for the payment of said notes. In accordance with the terms of the notes and upon default in the payment thereof the defendant dealt with the stock as though it were his own, disposing of at least a portion of it in different sales extending over a period of five months, without having a permit for that purpose. Briefly stated, the court held that to the extent that section 2, subd. 9, of the Corporate Securities Act attempted to require a natural person to secure a broker's permit before he may sell his own securities, when he is not the issuer or underwriter of the same, it was unconstitutional. It is at once apparent that that case, being free from the element of fraud, is clearly distinguishable from the instant one upon the facts.

[3] After giving full consideration to all contentions made by appellants regarding this branch of the case, we conclude that the evidence is sufficient to establish the offenses of which appellants were convicted.

[4] Appellants also rely for reversal upon a number of alleged errors of law which they claim occurred during trial. Being too numerous to deal with singly, it may be stated that they relate generally to rulings upon the admissibility of proof and to the giving and refusal to give certain instructions. The evidence objected to consisted mostly of statements made by the different appellants out of the presence of each other, representations made by appellants' agents to the purchasers in selling said securities, written communications and other documents sent out by the different appellants and by members of their respective office staffs in the negotiation and consummation of sales, and particularly evidence of the transactions had between Abrams' Bankers Security Company through which the sales passed and the purchasers.

After examining the record regarding these points we are satisfied that the evidence alluded to reasonably tended to connect the different appellants with the conspiracy, or else amounted to statements, acts, declarations, or correspondence of appellants or of their agents and employees, during the progress of the conspiracy and in aid of the common design and purpose thereof, and that the same were admitted in evidence after a foundation had first been laid by proof tending to establish the fact of such conspiracy. Such acts, statements, declarations, and correspondence were therefore properly admitted as evidence against each member of the confederacy. People v. Schmidt, 33 Cal. App. 427, 165 P. 555; People v. Creeks, 170 Cal. 368, 149 P. 821; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Vacarella, 61 Cal. App. 119, 214 P. 237; People v. Mazzurco, 49 Cal. App. 275, 193 P. 164; People v. MacPhee, 26 Cal. App. 218, 146 P. 522; 16 Cor. Jur. 654.

[5 8] We furthermore believe that all of the letters, circulars, checks, and other documents objected to were sufficiently identified and connected with appellants or with the conspiracy to justify their admission in evidence. The anonymous letter containing a warning to one of the purchasers to withdraw from the enterprise was expressly referred to in one of Eiseman's letters and therefore was admissible in evidence; and in any event its contents were not harmful. The evidence of the transfer of proceeds from the sale of securities to the accounts of Eiseman and to Ives, and the letters and documents incidental to these transfers, had a direct bearing upon the furtherance of the conspiracy as it was originally planned by Eiseman. Appellants strenuously urge and have extensively argued the point that the books, papers, and files seized under the search warrants were inadmissible in evidence because, as they claim, the proceedings and documents upon which the seizure was grounded were void. But assuming that the search warrants were defective, the contention that the evidence seized thereunder was inadmissible is completely answered by an adverse ruling in the case of People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383. The fact that Eiseman was a licensed attorney at law of this state and that upon the door of his offices appeared the wording, "Law Offices of J. J. Eiseman," did not disqualify Miss Colt from testifying as to the identity and authenticity of correspondence, documents, and papers issued by and belonging to the files of Bankers' Mortgage & Discount Company (subdivision 2, § 1881, Code Civ. Proc.), for the reason that her duties were that of clerk, bookkeeper, and cashier for the company mentioned, and none of the knowledge regarding which she testified was acquired by or imparted to her in the capacity of a clerk, secretary, or stenographer of an attorney at law; moreover, there is no claim made that the business enterprises forming the basis of these charges were promoted by Eiseman as an attorney at law.

[9, 10] The question of the character of the so-called certificates issued and given in payment for Class B stock is not a material matter, because the charges in the indictment related to the securities covered by Eiseman agreement; but, even if material, said certificates must be construed as "securities" of said company within the meaning of the Corporate Securities Act. People v. McCalla, supra. The other errors urged in reference to the admissibility of proof are either unimportant or insufficiently presented (People v. McLean, 135 Cal. 306, 67 P. 770), and hence do not require discussion.

[11, 12] As to the instructions, we have examined the entire charge of the court and also the instructions proposed by appellants which the court refused to give. From such examination we believe that when the court's charge is considered as a whole the jury was fairly and fully instructed upon all legal subjects pertaining to the offenses for which appellants were on trial, and also upon such legal matters as were necessary for the guidance of the jury in the exercise of its duties and prerogatives. Besides the matters already alluded to, the court's charge included instructions as to all material provisions of the Corporate Securities Act, the law of conspiracy, the question of intent, the right of parties in this state to incorporate and transfer securities outside of this state, and law bearing upon the territorial limitations of the California statutes; also the doctrine of reasonable doubt, burden of proof, and the benefit of legal presumptions. Many of appellants' proposed instructions which the court refused to give contained legal principles which were substantially embodied in the court's charge; others were offered in support of appellants' theory of a valid sale to Eiseman in Deleware; and the remaining ones related to matters which were immaterial to the issues, or contained some asserted principle of law which justified the refusal of the entire instruction. It was clearly within the province of the court to instruct as to the legal effect of the purported contract of sale, leaving to the jury for decision the disputed question of fact as to whether or not there was a bona fide sale.

[13, 14] Only a few of appellants' objections regarding instructions require special attention. They complain that in dealing with the subject of conspiracy the court in one part of its charge, upon the element of intent, instructed the jury that the question for it to pass upon was whether appellants "conspired to do the things which were in violation of law, not whether they had any knowledge that they were violating the law." The legal principle thus stated was doubtless applicable to the charges of actual sales of

securities. People v. McCalla, supra. If, however, as appellants contend, it be open to criticism when connected with the law of conspiracy, we do not believe the jury could have been misled by the instruction for the reason that the court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest intent is not a conspiracy as defined by law; also, that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants "honestly entertained a belief that they were not committing a wrongful act," and whether or not they "were acting under a misconception or in ignorance, without any criminal motive"; the court further stating, "Joint evil intent is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt motive was an essential element of the crime of conspiracy. Wharton's Criminal Law (11th Ed.) § 1606.

[15, 16] The court was justified in refusing to give appellants' proposed instructions emphasizing Bronson's testimony as to the legal advice furnished appellants, and other like ones wherein different circumstances from which the question of intent was to be determined were narrated and dealt with in separate instructions, for the reason that a general instruction was given to the effect that in considering the question of intent the jury should "take into consideration all of the facts and circumstances disclosed by the evidence." The proposed instruction relating to "common occurrences" of organizing corporations outside of the state to evade the California statute was properly rejected as embodying an immaterial matter; likewise those instructions relating to the title to the Class B stock. The remaining objections as to the instructions are of less importance and possess no merit.

[17] We find no error in the ruling disallowing a challenge for cause to juror Scovel. The juror stated that, while he entertained an opinion regarding violations of the Corporate Securities Act, the same as he did of violations of other penal statutes, he had no opinion regarding the facts of this particular case. While later during his examination there may have been some slight confusions in his answers upon the point, he positively declared that if accepted as a juror he could and would "absolutely set aside that opinion," which had been founded on press reports and rumor, and try the case fairly and impartially. "When such conflict occurs (in the answers of the juror) the trial court must decide, if possible, which of the answers most truly reveals the state of the talesman's mind. In other words, the questions generally presented are those of fact and not of law. People v. Loper, 159 Cal. 6, 112 P. 720, Ann. Cas. 1912B, 1193.

[18] Proof in support of venue as to counts 3, 4, 5, 6, and 7, while not as substantial as it might have been, was legally sufficient to meet the requirements of the rule stated in People v. McGregar, 88 Cal. 140, 26 P. 97, the respective purchasers having testified that the sales took place at their residences or places of business, as the case happened to be, which were designated in the record by street and number; and, furthermore, the data set forth on the cards seized in the office of said finance company relating to these sales specified the San Francisco residences or business addresses of the purchasers.

[19] The demurrer to the indictment was properly overruled. It was alleged in the indictment that the securities mentioned were issued by a purported foreign corporation and were brought into this state by Eiseman and Abrams as the property of said corporation and sold by all of the appellants without a permit. It was not necessary, as appellants contend, to set forth the capacity in which Eiseman and Abrams acted for the corporation in bringing said securities into the state, or whether they acted for it at all, nor does there seem to be anything anomalous or inconsistent in the situation that said corporation retained title to said securities, notwithstanding that it had "issued" the same and that they were in the constructive possession, at least, of Eiseman and Abrams when brought into the state for disposal. The indictment was not subject to the objections raised and favorably ruled upon in People v. Barnard, 63 Cal. App. 562, 219 P. 756, for the reason that the conspiracy here was confined to the violation of the Corporate Securities Act.

[20] Appellants claim that there is no such crime in California as conspiracy to violate the Corporate Securities Act. Since the instant case was briefed and submitted, however, this precise question has been considered and the matter decided contrary to appellants' views by the Supreme Court in the case of Doble v. Superior Court, 241 P. 852. The decision therein completely answers all of appellants' contentions made in this behalf.

[21-24] Appellants also attack the constitutionality of the entire Corporate Securities Act upon some eight grounds, but in presenting them counsel say that the objections urged overlap one another, making it impossible to consider them separately. For the same reason it would seem equally impossible to discuss or decide them separately. However, specifically answering some of the grounds urged, it may be stated that section 12, which declares that all securities sold in violation of said act shall be void, is

nowise involved in this criminal action. The assertion that said act illegally delegates judicial functions (as distinguished from quasi judicial functions) and also legislative powers to the corporation commissioner appears to be amply disposed of by the cases of Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140; Suckow v. Alderson, 182 Cal. 247, 187 P. 965; and Brecheen v. Riley, 187 Cal. 121, 200 P. 1042. Summarizing the remaining constitutional objections, they are in effect that the provisions of said act do not constitute a valid exercise of the police power of the state, and that the same are unreasonable, arbitrary, oppressive, discriminatory, and in restraint of trade. Again, we are relieved of the task of answering appellants' arguments by citing a number of cases in which similar questions have been exhaustively argued and finally decided. The cases referred to are Halsey & Co. v. Merrick (D. C.) 228 F. 805; Merrick v. N. W. Halsey & Co., 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Caldwell v. Sioux Falls Stockyards Co., 242 U. S. 559, 37 S. Ct. 224, 61 L. Ed. 493; Agnew v. Daugherty, 189 Cal. 446, 209 P. 34; and In re Girard, 186 Cal. 718, 200 P. 593. In passing upon these constitutional objections generally the court said in Merrick v. N. W. Halsey Co., supra:

> "We think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its functions."

In conformity with the law as announced in the cases cited it must be held here that the act in question is not unconstitutional.

[25] The crime of conspiracy is a distinct offense from the actual commission of the crime forming the object of the conspiracy, and the fact that the parties to the conspiracy succeeded in perpetrating the acts which of themselves constituted the crime they conspired to commit in no wise relieves them from liability under section 182 of the Penal Code. People v. MacPhee, supra. It follows that the guilty parties may be legally convicted of both crimes.

[26] We cannot agree with appellants that there was a hiatus in the operation of paragraph 3 of section 2 of said act at the time of its repeal in 1923 (St. 1923, p. 87), during which time this indictment was found, for the reason that the existing law remained in force until the amendment took effect.

[27] The claims of Eiseman and Abrams that they were entitled to immunity because they gave evidence before the corporation commissioner on April 12, 1923, are without merit. Section 17 of the Corporate Securities Act (as amended by St. 1923, p. 91, § 4), provides in part that:

> "No person shall be excused from testifying or from producing any book, document, or other thing * * * upon the ground that his testimony, or the book, document, or other thing required of him, may tend to incriminate him, or may have a tendency to subject him to punishment for a felony; * * * but no person shall be prosecuted, * * * or subjected to any penalty * * * for or on account of any act, transaction, matter, or thing concerning which he shall have been so *compelled* to testify under oath, or to produce such documentary or other evidence. * * *" (Italics ours.)

It is apparent, we think, that the law contemplates that the witness claim the privilege of not giving testimony or of not furnishing evidence against himself before he is entitled to the immunity provided for by the statute. It is conceded that such claim was not made by either Eiseman or Abrams; furthermore, the subpœna was not directed personally to either of them, but to the corporations. Their responses to the subpœna must consequently be considered as having been voluntary.

After a full review of the evidence in this case and a careful examination of the legal points presented, it is our opinion that the appellants were fairly tried and justly convicted. It is therefore ordered that the judgments of conviction and the orders denying their motions for new trials, which were also appealed from, be and each of them is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

78 Cal. App. 733

CHALMERS et ux. v. HAWKINS et al.*
(Civ. 5312.)

(District Court of Appeal, First District, Division 1, California. July 20, 1926.)

1. **Evidence 🔑537.**

Circumstantial evidence, to sustain verdict in civil cases, need not exclude every other reasonable conclusion.

2. **Automobiles 🔑244(22).**

Evidence *held* to sustain implied finding of injury by truck operated by defendants.

3. **Automobiles 🔑244(33).**

Evidence *held* to sustain finding that truck injuring pedestrian carried no lights, as required by Motor Vehicle Act 1915 (St. 1915, p. 397) § 13, as amended by St. 1919, p. 191.

4. **Automobiles 🔑244(38).**

Evidence *held* to sustain finding that operation of truck without lights, in violation of Motor Vehicle Act 1915 (St. 1915, p. 397) § 13,

---

*Hearing denied by Supreme Court September 16, 1926.

as amended by St. 1919, p. 191, proximately caused injury to pedestrian.

5. Automobiles 🔑216.

Pedestrians must use reasonable care for their own safety, but are not negligent in traveling on highway.

6. Negligence 🔑122(1).

Contributory negligence must be affirmatively established by defendant, unless shown or inferable from plaintiff's evidence.

7. Automobiles 🔑244(49).

Evidence *held* not to show contributory negligence of pedestrian struck by motor truck at night.

8. Appeal and error 🔑1064(1)—Instruction that jurors should consider what they would have done in plaintiff's place held not prejudicial to defendants, in absence of evidence of contributory negligence.

In personal injury suit, instruction that jurors should consider what they would have done in plaintiff's place, and whether she acted as reasonable person would under circumstances, *held* not prejudicial to defendants, in absence of evidence warranting finding of contributory negligence.

9. Appeal and error 🔑1064(1)—Instruction assuming that jurors are of ordinary intelligence, which cannot be legally questioned, is not prejudicial, though unnecessary.

That jurors, selected as provided for by law, are persons of ordinary intelligence cannot be legally questioned, and instruction assuming such fact and indicating their proper mental attitude toward evidence and logical method in deliberations is not prejudicial, though unnecessary.

10. Automobiles 🔑246(18).

Instruction that it is negligence for motor vehicle driver to continue onward when unable to see road *held* proper, in view of evidence that lamps were unlighted.

11. Automobiles 🔑149.

It is negligence per se for motor vehicle driver to proceed without lights when unable to see road.

12. Automobiles 🔑160(1).

Instruction authorizing recovery if defendant, seeing pedestrian, failed to stop truck, *held* erroneous; it being driver's duty to exercise only ordinary care to avoid injury.

13. Appeal and error 🔑1064(1)—Instruction to find for plaintiff if defendant, seeing her, failed to stop truck held not reversible error, in view of evidence.

Instruction to find for plaintiff if defendant, seeing her, failed to stop his truck *held* not reversible error, in view of driver's and his companion's testimony that plaintiff was not seen by them or injured by truck, and absence of evidence warranting inference that they saw her.

14. Appeal and error 🔑1031(1).

Prejudice from error is not presumed, but must appear affirmatively from examination of entire cause, including evidence, or from nature of error itself.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by James E. Chalmers and wife against Lee B. Hawkins and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jennings & Belcher, of Los Angeles, for appellants.

Frank S. Forbes and Harry J. McClean, of Los Angeles, for respondents.

CASHIN, J. An action to recover damages for personal injuries sustained by Ora G. Chalmers, in which her husband, James E. Chalmers, has joined as a party plaintiff. The jury returned a verdict for plaintiffs, upon which judgment was entered, and defendants moved for a new trial, which was denied. An appeal from the judgment was taken by the latter and is presented on the judgment roll with a bill of exceptions.

Defendants urge as grounds for reversal an alleged insufficiency of the evidence to sustain the verdict, errors in the admission and in the denial of motions to strike out portions of the testimony, together with the giving and refusal of certain instructions.

The evidence shows that Mrs. Chalmers (who will be hereinafter referred to as the plaintiff) on the evening of September 4, 1920, became a passenger on a motor bus running from Long Beach to Whittier, her destination being the town of Hynes near which she resided. The point nearest to her destination on the route followed by the bus was the intersection of two highways known as Artesia and Ocean avenues, approximately one-half mile south of Hynes, to which the latter avenue leads. The bus proceeded north on Ocean avenue, reaching the intersection at the hour of 10 p. m., its route being thence west on Artesia avenue. The plaintiff, according to her testimony, alighted at the intersection, walked therefrom north on Ocean avenue, keeping a distance of approximately 2 feet to the right of the paved portion thereof, to a point between 350 and 400 feet from Artesia avenue, where the injuries in question were received. Plaintiff was found between 10:30 and 11 o'clock on the same evening lying unconscious at the point last mentioned. Her body was about 4 feet to the east of the paved portion of the avenue, her clothing being partially torn therefrom, and portions of her clothing and articles carried by her were found to the north and south of this point. According to the testimony, an indentation in the roadway along the east side of the pavement led from a point 70 feet south to the place where she was found and thence northwesterly 10 feet to the edge of the pavement. This indentation, as described by the witnesses, corresponded to the track of an auto truck equipped with double tires on the rear wheels, such being the equipment of a truck owned by the defendant Lee B. Hawkins as described by him at the trial. It was further shown that subsequent to the accident on that evening and the following morning there were found near and along the indentation mentioned drippings of beet pulp, from the location, appearance, and quantity of which, as described by the witnesses, it might reasonably be inferred that the indentations were made by a vehicle transporting that substance.

Plaintiff was unable to state how the accident occurred, testifying that she neither saw nor heard the approach of a vehicle, and that her first knowledge of the fact of her injuries was received upon regaining consciousness at the hospital to which she was taken. So far as shown by the testimony, no one saw the occurrence which caused her injuries. The evidence further shows that the night was dark and that there were no lights along Ocean avenue either at or near the scene of the accident.

Defendant Lee B. Hawkins, by whom defendant Frank Hawkins was employed as a driver, was at and prior to the time of the accident following the business of trucking, with his office at the town of Moneta, some miles west of Ocean avenue, using in such calling several Mack trucks. Early in the evening mentioned the driver, Hawkins, with two other employees, were sent by their employer to a point near the town of Artesia, situated to the west of Ocean avenue, for the purpose of unloading a trailer which on that day while conveying a load of beet pulp to the employer's premises had broken down. The employees mentioned, after removing the beet pulp to the Mack truck, commenced the return trip between 10 and 10:30 o'clock p. m., passed along Artesia avenue to the intersection mentioned, and thence north over Ocean avenue. Several persons who occupied the motorbus on which plaintiff was a passenger testified to meeting a Mack truck shortly after the plaintiff alighted from the bus at a point on Artesia avenue west of the intersection, that the seat of the truck was occupied by three persons, and that the truck carried no lights. A witness, who conducted an oil station on Ocean avenue between the town of Hynes and the intersection mentioned, and his wife, testified to the fact that a Mack truck passed the station between 10:15 and 10:45 o'clock p. m., traveling north at a speed between 18 and 30 miles per hour, and that no lights were seen by them thereon. Two witnesses who passed south on the same avenue at about the same time met a truck at a point between 200 and 500 feet north of the intersection. According to their testimony there were no lights thereon. The truck, as described by these witnesses, was of the size and shape of a Mack truck, and its position when seen was partially off the paved portion of the highway to the east. The employees mentioned testified that the lights on their truck were burning, but that the lens of one of the lamps was broken, over which, in order to prevent the Presto-light flame from being extinguished by the breeze, a cloth was held by one of them during the return trip. Each of these employees denied that he saw or that the truck struck the plaintiff, or that he had knowledge of the accident on the evening that it occurred. Plaintiff on that evening wore a garment described by her as a mink fur cape, and witnesses who subsequently examined a Mack truck owned by defendant Lee B. Hawkins at his place of business testified that they found adhering to a metal part projecting from under the body of the truck on the right-hand side thereof certain hair or fur, which was produced at the trial. A furrier testified that the cape worn by plaintiff, which was in evidence at the trial, and the fur found by the witnesses mentioned, were both from the animal known as the kolinsky, a species of mink.

The foregoing is a statement in substance of the evidence which bears materially on the question of the cause of plaintiff's injuries, and an examination of the record discloses no prejudicial error in any of the particulars specified by defendants (exceptions 1 to 55, inclusive), either in its admission, the rulings sustaining objections to questions propounded by the latter, or their motions to strike portions of the testimony.

[1] It is urged by defendants that the finding that plaintiff was struck and injured by the auto truck operated by defendants, being a conclusion based upon evidence which was largely circumstantial, the facts relied upon for its support must be such that the finding is the only conclusion that can fairly or reasonably be drawn therefrom, citing in support of this contention Wilbur v. Emergency Hospital Ass'n, 27 Cal. App. 751, 151 P. 155, wherein the court, citing Neal v. Chicago, R. I. & P. Ry. Co., 129 Iowa, 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905, and other cases relied upon by defendants here, held that a theory cannot be said to be established by circumstantial evidence even in a civil action unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. The same rule is declared in Estate of Wallace, 64 Cal. App. 107, 220 P. 682, with reference to which the Supreme Court, in denying a rehearing, said: "We do not wish to be understood as approving the statement of the rule by the District Court of Appeal as to the method of weighing circumstantial evidence when applied to a reviewing court on appeal." The correct "rule is stated and applied in the recent cases of Estate of Loucks, 160 Cal. 551, 554, 555, 117 P. 673, Ann. Cas. 1913A, 868, People v. Tom Woo, 181 Cal. 315, 184 P. 389, and Mah See v. North

American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123."

In People v. Tom Woo et al., supra, an appeal from a judgment following conviction on a charge of murder, the evidence connecting appellants with the homicide being circumstantial, and it being contended that the evidence was insufficient to sustain the verdict, the court said, in affirming the judgment:

> "The principal question on this appeal is whether the evidence is sufficient to justify the verdict against the appellants. * * * In passing upon this question we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after the verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

As the rule is stated in other jurisdictions, circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury. Midland Valley Ry. Co. v. Taylor, 85 Okl. 95, 204 P. 1102; Meier v. N. P. Ry. Co., 51 Or. 69, 93 P. 691; Pittsburg C. C. & St. Louis Ry. Co. v. Hoffman, 57 Ind. App. 431, 107 N. E. 315, 321; Hashman v. Wyandotte Gas Co., 83 Kan. 328, 111 P. 468; Lane v. So. Kan. Mut. Ins. Co., 113 Kan. 365, 214 P. 92; Farber v. Boston Ins. Co. (Mo. App.) 256 S. W. 1079; St. Louis B. & M. Ry. Co. v. Moss (Tex. Civ. App.) 203 S. W. 777.

[2] The facts shown by the testimony fairly sustain the implied finding that plaintiff was struck and injured by the truck operated by defendants; and while, as contended by them, the evidence does not exclude every supposition to the contrary, this conclusion and no other finds reasonable support from the known circumstances. It sufficiently appears from the evidence that plaintiff at the time of the accident was walking on the right or east side and off the paved portion of the highway; that she saw no lights and was unaware of the approach of the truck, of which no warning was given. It also appears that the truck was seen on Artesia avenue without lights at a point the distance from which to the place of the accident at the rate of speed maintained by the truck, as testified by the driver, would be covered within a few minutes; and, further, that a Mack truck without lights passed north along Ocean avenue between 10:15 and 10:45 o'clock p. m. of the same evening.

[3, 4] Section 13 of the Motor Vehicle Act of 1915 (St. 1915, p. 397), as amended in 1919 (St. 1919, p. 191), provided that:

> "Where there is not sufficient light within the lateral boundaries of the public highway to reveal all persons, vehicles or other substantial objects within said boundaries for a distance of at least 200 feet, at all times during the period from a half hour after sunset to a half hour before sunrise, every automobile while on the public highway shall carry at the front at least two lighted lamps."

The evidence sustains the conclusion of the jury that the truck was negligently operated in that no lights were carried thereon as required by the statute, and that such negligence proximately caused the injury. Hutchinson v. Miller & Lux, 60 Cal. App. 1, 212 P. 394; Fenn v. Clark, 11 Cal. App. 79, 103 P. 944; Western Indemnity Co. v. Wasco Land & Stock Co., 51 Cal. App. 672, 197 P. 390.

[5-7] Defendants as a special defense alleged contributory negligence on the part of plaintiff. While it is the duty of pedestrians to use reasonable care for their own safety, it is the settled law that they have the right to travel upon the public highway, and it is not negligence for them to do so. The burden of proving a want of ordinary care proximately contributing to the injury rests upon the defendant, and must be affirmatively established unless it be shown or can be inferred from the evidence adduced in support of plaintiff's case. Rush v. Lagomarsino (Cal. Sup.) 237 P. 1066; Hatzakorzian v. Rucker-Fuller Desk Co. (Cal. Sup.) 239 P. 709, 41 A. L. R. 1027. Here no evidence direct or circumstantial, which reasonably tends to support this defense, appears from the record.

[8] Defendants except to the following instruction given by the court at the request of the plaintiff:

> "It is peculiarly appropriate that such a question shall be left to the judgment of a jury, who are presumably people of ordinary intelligence, and who under ordinary conditions would presumably exercise ordinary care. In considering the evidence, assuming each member of the jury to be such a person, and not unusually cautious or unusually reckless, he may well ask himself, what would I have done under such circumstances? So it would be well for you first to consider yourself in the place of the plaintiff, and consider what you would have done under the circumstances under which she was placed, and whether she acted as a reasonable person would under the circumstances. Then you should put yourselves in the place of the defendant driver, and determine whether, if you had been in his place, you would have acted as he did, or whether he acted as a reasonably prudent person would have acted under the circumstances."

The reference to plaintiff contained in this instruction can give defendants no ground for complaint. As stated, no evidence was adduced from which the jury might reasonably have concluded that plaintiff was guilty of negligence which contributed to her injuries; but the question remains whether the instruction as applied to the defendants was erroneous, and, if so, prejudicial. A like instruction was disapproved in Freeman v. Adams, 63 Cal App. 225, 218 P. 600. In the later case of Kelley v. Hodge Transportation System (Cal. Sup.) 242 P. 76, the court, in considering an instruction similar in form and substance, said:

> "It is difficult to understand how jurors, if not men of reasonable understanding, would be able to determine whether others whose conduct is under investigation acted in a reasonable manner."

[9] The jury represent the ideal prudent man whose assumed course of conduct under given circumstances constitutes ordinary care, and whether such care was used in view of the facts of a particular case—the question having been submitted to a jury—is necessarily determined by the sense and experience of the individual jurors collectively expressed in the verdict. That jurors selected as provided by law, whose functions are equal in importance to those of the officer presiding at the trial, are persons of ordinary intelligence is legally not open to question; and an instruction which assumes the fact and indicates their proper mental attitude in respect to the evidence, with the logical method to be pursued in their deliberations, while unnecessary, cannot reasonably be said to have been prejudicial.

[10, 11] The court further instructed that:

> "It is negligence for the driver of a motor vehicle to continue his onward course when he is unable to see the road over which he is driving."

In view of the evidence tending to show that the lamps of the truck were unlighted, this instruction was not improper. If the jury so found it was negligence per se for the driver to proceed on his course without lights. Hutchinson v. Miller & Lux, supra; Fenn v. Clark, supra.

[12] Defendants complain of other instructions, none of which in our opinion was objectionable with the exception of instruction 32, which was as follows:

> "If you find from the evidence in this case that the plaintiff was walking down the highway, and that the defendant ran into and upon and struck the plaintiff, causing the injuries complained of, without seeing the plaintiff when an ordinarily prudent person would have seen her, or, seeing her, failed to stop his truck to avoid injuring the said plaintiff, and if such acts of the defendant contributed proximately to causing the injury complained of, and she was not guilty of negligence proximately contributing to the injury in any manner, then your verdict must be for the plaintiff."

[13, 14] As contended by defendants, if the driver saw the plaintiff it became his duty to exercise ordinary care to avoid injuring her, and the instruction directing a verdict for plaintiff if defendant, "seeing her, failed to stop his truck," was to that extent erroneous. The driver and those accompanying him denied that the plaintiff was seen by them at any time or was injured by the truck. In view of their testimony and the fact that no evidence was adduced from which it might be inferred that the plaintiff was seen by them, the instruction, while erroneous, cannot reasonably be said to have been prejudicial to an extent warranting a reversal. Prejudice from error is no longer presumed (People v. O'Bryan, 165 Cal. 55, 130 P. 1042; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 P. 238), and the fact that the reviewing court cannot say that such was not its effect is insufficient. The injury must appear affirmatively from an examination of the entire cause, including the evidence, or from the nature of the error itself. Vallejo, etc., R. R. Co. v. Reed Orchard Co., supra; People v. Mazzurco, 49 Cal. App. 275, 280, 193 P. 164; People v. Chapman, 55 Cal. App. 192, 201, 203 P. 126.

After such examination it is our conclusion that the findings of the jury are supported by the evidence, and that no error is shown by the record which was prejudicial to a degree justifying the opinion that such error resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

78 Cal. App. 550

Ex parte ANGELLO. (Cr. 1289.)

(District Court of Appeal, First District, Division 1, California. June 28, 1926.)

Habeas corpus 🔑**85(1).**

Evidence at preliminary examination in prosecution for felony embezzlement *held* sufficient to warrant holding defendant to answer, and to warrant denial of his application for habeas corpus.

Application for writ of habeas corpus, prayed to be directed to Sheriff of Alameda County, to secure release of B. Angello from custody on charge of felony embezzlement. Writ discharged, and prisoner remanded.

Joseph P. Lacey, of Oakland, and T. C. West, of San Francisco, for petitioner.

Earle Warren, Dist. Atty., and J. F. Coakley and Edwin A. Heafey, Deputy Dist. Attys., all of Oakland, Wm. F. Cleary, Deputy Atty. Gen., for respondent.

TYLER, P. J. Habeas corpus. The petition alleges that defendant is unlawfully detained of his liberty by the sheriff of Alameda county. It recites that on about August 15, 1924, a complaint was filed in the justice's court of the city of Oakland, accusing petitioner of the crime of felony embezzlement.

That thereafter a preliminary examination was had upon said charge and accused was held to answer before the superior court. Petitioner here claims that there was no evidence produced at the preliminary examination warranting the justice in holding him to answer, but, on the contrary, that the evidence had upon the hearing entirely failed to show the commission of the crime charged, or any crime. He further claims that the complaint was based upon information and belief and was not issued in accordance with the provisions of sections 811, 812, and 813 of the Penal Code, and that therefore said court had no jurisdiction to proceed in the preliminary examination of defendant on the charge.

There is no merit in petitioner's first contention. Petitioner has failed to file any points and authorities in support of these contentions as required by the rule of this court. An examination of the record, however, shows that there was evidence to the effect that defendant leased certain household furniture of the value of approximately $1,000 from the Gilchrist Furniture Company, and that upon acquiring possession thereof he shortly thereafter moved the same without the state. Equally without merit is the claim that the complaint was based upon information and belief. It directly charged defendant with the commission of the offense, and there was sufficient evidence adduced at the hearing showing knowledge on her part of the offense.

The writ is discharged, and the prisoner remanded.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 652

GIBSON v. CRUICKSHANK. (Civ. 4434.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1926.)

1. Evidence ⚷441(11).

In action on check given as part payment for tractor, admission of parol evidence affecting sale contract *held* not error.

2. Principal and agent ⚷104(2).

Agent authorized to sell tractor *held* authorized to make warranties affecting it, in view of Civ. Code, §§ 1763 et seq., 2323.

3. Sales ⚷441(3).

Evidence *held* to sustain finding of breach of warranties covering tractor sold, in view of Civ. Code, § 1786.

4. Sales ⚷126(1).

Two months' delay in giving formal notice of rescission of contract to purchase tractor *held* not lack of diligence, constituting waiver of right, in view of conversation had after unsuccessful tests.

5. Sales ⚷366.

In action by transferee of payee seller, on check given as part payment for tractor, judgment for defendant on cross-complaint for amount equaling face value of notes representing balance of purchase price, or for return of the notes, *held* improper, there being no showing that plaintiff was holder of notes, or that defendant could be compelled to pay them.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by R. H. Gibson against William Cruickshank, wherein defendant filed a cross-complaint. From a judgment for defendant in the main action and on cross-complaint, plaintiff appeals. Judgment modified, and, as modified, affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Thomas T. Porteous, of Riverside, for respondent.

CONREY, P. J. It appears from the amended complaint, which was filed by one J. S. Gibson, that a check for $725 was made and delivered on the 25th day of June, 1920, as part payment to plaintiff on account of one Samson sieve-grip tractor, sold and delivered by the plaintiff to the defendant for the agreed price of $1,450. It further appears from the amended complaint that, in addition to the check, the defendant at the same time executed and delivered to plaintiff two promissory notes, also dated June 25, 1920, in favor of the plaintiff, each note in the principal sum of $362.50, with interest, which notes were payable in three months and six months, respectively, after date; that said notes were accepted by plaintiff to cover the balance of said purchase price. It was further alleged that on June 29, 1920, the defendant stopped payment on said check, and has refused to pay the amount therein specified as set forth in said check, or at all, and that the said sum covered by said check remains due, owing and unpaid from defendant to plaintiff. Plaintiff's action is on the check alone, and not on the notes.

By his amended answer to the amended complaint defendant denied the sale or delivery by the plaintiff J. S. Gibson of said tractor, but alleged that on June 25, 1920, he agreed to purchase from one O. C. Hathaway a tractor (giving the same description as in the amended complaint) for the sum of $1,450, "payable $725 on delivery of said tractor, and two notes for $362.50 each, payable three and six months after date, respectively, upon the conditions hereinafter set forth." The amended answer then set forth certain representations and warranties made by Hathaway to defendant, which defendant believed, and, so believing and relying thereon, entered into said contract. The amended answer alleged falsity of the representations, and breaches of warranty; also that defendant stopped payment on said check and gave notice of rescission, etc.

As a separate defense the defendant admitted that he agreed to purchase the tractor from the plaintiff, but alleged that the agreement was made through plaintiff's agent, Hathaway, and upon the like representations and warranties as stated in the first defense, it being now in the second defense alleged that said representations and warranties were made through plaintiff's agent, Hathaway. With his answer the defendant filed a cross-complaint based upon the same transactions hereinabove mentioned, and sought to recover the sum of $160 expended by the defendant in attempting to work and operate the tractor, and also demanded judgment that the check and notes be delivered up to defendant for cancellation, or judgment for the amount thereof in case delivery could not be had. Plaintiff's demurrer to the answer and his demurrer to the cross-complaint being overruled, the plaintiff filed an answer to the cross-complaint, thereby completing the issues on which the case was tried.

Thereafter, it being made to appear that J. S. Gibson had transferred to R. H. Gibson all of J. S. Gibson's rights in and to the plaintiff's cause of action, the present appellant, R. H. Gibson, was substituted as plaintiff. It was after such substitution that the case was tried by the court, and judgment rendered to the effect that plaintiff take nothing, and that the defendant recover from plaintiff possession of said promissory notes, or, in case delivery thereof cannot be made, that defendant recover from plaintiff the sum of $725, with interest, etc. From this judgment the plaintiff appeals.

In its findings the court found that at the stated time defendant agreed to purchase from J. S. Gibson through O. C. Hathaway, his agent, the described tractor for the agreed price of $1,450, payable $725 upon delivery of the tractor, and the balance by the promissory notes; and that the check and notes were delivered. The court then found as follows:

> "III. That for the purpose of inducing the defendant to enter into said agreement to purchase said tractor, the said J. S. Gibson, by his agent, O. C. Hathaway, represented and warranted to defendant that said tractor could and would haul defendant's grain separator to, upon, and from any field where defendant might desire to take same for the purpose of threshing grain, and would furnish power to operate said separator in threshing grain; that the defendant believed said representations and warranty, and so believing them to be true, and in reliance upon them, agreed to purchase said tractor as aforesaid, and it was agreed by said J. S. Gibson that, if said tractor did not and could not do the work it was represented and warranted it could do, as above set forth, defendant would not have to carry out said agreement of purchase.
>
> "IV. That said representations and warranty were and are each and all false and untrue; that after the delivery of said tractor to the defendant he made various trials of said tractor in attempting to use the same in hauling his said separator; that in all of said trials said tractor was operated with proper care and skill at all times, but it was not possible to make the same work, or to develop power to haul said separator, and said tractor was not and never was reasonably, or at all, fit for the said purpose of hauling said separator, or of operating the same in threshing grain, and said tractor did not at any time work so as to comply with the warranty or conditions upon which said defendant agreed to buy same.
>
> "V. That on the 29th day of June, 1920, defendant stopped payment on said check for $725, and it has not been paid, and on or about the 5th day of July, 1920, defendant notified the plaintiff, through his agent O. C. Hathaway, that said tractor could not do the work it was represented it would do, and that it did not meet the conditions upon which it was sold, and that he rescinded said agreement of purchase, and tendered said tractor back to the plaintiff, and demanded of him the return of said promissory notes and check, but to return same plaintiff refused."

[1] Appellant contends that, if the findings be understood as affirming that there was not a completed sale of the tractor, they are contrary to the evidence. The tractor was delivered. The check and the notes contained recitals that they were given by way of "payment" on the tractor; and the findings do indicate a completed sale, down to the point where they say that:

> "It was agreed by said J. S. Gibson that, if said tractor did not and could not do the work it was represented and warranted to do, as above set forth, defendant would not have to carry out said agreement of purchase."

There was no written evidence, other than the check and the notes. Appellant contends that:

> "The admission of parol evidence, tending to establish parol warranties and adding conditions to the written promise to pay, in the form of the check and notes, was reversible error."

But if we accept appellant's theory, which appears to be correct, that the check and the notes were given and taken in payment of the purchase price, then they were parts, not of the contract, but only of its performance. The contract itself was made altogether by oral statements. Therefore there was no error in receiving testimony concerning those statements.

[2] Now, as to representations made by the seller to induce the buyer to make the agreement of purchase, these were:

> "That said tractor could and would haul defendant's grain separator to, upon, and from any field where defendant might desire to take same for the purpose of threshing grain, and

would furnish power to operate said separator in threshing grain."

But these statements, in the circumstances under which they were made, were in the nature of warranties in the contract itself, rather than representations by way of inducement to make the contract, and, since these warranties were in effect warranties of the quality of the article sold, they were warranties which the agent, Hathaway, was authorized to make. "An authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property." Civ. Code, § 2323. Comparing the facts, as shown by the evidence, with the article on warranty (section 1763 et seq.) in the Civil Code, it appears that the transaction carried with it no implied warranty. The defense herein, therefore, must rest on the express terms of the contract as made between Hathaway and the defendant.

[3] On June 25, 1920, at the time when this contract was made, the defendant was engaged in threshing grain for one McMahon on land of McMahon at West Riverside, and was using a Fordson tractor. Defendant desired to obtain a tractor of greater power than the Fordson. On his invitation, Hathaway brought the Samson tractor to the McMahon place. By conversations between defendant and Hathaway it was made clear that the tractor would be used to operate the thresher, and also to haul the thresher to other places where it would be used. The Samson tractor was tested for a short time by using it to complete the McMahon job, and they then attempted to use the Samson tractor to pull the thresher out to the road. This it did not do satisfactorily, but this was attributed to the fact that at that time the "road bands," which were provided for use on the tractor wheels when being used on the highway, had not been removed, so they "hitched on the Fordson" and brought the machinery out to the road. It was there that the sale was closed. According to defendant's testimony, he told Hathaway that he would take the tractor "on condition that it would pull the thresher wherever we wanted to go and operate it." Hathaway replied that "it would pull that any place we wanted to go and thresh." Defendant then said, "On that condition I will pay you for the tractor." Thereupon defendant delivered the check and the two notes.

This brings us to the further question of breach of warranty, or failure of the condition on which the sale was made. Defendant's next threshing job at that time was to be on the property of Scofield, about one mile from the McMahon place. The Samson tractor pulled the thresher over the highway, and 300 or 400 yards along a road leading up to the Scofield place. There the tractor "went dead" on soft ground, and it became necessary to get a team of horses to take the thresher to the Scofield place. On the next day (Sunday) Hathaway's son came out in response to a complaint from the defendant, and they began threshing grain, obtaining their power from the Samson tractor. After about 30 minutes the engine stopped and would not go. They were not able to get it started again that day. The next day (Monday) defendant and his son came, and after some difficulty and delay the machine started, and threshed for about two hours, when it stopped again. The job was finished by using the Fordson tractor. Defendant then started to take the Samson tractor back to Riverside, but when he stopped to put on the road bands he could not get it to start again, and it was left on the roadside until July 4th, an interval of six days. On July 4th defendant "got it started, and got it as far as my place, when it stopped." He was taking the tractor to Hathaway's when it stopped. Hathaway lived about 300 feet beyond defendant's home place. Defendant further testified that on or about July 11th he told Hathaway that the tractor wasn't any good, and would not do the work. Hathaway replied that, "if it wasn't any good, he didn't want me to keep it. * * * He said he would come after it. * * *" Apparently no further effort was made to use the tractor, and in September defendant took it to Hathaway's premises and left it there. On September 17th formal notice of rescission was given.

While the evidence on the point may in some respects be conflicting, it is nevertheless sufficient to sustain the court's finding that, in defendant's trials of said tractor and his attempts to use the same, it was operated by him with proper care and skill, and that the tractor was not reasonably fit for the stated purposes for which it was intended to use it, and did not work "so as to comply with the warranty or conditions upon which said defendant agreed to buy the same," and, since it appears that the warranties were "intended by the parties to operate as a condition" (Civ. Code, § 1786), the buyer was entitled to rescind the executed sale (Pepper v. Vedova, 26 Cal. App. 406, 147 P. 105; Luitweiler, etc., Co. v. Ukiah, etc., Co., 16 Cal. App. 198, 205, 116 P. 707, 712).

[4] Appellant suggests the further point that defendant's right of rescission was waived by lack of diligencce, and by use of the apparatus after knowledge of the alleged defects. We think, however, that the use was not extended beyond the limits of a reasonable test. And in view of the conversation of July 11th, above stated, the delay before attempting to formally complete the act of rescission—a delay of two months—did not necessarily constitute waiver of the right to rescind the sale.

[5] That part of the judgment which allows recovery against appellant of an amount

equal to the face value of the notes is without support in the pleadings or findings. So far as appears, these notes (which became due before the cross-complaint was filed) remained in possession of appellant. There is no evidence that respondent will be compelled, or that he can be compelled, to pay them.

It is ordered that the judgment be modified, by striking therefrom the words "and in case a delivery of said property cannot be had that defendant do have and recover of and from the plaintiff, R. H. Gibson, the sum of $725, with interest thereon at the rate of 7 per cent. per annum from the 25th day of June, 1920, until paid." As thus modified, the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

---

78 Cal. App. 511

LICHTIG & ROTHWELL, Inc., v. HOLUBAR. (Civ. 5572.)

(District Court of Appeal, First District, Division 2, California. June 23, 1926.)

1. Appeal and error 🔑930(1)—On appeal from verdict for defendant, reviewing court must construe conflicting evidence most favorable to defendant.

On appeal from verdict for defendant, where evidence is conflicting, reviewing court must construe case most favorably to defendant, under rule that, if there is in record competent evidence which might have been believed by trial court, its finding should not be disturbed on appeal.

2. Appeal and error 🔑1010(1)—Finding of trial court, supported by substantial evidence, that broker was not procuring cause of consummation of contract between actress and motion picture corporation, held conclusive on appeal.

In broker's action for commissions for procuring for defendant a professional engagement as an actress with a motion picture corporation, finding of trial court, supported by substantial evidence, *held* conclusive on appeal that broker was not the procuring cause resulting in consummation of contract between defendant and corporation.

3. Brokers 🔑53—Broker, to recover, must show that his efforts were procuring cause, and not merely one in a chain of causes; "procuring and inducing cause."

For broker to recover, evidence must show that his efforts were procuring cause, and not merely one in a chain of causes; "procuring and inducing cause" meaning originating from a series of events that, without break in their continuity, result in prime object of employment of the agent.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Lichtig & Rothwell, Inc., against Dorothy Phillips Holubar and another, in which action was dismissed as to the other defendant on his death. Judgment for defendant, and plaintiff appeals. Affirmed.

Lloyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

Bauer, Wright & Macdonald, Alexander MacDonald, and Frederick W. Williamson, all of Los Angeles, for respondent.

NOURSE, J. Plaintiff, a California corporation engaged in the business of acting as a broker or agent for actors and others engaged in the business of producing motion pictures, sued the defendant for $2,000 for services alleged to have been rendered in that capacity for the benefit of the defendant Dorothy Holubar, also known as Dorothy Phillips. The other defendant, Allen Holubar, who was sued as the husband of Dorothy Holubar, died during the pendency of the action, and the suit was as to him dismissed. Judgment went against the plaintiff, from which it has appealed on a typewritten record.

The action is based upon the ground that the plaintiff at the special instance and request of the defendant acted as a broker for the defendant in procuring for her a professional engagement as an actress with the Principal Pictures Corporation, a corporation which was engaged in the business of producing motion pictures. The trial court found that the defendant was not indebted to the plaintiff, because she had not employed the plaintiff as her agent to negotiate for the engagement mentioned, that the plaintiff rendered no services in her behalf, and that the plaintiff did not procure for her the engagement in question. The plaintiff's sole attack on this appeal is that these findings of the trial court are not supported by the evidence.

[1] The evidence upon all the issues involved is conflicting, and for that reason we must take the story of the case most favorable to the respondent, upon the well-known rule that, if we find in the record competent evidence, which might have been believed by the trial court, that finding should not be disturbed on appeal. Looking at the record in this light, we find that some time prior to June 14, 1922, the plaintiff was approached by the officials of the Principal Pictures Corporation, a corporation engaged in the production of motion pictures, and which was then contemplating the filming of a picture to be entitled "The World's a Stage," for the purpose of securing a list of actresses available to play the leading part. On June 14, 1922, the plaintiff submitted to Mr. Rosenberg, of the Principal Pictures Corporation, the name of Dorothy Phillips, among others, for that engagement. This was done without the knowledge or consent of Dorothy Phillips, and the suggestion was wholly voluntary on the part of the plaintiff. Mr. Rosenberg chose

Dorothy Phillips' name from the list, and informed the plaintiff that they would be interested in procuring her services, if she would accept employment at a salary of $10,000. On the same day an officer of the appellant met with Dorothy Phillips and her husband, and suggested to them the possibility of this engagement.

The appellant's story of this conversation differs widely from that given by the respondent. On the part of the appellant it is claimed that its representatives presented the possibility of such engagement to Mr. and Mrs. Holubar, but that the latter replied that she was then under engagement with another concern, and would not be able to accept employment with the Principal Pictures Corporation. When she was asked what salary she would desire, she stated that she would demand $25,000. To this the representative of appellant replied that he did not think that this was too much money, but that he would present it to his principal; that thereupon Mr. Holubar asked him who his principal was, and was told that it was Sol Lesser, president of the Principal Pictures Corporation. The following version of the conversation between these parties was then given by the representative of appellant:

> "He said, 'Well, if it is Sol Lesser,' he said, 'I know Sol very well, and,' he said, 'I would do anything I could in the situation.' And he said, 'You haven't any objection at all, Ben, if I deal with Sol direct?' And he said, 'You will get yours just the same.' I said, 'Not a bit in the world, Allen, and any way I can help you to get together, let me know.'"

The respondent's version of this meeting differs in important particulars from that given by the appellant. She testified that when appellant's representative first suggested the engagement to her she stated that she was not interested because she was already under contract with another concern and would, therefore, be unable to accept the engagement proposed by the appellant. She also testified that she did not hear anything said regarding her husband's negotiating directly with Mr. Lesser, and that appellant's representative did not mention Mr. Lesser's name during the conversation, and further that she stated that she was then receiving a salary of $25,000, and would expect the same from the engagement suggested by appellant, and that appellant's representative thereupon replied that his principal would not pay such a price, but that they would be willing to pay the sum of $10,000. Mr. Lesser, president of the Principal Pictures Corporation, testified that appellant's agent called upon him after his conversation with the respondent, and reported that the respondent demanded a salary twice what they were willing to pay, and suggested that he might do better by conferring directly with Mr. Holubar. Thereafter Mr. Holubar called upon Mr. Lesser and was tendered a proposition for the employment of respondent. In a day or two thereafter Mr. Lesser was notified by the respondent that she would not accept the engagement at the price suggested, and the Principal Pictures Corporation thereupon employed another actress to take the part. Negotiations for the engagement of the respondent were thereupon dropped by the Principal Pictures Corporation, but some time thereafter Mr. Levy, who was engaged with the respondent in the production of another picture, approached the Principal Pictures Corporation, and through his negotiations the respondent was engaged to take the leading part in "The World's a Stage," and received for her services the sum of $15,000 in cash and his promissory note for $5,000.

[2] On this evidence the trial court found that the respondent did not employ appellant to perform any services for her, that the appellant did not perform any services for her benefit, that she did not authorize the appellant to carry on or conduct any negotiations with the Principal Pictures Corporation in relation to such employment, and that respondent's engagement with the Principal Pictures Corporation was not the result of any agreement of employment between appellant and respondent or of any services rendered by the appellant for the benefit of the respondent. Conceding, as we must, that there is evidence in the record which would have fully justified a finding on the part of the trial court that the respondent was liable for the commissions claimed, our inquiry is closed by the findings which the trial court made and which we have seen are supported by substantial evidence. The effect of these findings is that the appellant was not the procuring cause resulting in the consummation of the contract between the respondent and the Principal Pictures Corporation.

[3] These findings must be viewed in the light of the rule of law applicable to the right of a broker to recover commissions where, as here, it is claimed that his efforts were not the procuring cause of the contract or benefit which the principal obtained. This rule of law is well stated in Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 17, 206 P. 653, 660, where this court said:

> "To constitute himself the causa causans, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his peculiar activities."

The rule is stated in another way in the Sessions Case as follows:

> "In order for the broker to recover, the evidence must show that his efforts were the procuring cause and not merely one in a chain of

causes. The expression 'procuring and inducing cause' as used in the books refers to the cause originating from a series of events that, without break in their continuity, result in the prime object of the employment of the agent."

This same rule was quoted with approval in Roth v. Thomson, 40 Cal. App. 208, 215, 180 P. 656, as coming from Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820, and in the Sessions Case it is quoted as coming from Park v. Culver, 169 Mo. App. 8, 154 S. W. 806. We have been unable to find the language of the entire quotation in either of the cases cited by our appellate court, but the rule is in line with all the authorities and we are satisfied that it is correctly stated as quoted.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

78 Cal. App. 353

LOS ANGELES CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. SCHUMANN et al. (Civ. 5226; L. A. 8421.)

(District Court of Appeal, Second District, Division 2, California. June 14, 1926. Hearing Denied by Supreme Court Aug. 12, 1926.)

1. Eminent domain 🔑222(4) — Instruction meaning that jury must be satisfied that defendant proved market value of property condemned by preponderance of evidence held not erroneous.

In action of eminent domain, instruction that "it was incumbent on defendants to prove to your satisfaction by a preponderance of evidence what was market value of property plaintiff condemned," meaning that jury must be satisfied that defendant proved market value of property by a preponderance of evidence, *held* not erroneous.

2. Appeal and error 🔑216(1) — Failure of court to adequately instruct jury held not ground for complaint, in absence of request.

Failure of court, in instructing that defendants had burden of proving to satisfaction of jury by preponderance of evidence what was market value of property condemned, in not defining "preponderance of evidence," or that jury must decide issue upon evidence presented, *held* not ground for complaint, where no instruction on such subjects was requested.

3. Trial 🔑194(5)—Instruction on weight to be given testimony as to market value of property condemned, containing no reference to any witness nor singling out any testimony, held not erroneous, as invading province of jury, nor to contain any incorrect statement of law.

Instruction on weight to be given testimony of witnesses expressing their opinion as to value of property condemned, though somewhat argumentative in form in part, *held* not erroneous, as invading province of jury, nor to contain any incorrect statement of law, where it contained no reference to any witness, and singled out no testimony, but was a mere statement of an incontestable truth, equally applicable to evidence given by experts on both sides.

4. Eminent domain 🔑222(4)—Instruction held not erroneous, as permitting jury to reject the testimony of any expert as to his opinion of market value of property condemned.

In action of eminent domain, instruction in effect that jury might reject opinions expressed by experts as to market value of property condemned, if they believed that circumstances shown were such that opinions given were not based on such knowledge of the facts as would enable witnesses to express a true opinion with reference to market value, *held* not erroneous, as permitting jury to reject the testimony of any expert as to his opinion. (Supreme Court, in denying petition for hearing, withholds approval from that part of instruction permitting jury to reject testimony of any witness expressing an opinion, not based on such a thorough knowledge of facts and circumstances relating to the property as to enable him to express a true opinion as to its market value, but does not deem it sufficiently prejudicial to justify a reversal.)

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action of eminent domain by the Los Angeles City High School District of Los Angeles County against Anna Marie Beatrice Schumann and others. Judgment for plaintiff, and defendants appeal. Affirmed.

George H. Moore, of Los Angeles, for appellants.

Edward T. Bishop, County Counsel, and J. F. Moroney and Arthur T. George, Deputy County Counsels, all of Los Angeles, for respondent.

CRAIG, J. By the filing of a complaint in the usual form the respondent began an action in eminent domain to condemn certain property of appellants for school purposes. The answer presented the value of the property as the sole issue. A trial was had before a jury. Beside the defendants, a number of expert witnesses testified for each side. A verdict was rendered, and judgment was entered accordingly, from which judgment this appeal is taken.

[1] The principal ground of appeal presented is that certain instructions given are said to be erroneous. Of these instructions No. 7 is the center of attack. It reads:

> "The burden of proof as to market value is on the defendants; that is, it is incumbent upon the defendants to prove to your satisfaction by a preponderance of the evidence what was the market value of the property the plaintiff is condemning, on November 2, 1923."

The appellants insist that the use of the words "to your satisfaction" renders the instruction incorrect, in that it is claimed this statement is inconsistent with the proposition that the defendant is only required to produce so much proof as amounts to a preponderance of the evidence. In Lawrence v. Goodwill, 44 Cal. App. 440, 186 P. 781, an instruction was reviewed which the court held to be partly correct. However, this statement is contained in the instruction:

> "By preponderance of evidence is not necessarily meant a greater number of witnesses; but, if the plaintiff has proven the material allegations of this complaint by such evidence as satisfies and produces conviction in the minds of the jury, then he may be said to have proven his case by a preponderance of evidence."

It was said that this direction to the jury might fairly be construed to mean "that the jury must be satisfied, * * * not that the truth was on the side of the party holding the laboring oar, but that the greater weight of evidence was on his side." This the opinion indicates would be a correct statement of the law, and this is what the trial court in the instant case informed the jury to be the rule which it must follow.

We think appellants have misunderstood the instruction. It means nothing more than that the jury must be satisfied that the defendant proved the market value of the property by a preponderance of the evidence. It is difficult to conceive how the idea can be entertained that by the language of the instruction "to your satisfaction by a preponderance of the evidence" more than one standard of proof was stated, or that by the words "to your satisfaction," used in the context, the impression could be conveyed that the words last quoted have anything to do with the definition of, or any limitation upon, the words "by a preponderance of the evidence." Clearly the statement in question requires the defendant to sustain the burden of proof by a preponderance of the evidence, and informs the jury that it must be satisfied that the defendant has done this. The jury is told that it must be satisfied that the defendant has produced a preponderance of the evidence to prove market value, as the law requires.

The cases cited by appellant upon this point chiefly discuss the definition of preponderance of the evidence. Yet, in so far as instruction No. 7 is concerned, that subject is in no way involved. This is true of Estate of Ross, 179 Cal. 629, 178 P. 510, and also People v. Miller, 171 Cal. 649, 154 P. 468. In the latter case the instruction held to be erroneous incorrectly defined preponderance of the evidence as in substance the same thing as proof beyond a reasonable doubt. Appellants cite Galloway v. United Railroads, 51 Cal. App. 575, 197 P. 663, as condemning the use of the term "to your satisfaction." A careful inspection of this opinion shows that the contrary is true. The offending instruction read:

> "Before you can render a verdict against the defendant, the evidence must satisfy your minds to a moral certainty and by a preponderance of the whole evidence."

The criticism of this instruction was, not that it used the words "to your satisfaction," but that it required that the jury should be satisfied *to a moral certainty.* Throughout the opinion the fact that the jury must be *satisfied* is impliedly accepted as the law. The instruction gave two conflicting rules. It informed the jury that they must be satisfied to a moral certainty, and again that they must be satisfied by a preponderance of the evidence. And the court indicates that the vice of the instruction is in announcing the first rule, and that it is impossible to determine which of the conflicting rules presented to the jury was followed by it. The necessary inference is that an instruction that the jury must be satisfied by a preponderance of the evidence would be the correct rule.

Counsel for appellants also direct our attention to the decision of the District Court of Appeal upon the second appeal of this case, reported at 69 Cal. App. 770, 232 P. 491. We are informed that the instruction, "Before you can render a verdict against the defendant, the evidence must satisfy your minds by a preponderance thereof * * * that the act of the motorman was not done in lawful defense of his own person," was held to be erroneous. This is true, but the opinion contains no mention of the propriety of the use of the word "satisfy." A most casual reading of the court's comments upon the instruction in question shows that the error consisted of the fact that by it the jury were instructed that the burden of proof was upon the plaintiff to show negatively that the motorman had not acted in the lawful defense of his own person, and while the same instruction contained a contrary statement, the court says it cannot be determined upon which theory the jury acted, and hence that the conflict was prejudicial.

This proposition is entirely different from that announced in Dowd v. Atlas Taxicab Co., 69 Cal. App. 9, 230 P. 958, where the jury was informed that the fact that the plaintiffs were without fault must appear "to your satisfaction." Nothing was said about "preponderance of the evidence," or "to a moral certainty," or "beyond a reasonable doubt." The fact was required to be established to the jury's satisfaction. Of course, this is not a correct rule. In fact, it leaves the jury without any definite standard; for one juror might be satisfied by a preponderance of the evidence, another by proof beyond a reasonable doubt, and still another without any substantial evidence. It is noteworthy that, although the court called attention to two erroneous instructions of which no complaint had been made by appellant, it passed without criticism the language in instruction No.

16, stating that before the plaintiff could recover "it must appear to your satisfaction by a preponderance of the evidence" that the defendant had been guilty of some negligence. Instruction No. 16 was held erroneous because of other language, but as to the part above quoted it was passed without criticism.

[2] In the instant case by instruction No. 7 the jury were not instructed that they must be satisfied that the truth was as asserted by appellants, but only that they must be satisfied that the greater weight of the evidence, its preponderance, was on their side. The court did not define "preponderance of the evidence"; but, since no instruction upon that subject was requested by appellants, no error was committed in the omission. The same is true of other criticisms made by appellants, such as that the jury were not instructed that they must decide the issue upon the evidence presented. Appellants asked no such instruction, and so cannot complain that none was given.

[3] Also we are urged to reverse the judgment, because it is claimed that the court erroneously instructed the jury upon matters of fact. Three instructions are cited in this behalf. They are Nos. 12, 9, and 14. No. 12 reads as follows:

> "Certain witnesses in this case were questioned as to their knowledge of sales of property similar to that involved in this suit, in the same vicinity, quoted by the owners to real estate men and others. These questions, and answers given by the witnesses in response thereto, should not be taken by you as evidence of the actual market value of any of the property in question, but solely for the purpose of determining how well qualified the particular witness may have been to give his opinion as to the market value of the property in question. The opinion of a witness is no better than the reasons upon which such opinion is based, and when a witness gives an opinion as to the market value of the property, it is pertinent to ascertain the extent of his investigation into every matter that would be a legitimate subject of inquiry by any one desiring to purchase the property in question. Therefore, in determining the weight to be given by you to the testimony of any witness who in this case has given his opinion as to the market value of any of the property in question, you may consider, as legitimately bearing upon his ability to form an accurate opinion as to its market value, his knowledge of sales of similar property in the vicinity of the property involved in this suit, his knowledge of the prices at which such property has been quoted in good faith by the various owners thereof in an effort to sell the same in the open market, his knowledge of the nature, surroundings, advantages, and disadvantages of the property, and any other fact or circumstances that would tend to establish the familiarity of the witness with such property and with its actual market value on November 2, 1923."

We are informed that this instruction does not contain a single proposition of law, but is no more and no less than a pure argument to the jury. Especially objection is made to the sentence beginning, "The opinion of a witness," and to the one commencing, "Therefore, in determining the weight." The first sentence in the instruction embodies the statement of a well-recognized rule which it is highly important that the juries should heed in considering expert evidence in condemnation cases, and without which confusion as to the purpose of permitting testimony concerning sales of similar property and legal limitations placed upon the use of such testimony might well result. The sentence beginning, "Therefore, in determining the weight," is really a restatement of the same rule. Though somewhat argumentative in form, the last sentence neither invades the province of the jury nor contains any incorrect statement of the law. The sentence beginning, "The opinion of a witness," gives a logical reason for the rule previously stated. It may be unnecessary to inform the jury as to the foundation for legal principles, but such an instruction can never be harmful, where it contains no reference to any witness and singles out no testimony, but is a mere statement of an incontestable truth equally applicable to the evidence given by experts on both sides. We find no error in instruction No. 14.

[4] The court gave the following instruction numbered 9:

> "You are not bound to accept the opinion of any witness as to the market value of any of these properties, but must determine the fact for yourselves, and in so doing it is your province to weigh the testimony of each witness who has expressed such an opinion with reference to all the circumstances surrounding not only the property itself, but the witness' familiarity with such property, and to determine from all such circumstances how well qualified the witness may be to express a true opinion of its market value, and you may, in your discretion, reject the testimony of any witness who has expressed such an opinion, if it appears satisfactorily to you that such opinion is not based upon such a thorough knowledge of all the facts and circumstances relating to the property itself as to enable him to express a true opinion as to its market value."

The objection made to this instruction is that it informs the jury that they may "reject" the testimony of any expert as to his opinion. Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, is cited as authority for appellants' stand in this regard. While it is true that the Supreme Court, in its opinion in that case, said that the phrase "you are at liberty to reject it," referring to expert testimony, and informing the jury that they might "disregard it," was "lacking in accuracy" as used in the particular part of the instruction in which it was contained, the following instruction was conceded to be correct:

> "1. (a) The opinions of expert witnesses are entitled to such weight as you deem proper to give them. You may accept or *reject such opin-*

ions as you may accept as true, or reject as false, any other facts in the case."

It is unnecessary to quote the entire instruction first above mentioned, which the court had under consideration in that case, but it is sufficient to say that, both from a reading of the instruction itself and the comments of the court upon it, the conclusion must follow that the language quoted by appellants, and which is termed by the opinion as inaccurate, was regarded as erroneous because of its context. Among a number of incorrect statements the instruction informed the jury that the testimony of experts was merely advisory. The opinion says:

> "The expression 'merely advisory' is not a correct description of the respective functions of the jury and the expert. Their respective functions are entirely independent. When the instruction is analyzed and considered, apart from other instructions, it is open to the objection that it may detract from the effect of expert evidence, in that it might lead the jury to believe it was optional with them whether to weigh such testimony as they would that of any other class of witnesses."

But in the instruction given in the instant case the jury were not informed that they could arbitrarily reject the opinions expressed by experts, but in effect that they might do so, if they believed that the circumstances shown were such that the opinions given were not based upon such knowledge of the facts as would enable the witnesses to express a true opinion with reference to market value.

We are told that the trial court sustained objections to questions by which it was sought to show that there was no other property in the vicinity of the same size or character as that involved in this action. However, our attention is not directed to any part of the record where such an effort was made. The rights of the many other litigants whose appeals insistently demand our attention prevent us, regardless of our inclination, from assuming counsel's burden of time-consuming labor involved in searching the record for the rulings which are asserted to exist.

The contention that the burden of proof as to valuation is not legally upon the defendant in a condemnation suit might be worthy of serious consideration, if it presented a new question. However, the cases referred to by appellants—Monterey County v. Cushing, 83 Cal. 507, 23 P. 700; San Diego L. Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 P. 9, 18—determine the matter adversely to their claim.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for hearing herein is denied. In denying such petition we withhold our approval from that portion of instruction numbered 9, reading: "And you may, in your discretion, reject the testimony of any witness who has expressed such an opinion if it appears satisfactorily to you that such opinion is not based upon such a thorough knowledge of all the facts and circumstances relating to the property itself as to enable him to express a true opinion as to its market value." We do not, however, deem the above portion of the instruction, when read in the light of the other instructions given by the court, to be sufficiently prejudicial to justify a reversal of the case.

78 Cal. App. 617

HABER et ux. v. PACIFIC ELECTRIC RY. CO. HABER v. SAME. PETRIE et ux. v. SAME. (Civ. 3135.)

(District Court of Appeal, Third District, California. July 7, 1926.)

1. Street railroads 🔑114(13)—Finding of contributory negligence of automobile driver attempting to cross street railway track held warranted by evidence.

Evidence of automobile driver's attempt to cross street railway track when view of traffic on opposite side of closely approaching train was obscured *held* to warrant finding of contributory negligence in action for injuries to occupants of automobile, which was struck by train while blocked on track by traffic congestion.

2. Trial 🔑260(8)—Refused instruction as to duty to propel street car carefully, with due regard for safety of other vehicles, held substantially covered by instructions given.

In action for injuries to occupants of automobile struck by electric train, refused instruction that it was defendant's duty to propel its car carefully, with due regard for safety of other vehicles, *held* substantially covered by instructions given.

3. Trial 🔑191(8)—Instruction that failure to propel street car carefully, with due regard for safety of other vehicles, was negligence, held properly refused as implying negligence.

In action for injuries to occupants of automobile struck by electric train, instruction that failure to propel car carefully, with due regard for safety of other vehicles, was negligence, *held* properly refused as implying negligence.

4. Appeal and error 🔑1067—Refusal of last clear chance instruction, in action for injuries to occupants of automobile struck by electric train, held harmless to plaintiffs.

Where testimony, in action for injuries to occupants of automobile struck by electric train, showed that latter was from 40 to 100 feet away when automobile entered track, that motorman immediately applied emergency brakes, and that collision would have been avoided if automobile driver had not slackened speed, refusal of instruction on last clear chance was harmless to plaintiffs, in absence of testimony as to distance in which train could have been stopped.

5. Trial 🔑253(4)—Instructions on last clear chance held properly refused as omitting necessary elements.

In action for injuries to occupants of automobile struck by electric train, instruction that contributory negligence would not bar recovery if manner of operating car after discovering plaintiffs' peril amounted to willful or reckless conduct *held* properly refused as omitting questions whether plaintiffs could extricate themselves from impending peril and whether failure to take advantage of last clear chance was proximate cause of injury.

6. Negligence 🔑83—Elements of "last clear chance" doctrine stated.

Application of last clear chance doctrine depends on whether plaintiff's danger was perceived by defendant in time to avoid injury by ordinary care, whether defendant exercised such care or neglected to do act within his power which would have prevented injury after discovering plaintiff's situation, whether both parties were guilty of concurrent negligence, continuing to time of and contributing to accident, whether defendant knew of and could have avoided danger of which plaintiff did not know, and whether plaintiff could have extricated himself from impending peril by exercising ordinary care.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

7. Negligence 🔑83—Actual peril, but not physical impossibility of escape, is essential to application of last clear chance doctrine.

For last clear chance doctrine to apply, peril must have been an actual one, but physical impossibility of escape is not absolutely essential, it being sufficient that injured person was unaware of danger.

8. Negligence 🔑83.

That defendant but for his remissness would have observed plaintiff's dangerous position is insufficient to render last clear chance doctrine applicable.

9. Street railroads 🔑90(4).

Motorman must exercise reasonable diligence in analyzing situation on observing automobile approaching track.

10. Trial 🔑194(8) — Instruction that there was no evidence that plaintiffs controlled operation of automobile struck by electric train held properly refused.

In action for injuries to occupants of automobile struck by electric train while blocked on track by traffic congestion, instruction that "there is no evidence which warrants * * * conclusion that plaintiffs * * * were in any degree in the control of the operation of the automobile," *held* properly refused.

11. Trial 🔑260(8)—Refused instruction as to imputation of automobile driver's negligence to passengers held covered by instructions given.

In action for injuries to occupants of automobile struck by electric train, refused instruction that automobile driver's negligence could not be imputed to plaintiffs and that jury were to determine merely whether defendant was guilty of negligence proximately causing accident and plaintiffs of negligence contributing thereto *held* covered by instructions given.

12. Street railroads 🔑118(1)—Instructions on duties of occupants of automobile and motorman held proper.

In action for injuries to occupants of automobile struck by electric train, instructions that plaintiffs were required to anticipate operation of cars at usual speed, that defendant had right to expect that automobile driver would anticipate such speed, and that motorman had right to assume that approach of car would be visible to plaintiffs, and that they would not attempt to cross so close in front of it as to make collision unavoidable, *held* proper.

13. Street railroads 🔑85(1).

Street car being confined to tracks, automobile driver must give way to its clear passage, though his and motorman's duties on approaching intersection are reciprocal.

14. Street railroads 🔑103(3)—Motorman must have observed peril in time to avoid injury for last clear chance doctrine to apply.

Automobile driver must observe street car's approach and use ordinary care to avoid collision therewith, failing in which it must be shown that motorman actually observed peril in time to avoid injury for last clear chance doctrine to apply.

15. Street railroads 🔑90(3).

Whether bell of electric train was rung was immaterial, where occupants of automobile struck by train saw it and knew that it was approaching.

16. Appeal and error 🔑1170(9)—Instruction that plaintiffs cannot recover if accident was caused by negligence of automobile driver blocking their automobile on street car tracks held not prejudicial error (Const. art. 6, § 4½).

In action for injuries to occupants of automobile struck by electric train, instruction that plaintiffs could not recover if accident was caused by their driver's negligence or that of automobile driver blocking him from leaving track *held* not prejudicial error within Const. art. 6, § 4½, as allowing jury to consider negligence of parties not before court, in view of all circumstances.

17. Street railroads 🔑114(13)—Finding that negligent driving of automobile was sole proximate cause of injuries to occupants held warranted by evidence.

Evidence that automobile driver ventured on street railway track, with three-car train, visible at all times, seen to be approaching, and traffic on opposite side of track, *held* to warrant jury's finding that careless, reckless, and negligent driving of automobile was sole proximate cause of occupants' injuries.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Actions by George B. Haber and wife, by George B. Haber alone, and by A. J. Petrie and wife against the Pacific Electric Railway Company. Judgments for defendant, and plaintiffs appeal. Affirmed.

Bachman & LePage, of Long Beach, for appellants.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

PLUMMER, J. The three cases set forth in the title were all tried upon the same evidence, before the same jury, and are brought before us upon appeal on one transcript and one set of briefs. The defendant had judgment in all three of the cases, and the plaintiffs in the respective cases appeal. These actions are based on injuries sustained while the plaintiffs were riding in an automobile in a southerly direction on a certain street in the city of Los Angeles, known as and called South Wilton street. This street is intersected by a certain other street running easterly and westerly in said city, known as and called West Sixteenth street, upon which the defendant owned and operated a double-track railway. The complaints set forth two causes of action: (1) That as the plaintiffs were proceeding in an orderly and careful manner in a southerly direction and were attempting to cross the tracks belonging to the defendant, and that when they got upon said tracks they were blocked thereon by traffic congestion, and, while so blocked thereon, the defendant carelessly, negligently, and recklessly managed, operated, and controlled a certain three-car train then being operated in an easterly direction on said Sixteenth street and in consequence of said manner of operation ran said train against the automobile in which plaintiffs then and there were, with such force and violence that plaintiffs suffered injuries, etc.; the second cause of action alleges that while the automobile in which the plaintiffs were seated was standing in a dangerous place across defendant's tracks and unable to move in any direction, that the defendant perceived, or in the exercise of ordinary care should have perceived, the situation and danger of plaintiffs, and that defendant, by exercising ordinary care, might have stopped said train and avoided a collision with said automobile, but that defendant so carelessly, recklessly, and negligently managed, controlled, and operated its said three-car train that in consequence thereof said train was run against the automobile, etc., injuring the plaintiffs. The facts show that the automobile owned by George B. Haber was at the time of the collision being driven and operated by George M. Haber, a son of George B. Haber, that in the automobile there were also Anna E. Haber, wife of said George B. Haber, Mrs. A. J. Petrie, Louise and Jeannette Haber, daughters of Mr. and Mrs. Haber. The automobile was and for some minutes preceding the accident had been proceeding in a southerly direction on South Wilton street, traveling at a speed estimated by the driver at 20 miles an hour; by other witnesses at a considerably higher rate of speed. The driver of the automobile, George M. Haber, stated the speed at 20 miles an hour just before entering the intersection of Wilton and Sixteenth streets. That upon entering the intersection he slowed down to 15 miles an hour. That before he started to cross the street he looked both ways. That as he looked toward the west, which was on his right, he saw the defendant's train. That the train was a short block away. That it was so far away he did not think there would be any danger of being hit. That when he entered upon the north line of the defendant's railway the automobile was being driven at about 12 miles an hour, and, further, that the train at that time he estimated to be 100 feet away. That he proceeded across the north line of tracks and onto the south line of the railway upon which the defendant's train was traveling in an easterly direction. The north line of rails was called the "west-bound track," the south line is called the "east-bound" track. That when he actually got on the tracks the train was about 40 feet away. That at this instant of time, an automobile being driven in an easterly direction shot in front of him, necessitating his slowing down to about 5 miles per hour to avoid colliding with such automobile. His testimony is as follows in this particular:

> "When I got on the tracks that this train was running on, when the front wheels got on this track, the train was probably 40 feet off at that. I couldn't give any intimation that I was going to slow down to the motorman. I didn't know anything about this auto that was going to cut me off until I got just a few feet farther. When I was actually on the tracks and the train was 40 feet or less I did something that I myself had not expected to do; that is, I slowed down. That auto that passed in front of me was about 5 feet from me when I first saw it. It was coming from the west on Sixteenth street. It was coming so fast I did not see it. About all I saw was a black streak shot in front of me. When that black streak shot in front of me, the train was so close that I couldn't get off before the train hit me. I was going possibly 10 miles an hour, that is, when I was on the tracks; I slowed down just enough to let the auto pass. When I slowed down on the tracks the street car was running about 15 miles an hour. I am able to judge that if I had not slowed down on the track and I had continued at the speed that I was making in crossing the tracks, and the street car continued at the speed it was making, that I would have gotten across in plenty of time. The automobile that passed in front of me was going at about 38 miles per hour. I first saw it when it was 20 or 25 feet away."

The testimony shows that there was a vacant lot on the northwest intersection of Wilton and Sixteenth streets, so that the occupants of the automobile had a clear view of the approaching three cars, and also that the motorman of the train had a clear view of the automobile. There is nothing in the testimony showing that either the train or the automobile was not equipped with proper appliances for managing, controlling and stopping the same, nor is there anything in the testimony showing the distance required to stop either the train or the automobile at the place where the collision occurred, or under like conditions then prevailing. All of these matters appear to have been entirely omitted from the case. George B. Haber, the father of George M. Haber, testified that his son was driving the automobile, that he occupied the front seat with him, that he first saw the train when the automobile was 75 feet north of the north curb line of Sixteenth street, at that time the automobile was running between 18 and 20 miles an hour, that he would estimate the distance of the train from the intersection at 300 feet, that when they got upon the east-bound track, or nearly to the east-bound track, an automobile came from the west and blocked their way, that at that time he would judge the train was 100 feet away, and that the train had slowed up some, that before they could get off the east-bound track, after the automobile had passed on, they were struck by the defendant's train, that he did not hear any bell, and that he did not need any bell to tell him that the train was coming, for he saw it. On cross-examination this witness testified that when he first saw the speeding automobile coming across the intersection he thought the train was some 150 feet away; also, that when they were at the north curb line of Sixteenth street the train was distant some 250 feet. This witness further testified that when he got on the west-bound track he did not know how close the train was; that he was relying on his son to watch out for such things; that he allowed him to drive the car on the day in question and authorized his son to drive the car and take the witness and his wife in the same; that he had the right to direct where the car should go, but that he did not exercise such authority.

Miss Louise Haber testified that she saw the train at least 100 feet away, and that at such point is slowed up some; that the car in which they were riding slowed up some when they were entering Sixteenth street; that they slowed down just before entering on the tracks and started up again, and when the other automobile shot in front of them they slowed down and the train hit them. "I think we were just about on the track the train was on when the other automobile dashed by."

Amos Peterson, a witness called for the plaintiff, testified:

> That he was coming west on Sixteenth street; that when he first saw the plaintiffs' car he was 100 or 200 feet east of it; that he had slowed up for the intersection. "I saw the train coming and heard the noise of the brakes, and when I looked around the train was practically on top of them. Plaintiffs' automobile was about across the track. When I first saw the train it was 300 or 400 feet away; when the automobile got on the track, I should judge it was 50, maybe 100 feet away—that is, when they put on the brakes. I should judge the train was making about 20 miles an hour; I should judge the automobile had slowed down to either 3 to 5 miles per hour; the train went in my judgment from 45 to 50 feet after it hit

the automobile; I did not see the speeding automobile that went by."

J. C. Page, a witness called by the plaintiff, testified that he was at the intersection of Wilton and Sixteenth streets at the time of the accident; that just preceding the collision he was traveling easterly on Sixteenth street; that he was driving a Ford car; that the three-car Pacific Electric Railway train came along on Sixteenth street running easterly and "caught up with me at a place called Arlington"; at Arlington both he and the train slowed down; that after Arlington he speeded up some; that an automobile passed by him running about 40 miles an hour; that he speeded up his automobile to 20 or 25 miles per hour; that the train was coming faster than he; he would judge about 30 miles an hour; that he first heard the train make a sound indicating that they were turning on the air or turning off the power at a point about 250 feet from Wilton street; that after that the train picked up some speed, he would judge about 30 miles an hour; that the first the motorman lessened the speed was about 250 feet from Wilton street; that an automobile running about 40 miles an hour crossed in front of the Haber car; that at that time the front car of the train was distant from Wilton street close to 100 feet; that when the automobile crossed in front of the Haber car the Haber car lessened its speed; that the time the automobile started to stop the brakes were put on the train the last time; "I would judge it was 100 feet from the Haber car after it started to put on the brakes, the car went across the intersection of Wilton street. I think it was the air brakes that I heard go on when the train was about 100 feet from the point of the collision. Possibly I am in error as to the distance the train was away. It was between 75 and 100 feet."

A witness by the name of Hill, called for the defendant, testified that he was riding on the train, and that just preceding the application of the brakes the train was running between 15 and 20 miles per hour.

H. B. Spurlin, the motorman on the train, testified:

> That he was operating a three-car interurban train; that as he came toward Wilton place he threw off the power and was coasting along at the rate of about 15 miles per hour; that he first noticed the automobile speeding along at about 500 or 600 feet back from the intersection; that the automobile was traveling much faster than the train; that he thought the automobile was running between 30 and 35 miles an hour; that he was ringing the bell all along; that the traffic coming east and west on Sixteenth street was pretty heavy; that when the Haber car came to the intersection it slowed down and then shot forward and slowed down suddenly in front of the train. "When the automobile came on the track I was about 15 feet away. I threw the train into emergency. That means I put on all the brakes I had. It was not possible for me to stop and avoid the collision. I figured the automobile was going to slow down and stop when it came to Sixteenth street. I would say the train stopped in about 70 feet, that it made a good stop—that the automobile slowed down about 20 feet distant from the north line of Sixteenth street. I was not 100 feet away when the automobile slowed down on the track in front of me. When I saw him coming in I commenced trying to stop. When I saw this auto apparently about to get on my track and slowed down, I did everything I could to avoid hitting him. I did not slow down and start up the train again. I simply threw off the power and let the train coast. That is what we usually do when we pass Arlington."

Dale R. Roundtree, a witness, was riding in the first car of the train. He testified before the brakes went on, in his judgment, the train was not exceeding 20 miles an hour.

S. E. Wilson, a witness called for the defense, testified:

> That he was assistant superintendent of the Western division of the Pacific Electric Railway Company, that he was a passenger on the train; that the train was running between 15 and 18 miles per hour; that there was a switch point at Arlington 400 feet distant; that at the time the emergency brakes were applied, in his judgment, the front end of the train was 50, possibly 60, feet from the west curb line of Wilton street. "The train did not slow down as if to stop and then start up again. After the brakes went on, the next thing I heard was the noise of the machine careening backward. From where the train hit the automobile until it stopped was between 18 or 19 steps. I stepped the distance. From the place where the brakes went on to where it stopped, I would say, was a distance of about 130 feet. That was a good stop for a train running between 15 to 18 miles per hour of the weight of a three-car interurban."

Miss A. A. Way, a witness called for the defense, stated that she was riding on this train, that she heard the bell ringing several times, and that the speed of the train was just as usual.

Mrs. Jessie M. Way testified that she was riding on the train, and that she heard the brakes go on before the crash; they were very close together.

Miss Voigts, a witness for the defendant, testified that she was sitting in the first car of the train; that she saw the automobile before it was struck; that they were pretty close to it when it came out of the side street; that the motorman stopped the train very quickly; that the motorman was sitting quiet before the stop; that the automobile came very quickly from the side street and then stopped. "I think the automobile was coming at about the same speed as the train, because I thought the automobile could not make it."

Harry R. La Grange, a witness called for the defendant, testified that he was seated in the first car in the third seat back from the motorman; that he was looking straight ahead and saw the automobile coming in front of the train; that the train was running about 15 miles per hour; that he observed the clanging of the bell as the car approached the intersection.

Mrs. Elliston, a passenger on the electric train, testified that she saw the automobile coming from the left; that she thought it was running about 30 miles per hour; that when she first saw the automobile it was about as far from the intersection as the train; that she did not hear the bell or whistle; that the train stopped very suddenly.

Arthur J. Brown testified that he was the head conductor on the train, that the train was running from 15 to 20 miles an hour, and, further, that the motorman was ringing the bell, and that the train had not reached a speed of 30 miles an hour at any place between Arlington and the accident.

George Malhoit testified that the train was going between 15 and 17 miles per hour, but the train did not slow down and then start up; that the train went past the point where it struck the automobile a little more than a car length.

[1] The foregoing is, in substance, the testimony upon which the jury found for the defendant. There was no testimony introduced as to the width of the streets, nor, as has been said, was any testimony introduced as to the distance in which either the train or automobile could be stopped. The testimony shows that the occupants of the automobile were aware of the approach of the train, and the motorman of the train also had knowledge of the approach of the automobile. No question is made as to the sufficiency of the evidence to justify the verdict of the jury. Nor is there any real question presented as to the contributory negligence on the part of the automobile driver. The testimony shows that he was fully cognizant of the approach of the train, that he saw the condition of the traffic and thought he had plenty of time to cross the track before the train would reach him, and that he was suddenly compelled to do something he was not expecting to do, to wit, slow up his automobile to avoid colliding with the machine driving in the same direction with the defendant's train, and that the automobile that passed in front of him had been running along by the side of the train and so had not been perceived. The conclusion seems unavoidable from the facts presented that the driver of the automobile was guilty of a high degree of negligence in attempting to cross the track when his view of the traffic speeding along on the opposite side of the train was obscured, and that his attempting to do so when the train was approaching so closely amply justified the jury in reaching such a conclusion.

For grounds of reversal the appellant sets forth that the court erroneously refused to give the following instructions asked for by the plaintiffs:

(1) "It was the duty of the Pacific Electric Railway Company on the occasion in controversy here to propel its electric car in a careful manner and with due regard for the safety and convenience of pedestrians and other vehicles upon such street, and a failure to do so was negligence."

(2) "The defendant pleads in its answer contributory negligence on the part of the driver of the automobile and on the part of plaintiffs; yet contributory negligence would not be a bar to plaintiffs' cause of action, if they have established the same, if you shall further believe from the evidence that at the time of the accident, after the motorman discovered the peril of the plaintiffs, his manner of operating the car amounted to willful or reckless conduct, for contributory negligence in this state is never a defense as a bar where the proximate cause of an accident is the wanton and reckless conduct of the person so pleading such contributory negligence as a defense."

(3) "In this case there is no evidence which warrants the jury in the conclusion that plaintiffs, or either of them, were in any degree in the control of the operation of the automobile in which they were riding at the time of the accident, or that the relationship of the plaintiffs to the driver of the automobile was such that his negligence, if any, could be imputed to them. Under such circumstances, the question of whether the driver of said automobile was guilty of negligence is not material, nor to be considered by you in the decision of this case. You are to determine merely whether the defendant was guilty of negligence proximately contributing to and causing the accident, and whether the plaintiffs or any of them, were themselves guilty of negligence which contributed to such accident, and if you find that defendant was guilty of such negligence, and the plaintiffs were not, then the amount of damages sustained by the plaintiffs and each of them, as the result of such negligence, * * *"

—and also erred in giving to the jury the following instructions, which we will number, for convenience, A, B, and C:

A. "I charge you that plaintiffs were required to expect and anticipate, to the extent that a prudent person of their age and experience and knowledge would anticipate, that defendant would operate its cars on its line at the usual and customary rate of speed in said locality; and defendant, if operating lawfully and in the usual manner, had a right to expect (until it had actual knowledge to the contrary) that any automobile driver would anticipate and look out for such speed of operation of its cars and trains."

B. "You are instructed that if you believe from the evidence that the approach of defendant's car was visible to any one in plaintiffs' position exercising ordinary care, then said motorman had a right to assume that the approach of his car would be visible to plaintiffs driving said automobile towards said crossing, and had a right to expect that the approach of his car would be heeded by plaintiffs under such circumstances, and that plaintiffs would not attempt to cross so close in front of said car as to make a collision therewith unavoidable. And the motorman had a right to operate his car forward under such assumption and to rely thereon until he had actual knowledge that an attempt would be made to drive said automobile across said track in front of his car."

C. "If you find that this accident was caused solely and proximately by either negligence on the part of the young Mr. Haber driving the automobile or by negligence on the part of some other automobile driver in getting into his way and blocking him from getting off the track, you cannot hold the railway company liable, and your verdicts must be in its favor."

[2] In so far as the alleged error of the court to give the plaintiffs' requested instruction No. 1, it is sufficient to say that the substance of that instruction is fully set forth in other instructions given by the court to the jury, wherein the jury was told that the operator of a vehicle has a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals and take the usual precautions to avoid injuring others; each may rightfully expect that the other will, at the proper time, discharge his proper duty towards others; that the plaintiffs and the driver of the automobile had a right to rely upon the presumption of law that the motorman in charge of and operating an electric car upon a street would propel the same at a lawful rate of speed and would not propel the same at an excessive rate of speed in violation of an ordinance of the city of Los Angeles; and that all of them had a right to rely upon such presumption of law until by the use of ordinary care they, or any of them, had notice to the contrary.

The court also instructed the jury that pedestrians and automobile drivers had an equal right to the use of the street with the defendant, save and except that the defendant could not turn aside, but that its cars must follow the tracks, and that the pedestrian and automobile driver, in due season, should yield the right of way. The court also fully instructed the jury as to the duty of all parties to exercise due precaution to avoid accidents upon the streets, and that a pedestrian or automobile driver may act upon the theory and belief and expectation that others, as well as himself, will use the reasonable care that the situation requires to avoid collisions, etc.

[3] It may also be noted that plaintiffs' requested instruction No. 1 is also faulty in that it contains an implication of negligence on the part of the defendant. There should have been inserted words to the effect that if the jury found from the testimony a failure on the part of the defendant to operate its train with regard for the safety and convenience, etc., then and in that case the defendant was negligent.

[4-6] Appellants' requested instruction No. 2, refused by the court, appears to have been requested on the theory that it sets forth the doctrine of last clear chance. On the part of appellants it is argued at length that the testimony which we have set forth shows that the doctrine of last clear chance is applicable. On the part of the respondent it is likewise argued at length that this doctrine is inapplicable; that the plaintiffs saw that the motorman had a legal right to assume that the plaintiffs would not venture into a place of danger; and that when the plaintiffs had, by the action of the automobile driver, created the situation of peril, there remained no opportunity whatever for the stopping of the train. The testimony shows that at the time the plaintiffs entered the perilous zone, or the track upon which the collision occurred, the train in question was from 40 to 100 feet away, one witness testifying to a greater distance, but his testimony shows that his estimate was little more than speculation. All the testimony illustrating the acts of the parties at the critical moment is to the effect that at the instant of time when the automobile driver placed his machine in a perilous position by slowing up while on the east-bound track, the motorman, irrespective of the distance which the different witnesses estimated the front car of the train to be from the automobile, immediately applied the emergency brakes and did all that could be done to stop the train. The testimony of the automobile driver shows that had he not slackened the speed of his machine after entering upon the track, there would have been no collision. Under these circumstances, without any testimony whatever showing the distance in which the train could be stopped, or that anything was left undone which could have been done by the motorman, we do not see how any instruction on the subject of last clear chance could have materially affected the verdict of the jury. But, assuming that an instruction on the subject of last clear chance might have properly been given to the jury, we nevertheless think that the instruction requested by the appellants was properly refused, as not being either a clear or correct statement of the law on that subject. The requested instruction omits entirely the ability of the plaintiffs to extricate themselves from the impending peril, and also omits the necessary element that the failure to take advantage of the so-called last clear chance was the proximate cause of the injury. By an examination of the elements entering into an instruction so framed as to present the subject of last clear chance, it will be readily perceived that the requested instruction is deficient. These elements are set forth in the opinion of the Supreme Court in the case of Townsend v. Butterfield, 168 Cal. 568, 143 P. 762, as follows:

"1. Whether or not the plaintiff's danger was perceived by defendant in time to enable him, by ordinary care, to have avoided injuring plaintiff.

"2. Whether, after discovering plaintiff's situation of peril, defendant did exercise ordinary care, or did neglect to do some act within his power, which, if done, would have prevented the injury.

"3. Whether or not both parties were guilty of current negligence continuing to the time of the accident and each contributing thereto.

"4. Whether or not the defendant knew of the danger and could have avoided it against the plaintiff who did not in fact know thereof,"

—to which we may also add the inability of the plaintiff, by the exercise of ordinary care, to extricate himself from the impending peril. Two of these elements necessary in presenting the subject of last clear chance are set forth in the recent case of Darling v. Pac. Electric Ry. (Cal. Sup.) 242 P. 703: (1) Whether or not after the plaintiff became aware of the threatened danger she could not by the exercise of ordinary care have extricated herself. (2) Whether or not the motorman had actual knowledge of the plaintiff's condition and could by the exercise of ordinary care have avoided the accident, but negligently failed to do so. In the case of Ilardi v. Central Cal. Traction Co., 36 Cal. App. 488, 172 P. 763, this court sets forth an instruction held to be a correct statement of some of the elements necessary to be incorporated in an instruction of the subject of last clear chance. One of the further necessary elements to be included in an instruction on the subject of last clear chance is, among others, set forth in the case of Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36. There the court treats this subject as follows:

"Under the last clear chance doctrine the peril which calls upon the train employees to act must be an actual one from which the imperiled party cannot escape by the exercise of ordinary care. Until the deceased reached the point from which he could not escape injury by the exercise of ordinary care, either by stopping or accelerating his pace, the doctrine of the last clear chance does not apply. The rule is well stated in the following quotation from French v. Grand Trunk Ry., 76 Vt. 441 (58 A. 722): 'It is true that when a traveler has reached a point where he cannot help himself—cannot extricate himself—and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears, and physical strength, to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When the negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery."

[7-9] The court then considers other elements which we have mentioned herein as necessary to set forth the doctrine of the last clear chance. In Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709, is set forth the elements necessary to be incorporated in an instruction when given to a jury upon the subject of last clear chance. In 19 Cal. Jur. 653, 654, § 801, it is pointed out that the doctrine of the last clear chance is not applicable until one reaches a point of peril from which he cannot extricate himself by the exercise of ordinary care; that the doctrine presupposes that he has placed himself in that position by his own negligence. The peril must be an actual one. It is not absolutely essential that it is physically impossible for the plaintiff to escape. It is sufficient that he is unaware of the danger. It is also pointed out that if the injured person is observed in a position where, with the exercise of reasonable care upon his part, no injury will fall to him, other persons have the right, until circumstances clearly point to the contrary, to assume that he will not expose himself to danger. Section 82 of the same volume sets forth that the defendant must have had actual knowledge of the plaintiff's dangerous position; that he realized that the plaintiff was either oblivious of the danger or could not extricate himself therefrom by the exercise of reasonable care. It is not enough that the defendant would have observed the plaintiff but for remissness upon his part, etc. It is further said that the operator of a train or street car has a right to assume that one approaching the track is in the possession of his normal senses, and that he is able to and will take care of himself. The defendant, under such circumstances, or the motorman in this case observing the situation, would be held to the exercise of reasonable diligence, when analyzing the situation. Under the circumstances disclosed in this case, the situation of peril arose when the automobile driver slackened the speed of his car upon the railroad track at which instant of time, as we have said, the testimony shows that the motorman applied the emergency brakes. Be this as it may, however, the requested instruction does not present the necessary elements which we have set forth in order to submit to the jury in the form of a statement of the law of the doctrine of the last clear chance, and was properly refused.

[10, 11] As to the third requested instruction refused by the court, it is sufficient to refer to the testimony of George B. Haber, the father of the driver of the automobile, to show its incorrectness. The instruction commences with these words: "In this case there is no evidence which warrants the jury in the conclusion that plaintiffs, or either of

them, were in any degree in the control of the operation of the automobile in which they were riding at the time of the accident." The testimony shows that there was no actual physical control, but there was sufficient to present to the jury the question whether, under the circumstances, the owner of the car, who had authorized his son to drive the car and take his family therein, was not in a position to give directions, and, also, order the automobile stopped when he observed the approach of the three-car electric train at a sufficient distance away when by stopping the automobile all danger of collision might have been avoided. All proper portions of the requested instruction were included in instructions actually given. The court did instruct the jury that the negligence of the automobile driver was not imputable to passengers; that the fact that the plaintiffs and the driver of the automobile in question were engaged in a pleasure trip together was not sufficient to impute the negligence of the driver to the occupants of the automobile. The court also instructed the jury that the negligence of the driver was not imputable to the plaintiffs unless the jury found that the plaintiffs, or any one or more of them, as the case might be, were, in whole or in part, in control of the mechanical operation of said automobile, or unless the jury found the relationship of coadventurers, or master and servant, or principal and agent, existed. The court further instructed the jury that the mere fact of the relationship of the parties would not warrant imputing to any of them the negligence of the driver. It thus appears that, eliminating the question as to instructing the jury that there was no evidence, the court properly instructed the jury as to the law applicable to the case.

[12-14] As to the instructions A and B given by the court to the jury, we find nothing therein contrary to a correct statement of the law. In the case of Bibby v. Pacific Electric Ry. Co., 58 Cal. App. 658, 209 P. 387, almost identical questions were presented, and it was there held that such instructions are proper. It is to be noted that a hearing in this case in the Supreme Court was denied. In the Bibby Case the court instructed the jury that the motorman of the car exercising ordinary care has the right to assume that one driving an automobile would not attempt to drive upon the track so close to an approaching car as to be in danger of being struck thereby, when the approach of the car could be seen or heard by the use of ordinary care; that it is not the duty of the motorman in such situation to slow down, or to stop his car, when the automobile first approaches the track, nor until the motorman sees, or in the exercise of ordinary care should conclude, that the automobile would continue to proceed upon the track in front of the car. The court further instructed the jury in that case as to the duty of the automobile driver to see the approaching car when the same was visible. In the case at bar it is admitted by all the parties that the approaching car was visible several hundred feet away. In Kuchler v. Milwaukee Elec. Railway & Light Co., 157 Wis. 107, 146 N. W. 1133, Ann. Cas. 1916A, 891, it is said: A motorman has the "right to presume that the driver of the horse, though only a few feet from the track, would stop and not make an effort to cross immediately in front of a rapidly approaching car"—citing a number of cases. See, also, 19 Cal. Jur. 654, section 82, to the effect that the operator of a train or street car has the right to assume that one approaching the track is in possession of his normal senses and that he is able to and will take care of himself. While it is said that the duties of a motorman and the automobile driver approaching an intersection are reciprocal, yet, from the fact that the street car is confined to its tracks, it is the duty of the automobile driver to give way to its clear passage. It is the duty of the automobile driver to observe the approach of a street car and use ordinary care to avoid a collision therewith, and when there is a failure so to do, in order that recovery be had, it must be shown that the motorman actually observed the peril in time to avoid the injury, before the doctrine of the last clear chance applies. 23 Cal. Jur. p. 881, § 45; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 610, 93 P. 677; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Lambert v. Southern Pacific R. Co., 146 Cal. 231, 79 P. 873; Arnold v. San Francisco Oakland Term. Rys., 175 Cal. 5, 164 P. 798.

[15] In the case at bar all parties saw the approach of the electric train, knew that it was being propelled forward, and therefore whether the jury concluded that the bell was or was not rung according to the testimony of different witnesses, which it had the right to accept or reject, was wholly immaterial, and we do not need to consider that phase of the case further than to say that there was testimony from which the jury might conclude that the bell was being rung. The plaintiffs saw the train and knew that it was approaching.

[16] The appellants strongly insist that the giving of the instruction that "if the accident was caused solely and proximately by either the negligence of the driver of the automobile in which the plaintiffs were riding, or on the part of the automobile driver blocking him from coming off of the track, the plaintiffs cannot recover." The point is made that this instruction is outside the issues, in that the jury was allowed to consider the negligence of parties not before the court. Taken in the abstract, this appears to be true, but when considered in relation to all the circumstances attending the case, it is evi-

dent that the jury was not misled. If the sole cause of the accident was attributable to others than the defendant, the jury necessarily would conclude that the defendant was not negligent. If the defendant was negligent in any particular contributing to the accident, then no other person could possibly be the sole cause. In the Bibby Case, supra, in the instructions given in that case to which we have referred and where two defendants were charged with negligence, the court instructed the jury as follows:

> "If you believe from the evidence that the driver of the autobus was negligent in this respect, and that such negligence on his part was alone the direct and proximate cause of the accident, then plaintiffs cannot recover against the defendant railway company."

This instruction was held to be correct. In Birmingham Ry., Light & Power Co. v. Ely, 183 Ala. 382, 62 So. 816, a case involving an automobile collision and a street car, the court held that the following instruction should have been given:

> "If the jury believe from the evidence that the negro chauffeur in charge of the automobile in which plaintiff was riding was negligent in running the automobile down the hill at the time of the collision between it and defendant's street car, and that this negligence on his part was the sole proximate cause of the collision and plaintiff's injury, then you should find a verdict for the defendant."

[17] In the case at bar, if the sole proximate cause of the collision was the negligent operation of the automobile by George M. Haber, the driver thereof, then and in that case the plaintiffs cannot recover of or from the defendant Pacific Electric Railway Company. We do not think the reference to a possible third party contained in the instruction misled the jury to the prejudice of the plaintiffs, and therefore that section 4½ of article 6 of the state Constitution applies in this case. The evidence shows that the jury was fully warranted in finding that the sole and proximate cause of the injuries to the plaintiffs was the careless and reckless and negligent driving of the automobile. Venturing upon a railway with a three-car train approaching, visible at all times, seen to be approaching, in view of the traffic on the opposite side of the track which might at any moment intercept the progress of the automobile, makes almost unavoidable the conclusion that the driver of the autombile was alone responsible, to say nothing of sufficiently supporting the verdict of the jury.

The judgment is affirmed as to all three cases.

We concur: FINCH, P. J.; NEEDHAM, Justice pro tem.

---

78 Cal. App. 378

GONNERMANN v. ROBERTS. (Civ. 4652.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1926.)

Automobiles 🔑245(10, 76)—Automobile driver's negligence as to street car passenger alighting and passenger's contributory negligence held for jury (Motor Vehicle Act 1915, § 20, as amended by St. 1919, p. 217, § 12, subd. [*o*]; Motor Vehicle Act 1923, § 134).

In action for injuries sustained by plaintiff when stepping from street car and struck by defendant's automobile, which failed to clear car by six feet as required by Motor Vehicle Act 1915, § 20, as amended by St. 1919, p. 217, § 12, subd. (*o*), and Motor Vehicle Act 1923, § 134, question of defendant's negligence and plaintiff's contributory negligence *held* for jury.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Anna L. Gonnermann against William F. Roberts. Judgment for plaintiff, and defendant appeals. Affirmed.

Joe Crider, Jr., and Chandler P. Ward, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

YORK, J. Action to recover damages for injuries resulting from negligence of defendant in operating an automobile.

Appellant's statement of the matter involved in this appeal is:

> "The propositions involved on this appeal arise solely on the court's refusal to grant defendant's requested instruction No. 1 for a directed verdict in favor of the defendant."

According to the evidence, the plaintiff stepped from the street car into the street, where there was sufficient room for the automobile driven by the defendant to have passed her without even going close either to her or to the cement curb on the near side of the street. In other words, if he had driven his car half way between the car and the curb, there was sufficient room for him to pass without coming in contact with the plaintiff, or even proximately close to plaintiff. Therefore the doctrine of "last clear chance" certainly cannot apply to the facts involved in this matter. The authorities cited by appellant do not cover the facts involved herein. As we view it, the question is merely whether the defendant, who if he had been looking would certainly have seen the plaintiff, could, in the exercise of ordinary care, have avoided striking her, and whether as she stepped from the car to the street she should have anticipated that he would have passed closer to the car than to the curb or close enough to strike her.

We can see no element of contributory negligence in the way that she alighted from the car. She stepped from the car to the street, but did not take another step forward. Under the circumstances shown, she had a right to assume that the automobile driven by the defendant would clear the car at least six feet, as was required by the Motor Vehicle Act of 1915, § 20, as amended (Stats. 1919, p. 217, § 12, subd. [*o*]), as follows:

> "In passing any railroad, interurban or street car while passengers are alighting from or boarding the same, vehicles shall be operated or driven on the right hand side of such cars and at a rate of speed not exceeding ten miles an hour and no portion thereof or of any load thereon shall come within six feet of the running board or steps of such cars, and shall at all times be operated with due care and caution so that the safety of such passengers shall be assured. * * *"

See, also, present California Vehicle Act, § 134 (St. 1923, p. 560).

The only movement of the plaintiff, after she had reason to believe that she was in danger of being struck by the defendant, was to move her body back toward the street car step. There was nothing to obstruct the view of the driver of the machine; there was nothing in the road that would interfere with his seeing. He testifies that his brakes were in such shape that he could stop within but a very few feet; in fact, within one-fifth or one-sixth of the distance that he was from her at the time that she alighted from the car.

Therefore, under the authority of the case of Mann v. Scott, 180 Cal. 550, 554, 182 P. 281, it would have been error for the trial court to have given the instruction, under the facts and circumstances here shown, directing a verdict in favor of the defendant.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

78 Cal. App. 713

ARP v. BLAKE et al. (Civ. 3086.)

(District Court of Appeal, Third District, California. July 16, 1926.)

1. Contribution 🔑9(6)—Plea of estoppel in action to enforce contribution founded on payment of judgment held not sustained by evidence.

In action to enforce contribution founded on payment of judgment, plea of estoppel, in that plaintiff failed to disclose to defendant when purchasing judgment that he intended to set up his right to contribution, as against judgment against him for any excess he might be compelled to pay over and above his share of the obligation, *held* not sustained by evidence.

2. Judgment 🔑846.

Judgment debtor *held* not bound to disclose to one purchasing judgment that there were certain claims and liens existing against or on such judgment under Civ. Code, § 1432.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by James Arp against Elizabeth S. Blake and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Brittan & Brittan, of Bakersfield, for appellants.

Alfred Siemon, Paul F. Garber, and Siemon & Garber, all of Bakersfield, for respondent.

HART, J. The plaintiff brought this suit in equity to enforce his right to contribution founded upon his payment of a certain judgment obtained by one Ransch against the plaintiff, the defendant Blake, and one Hewitt, in the sum of $1,050 and interest. The plaintiff was awarded judgment, from which this appeal is prosecuted by the defendants under the so-called alternative method. Code Civ. Proc. § 953a.

The present is the final outgrowth of several other actions previously tried and determined, a recital of the history of which is deemed necessary to a clear understanding of the issue submitted for decision by this appeal. The respondent's brief contains the following well-stated and correct account of the several actions of which the present is the culmination, and we will therefore adopt into this opinion the history of the litigation as it is so recited:

> "On May 27, 1910, plaintiff, James Arp, made a contract with defendant Blake to sell her certain residential property. At the time of making said contract Arp held the property under another contract of purchase, presumably with the owner, J. Ransch, which contract had been executed by an attorney in fact; but it later developed that the owner had revoked the power of attorney, and Arp was unable to get title to deliver to Blake. Blake then brought suit against Arp and recovered judgment for breach of the contract to sell, and that case was finally decided against Arp by this (Supreme) Court, the decision being reported in Blake v. Arp, 180 Cal. 144, 179 P. 683. The details of that litigation are set forth in paragraph I of the complaint in this case. The judgment in that case will be referred to herein as the Blake-Arp judgment.
>
> "Shortly after the commencement of the suit of Blake v. Arp, the owner, J. Ransch, commenced a suit against Blake, Arp, and one Hewitt, for the purpose of recovering the value of the use and occupation of said property for the time Blake occupied the same under the Arp contract. (The date of the commencement of this action is given in the clerk's transcript as March 17, 1919; but this is obviously a mistake, as it appears elsewhere in the said transcript that judgment in said case was secured April 11, 1916.) This case also found its way into the books, the appeal thereon being reported as Ransch v. Arp, 39 Cal. App. 580, 179 P. 694. That judgment was against Arp, Blake, and Hewitt for the use and occupation of the property, and the case is particularly described in paragraph II of the complaint herein. That

judgment will be referred to in this brief as the Ransch-Blake judgment.

"The above-mentioned litigation having thus resulted, Arp contended that the last-mentioned judgment was the personal and individual obligation of Blake by reason of her having secured the benefits of the said use and occupation, and that she ought to pay it, or, in case he should be compelled to pay it, that he should be allowed a set-off on the Blake-Arp judgment which Blake held against him. He accordingly moved for a credit in the case of Blake v. Arp, and the lower court allowed a set-off of one-third of the Ransch-Blake judgment; but both parties appealed and the case was reversed on the ground that contribution could not be enforced by motion. Blake v. Arp, 48 Cal. App. 715, 192 P. 452.

"Arp then commenced the present action for contribution or a set-off against the Blake-Arp judgment, having theretofore been compelled to pay the Ransch-Blake judgment. Defendant Cohn had received an assignment of the Blake-Arp judgment and was accordingly made a party defendant. The first cause of action set forth in our complaint relates to the matters above mentioned and asks for credit on the Blake-Arp judgment of the amount which plaintiff had been compelled to pay on the Ransch-Blake judgment. The complaint also contained two other causes of action growing out of garnishments on Arp by creditors of Blake, but these causes fell by the wayside on demurrer in the trial court.

"A trial was had on the first cause of action which resulted in a judgment in favor of Arp against Blake but not against Cohn. Plaintiff appealed to this (the Supreme) Court and the case was transferred to the District Court of Appeal for the second District for hearing, where it was decided August 2, 1923, by Judge Shenk. Arp v. Blake, 63 Cal. App. 362, 218 P. 773. By this opinion the decision of the trial court was reversed, and it was held that Arp's right to a set-off was valid and enforceable against Cohn as the assignee of Blake unless there had been an estoppel in favor of Cohn, and ordered the case back for trial on the issue of estoppel alone. The case was retired on that question and judgment went in favor of plaintiff and against defendant Cohn for the full amount of the Ransch-Blake judgment and interest, the defendant Cohn, as assignee of Blake, having enforced payment by Arp of the full amount of the Blake-Arp judgment during the pendency of the former appeal herein."

The facts set forth in the complaint, as is to be inferred from the foregoing statement, are, substantially, as they are given in said statement. The answer of Cohn, besides admitting and denying certain of the allegations of the complaint, sets up a special defense by way of an estoppel founded upon the following alleged facts:

That immediately prior to the purchase of the Blake-Arp et al. judgment by said Cohn and the assignment thereof to him, said Cohn met and conversed with the plaintiff herein regarding said judgment; that the plaintiff stated and represented to Cohn that he (plaintiff) "was about to pay off the said judgment owing to the said Elizabeth Blake, and that if he, the said defendant Charles Cohn, would purchase said judgment the said James Arp would shortly thereafter pay the said Charles Cohn the amount of said judgment, and defendant Charles Cohn, believing him and relying upon said representation of the said James Arp, did purchase said judgment and obtain an assignment thereof, and pay the sum of $2,550 to the said defendant, Elizabeth Blake, therefor, that he would not have purchased the same if the said James Arp had not made said representation to him, and that, therefore, the said plaintiff, James Arp, is and should be estopped of claiming of contribution or right to subrogation or contribution against this defendant, Charles Cohn."

As before stated, the special defense thus set up involved or tendered the only issue litigated below in the present trial. The trial court found against the defendant Cohn upon his plea of estoppel.

It appears from the evidence that, prior to the date of the purchase by Cohn and the assignment to him of the Blake-Arp judgment, to wit, June 3, 1919, said judgment being for the sum of $2,100, the judgment creditor Blake was indebted to Cohn, for and on account of money advanced by the latter to the former, in a sum exceeding $3,000; that Mrs. Blake, after obtaining the judgment against Arp, was frequently importuned by her attorneys in the action in which she secured said judgment for the payment of their fee of $708 for the professional services they rendered therein for said Blake; that she (Blake) applied to Cohn for sufficient money with which to pay said fee; that Cohn, upon the understanding that Mrs. Blake would assign said judgment to him in consideration of and for the payment of said attorneys' fee, agreed to satisfy or pay the same, and did do so, and received from Blake such assignment; that it was further agreed by Cohn that upon the satisfaction of said judgment by the payment thereof by Arp, Cohn should and would credit, upon the then existing indebtedness of Blake to him, the difference between the amount paid in satisfaction of the said fee of the attorneys and the sum remaining of the satisfied judgment debt. Arp having paid the judgment to Cohn, the latter followed the course with respect to the disposition of the money so received as indicated by his said agreement. These facts are undisputed—in fact, they were admitted by Cohn when testifying herein in his own behalf and were specifically found to be true by the trial court. But, as seen, Cohn claims that he did not purchase said judgment until after he had talked with Arp with reference thereto and then solely upon the representation or assurance by Arp that, if Cohn should and did buy the judgment, he (Arp) would pay and so satisfy it.

This brings us to the consideration of the question whether the finding as to Cohn's plea of estoppel rests upon a sufficient evidentiary foundation. Upon this question the court found:

That, prior to the purchase of said judgment by Charles Cohn, the latter and Arp had a conversation in which the proposition of Cohn to purchase said judgment was discussed; that said Arp (plaintiff) "then and there stated to the said Cohn that he, said plaintiff, held certain offsets against said judgment, and that, if he should be compelled to pay said judgment in said action 8450 to the said Ransch, he, the said plaintiff, would deduct the same from the amount of the judgment in favor of said Blake, and that, if the defendant Cohn purchased said judgment, the plaintiff would pay defendant Cohn whatever remained due; that it is not true that the said Charles Cohn purchased the said judgment from the said Blake upon any belief in or reliance upon any promise of the plaintiff to pay the whole of said judgment to the said Charles Cohn; that it is not true that the said Charles Cohn would not have purchased the said judgment except for his belief in or reliance upon any representation or statement of the plaintiff that plaintiff would pay the whole of said judgment."

The court further found, as above stated:

That the sum of $708 paid by Cohn to the attorneys acting for and representing Mrs. Blake in her action against the plaintiff here "is the only sum and the only amount of money which the defendant Cohn in any manner paid out or expended for or on account of said assignment" (of said judgment), and further found "that the defendant Cohn did not pay out or expend such sum or any part thereof, or suffer any loss or prejudice whatever by reason of any statement, act or declaration whatever of the plaintiff, James Arp; that, on or about June 3, 1919, immediately prior to the time when the said defendant Cohn paid out said sum of money and received the said assignment of said judgment the plaintiff, James Arp, notified and informed the defendant, Charles Cohn, that he, the said Arp, would expect credit on said judgment held by said Blake in the event he was ultimately compelled to pay said judgment in said case No. 8450."

It was also found, in response to the allegations of the supplemental complaint filed herein by the plaintiff here, that the plaintiff Arp was compelled to and did pay the amount of the judgment ($3,975) in the Ransch-Blake action upon a duly issued writ of execution, which was placed in hands of the sheriff, with instructions to satisfy the same out of the property of the plaintiff; that plaintiff, to prevent his property from being seized and sold under and by virtue of said writ, paid the amount of said judgment to the sheriff.

[1] The single question presented to us here is whether the above findings, in so far as they relate to the plea of estoppel set up by the defendant Cohn, derive sufficient support from the evidence. The defendant Cohn testified:

That he called at the office of the attorneys of Mrs. Blake in her litigation with the plaintiff to discuss the matter of paying the fee due them from Mrs. Blake for services performed by them for her in said litigation, and of taking over by purchase the judgment then existing in favor of Mrs. Blake against the plaintiff; that he (Cohn) did not care to consummate the deal until he had talked the matter over with plaintiff; that he left the office of the lawyers and within a brief time thereafter met Arp on the street; that he said to Arp that Judge Scott (one of Mrs. Blake's attorneys) "wanted him (Cohn) to buy the judgment that Mrs. Blake has got against you; I told him (Scott) I wouldn't buy anything subject to litigation. * * * 'Now,' I says (addressing Arp), 'that's the situation; you (Arp) are strong on lawsuits and I don't want lawsuits.' He (Arp) says: 'Yes, you have got a judgment and go ahead and buy it; I would rather you would have it than anybody else because I know in case I am short of money you are not going to crowd me.' I says, 'That's all right; I will give you all reasonable time, but I want interest on the principal.'"

Cohn, proceeding, testified that he thereupon told Arp that he (Cohn) would go to Judge Scott's office and give the judge a check for $708, the amount of the attorney's fee. Cohn further testified that the conversation just related was the only one he had with Arp regarding the purchase of said judgment prior to said purchase and that no other persons but Arp and himself were present when it took place. He had also testified that, prior to making such purchase, he had no knowledge of the fact or did not know that Arp had a judgment against Mrs. Blake.

As Cohn testified, no other persons than he and Arp were present when the said conversation took place. Therefore, Arp's was the only testimony other than that of Cohn disclosing the nature of the conversation given at the trial. Arp's testimony materially varied from that of Cohn relative to what was said by them in the conversation. But, before stating the testimony of Arp, or the substance thereof, it should be explained that, after the judgment obtained by Mrs. Blake against Arp became final, two creditors of the former, before the said conversation was had, brought actions against her to recover debts owing to them from her, and each had caused to be served upon Arp a writ of attachment, and thereby garnished the money due from Arp to Mrs. Blake upon said judgment. This garnishment existed at the time the conversation took place between Cohn and Arp relative to the purchase by the former of the Blake-Arp judgment and, of course, Arp was bound thereby. Code Civ. Proc. § 544. Now, as to the nature of the conversation referred to, Arp testified, as Cohn testified, that there was but one conversation between them relative to the Blake-Arp judgment, and, as Cohn also testified, said conversation occurred on the street, where the two happened to meet; that Cohn said to him that he (Cohn) had bought the Blake-Arp judgment from Mrs. Blake, and that he (Arp) replied:

"Well enough, that's all right; I will pay it, but there are several garnishments and I also have a claim against her (Mrs. Blake) for rent.

"Q. Did you tell him that time that you had no claims of any kind? A. No, sir, I did not; I told him I had a bill of the horse pasture and a garnishment by Mr. Allen and one of the Hochheimer Company, and also the J. Ransch judgment that she owed to Ransch which I was trying to make her pay.

"Q. What did he say, if anything? A. Well, he said he didn't have anything to do with that at all; I says, 'I have; they have already garnished me before this;' and so he says, 'I have paid Mr. Scott for the assignment;' he says, 'Yes. Mr. Scott called me up and told me about it; that you were going to pay it off or something like that.'"

On cross-examination Arp testified:

"Q. Now at that time when you had that conversation, what was said between you as to the payment of this Ransch judgment? A. Well, we talked it over there and I told Mr. Cohn about these garnishments against me and also the Ransch judgment against Mrs. Blake and I and Hewitt, and I hadn't occupied the house or received anything about it and * * * had to protect myself; he said he had bought it and I would as soon pay him as anybody else—it didn't make any difference to me; if I had to pay it, I would pay it. * * *

"Q. Didn't you tell him you were glad he had bought the judgment and knew he wouldn't press you and you would be glad to pay him interest on it? A. Not the whole judgment.

"Q. Well, did you distinguish between any particular amounts that you were willing to pay interest on? A. Well, just what was the balance—about twenty-four or twenty-five hundred dollars.

"Q. Well, did you say balance? A. Yes.

"Q. Did you ever tell him what this money was that she owed you? A. Yes; I told him several times.

"Q. You told Charley Cohn what it was? A. Yes.

"Q. Did you tell him in this conversation what it was? A. I told him something like thirteen hundred dollars. * * * He said he didn't know anything about that; that wasn't his business."

[2] It is clear that the testimony, of which a brief résumé is given above, fully upholds the finding that Cohn's special plea by way of estoppel is wanting in sufficient evidentiary support. First, it may be observed that Arp knew (as did Cohn) that the former would in any event be bound by the judgment against him—that is to say, he (Arp) knew that he would be so bound, regardless of whether the ownership thereof remained in the judgment creditor or was in any third party to whom she might assign it, and he (Arp) further knew that he was entitled to claim any set-off he might have against the judgment creditor or against her assignee of said judgment. Civ. Code, § 1432. Hence, it would seem, he could have had no possible reason for concealing from Cohn the fact that he claimed and intended to set up his right to contribution as against the judgment against him for any excess he might be compelled to pay, in satisfying the Ransch-Blake et al. judgment, over and above his share of the obligation. But, be that as it may, according to Cohn, it was Arp's silence as to his claimed right of contribution which constituted the main ground of his "offending," and this was only an act of omission in that he failed to disclose to Cohn that he claimed such right and intended to assert it at the proper time as in recoupment, pro tanto, of the money he appropriated to the payment of the Ransch-Blake et al. judgment in excess of the amount which constituted his share of the obligation. He, however, was not legally required to speak upon the subject, since, obviously, the proposition of Cohn to purchase the Blake-Arp judgment involved a matter or a proposed transaction solely between Mrs. Blake and Cohn, and one with which Arp was in no way or measure connected. Arp was not, nor was he to be, a party to that transaction. He was as much a stranger to it as any person in no manner or form connected with any of the litigation eventuating in the action by Blake against Arp and in which the former obtained the judgment against the latter which Cohn proposed to purchase. Arp, therefore, owed no legal duty to Cohn with respect to the matter of the latter's proposition to purchase the Blake-Arp judgment. He was under no legal obligation to advise Cohn regarding his proposition to buy said judgment, or to suggest to him (Cohn) that there were certain claims and liens existing against or upon said judgment. In Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L. R. A. 673, the obvious proposition is stated that:

> "Mere silence on the part of a party will not create an estoppel, unless he was under some obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak, and that he has not only been induced to act by reason of such silence, but that the other had reasonable cause to believe that he would so act."

The court in that case proceeded to say, as we have shown is true here, that there was nothing in the relations between the plaintiff and the defendant which made it the duty of the former to give the latter information regarding the matter as to which it was claimed the alleged estoppel arose.

But the foregoing considerations may be disregarded, and still the finding that the plea of estoppel was not sustained cannot be disturbed, and this upon the proposition that Arp's testimony, as seen, is in sharp conflict with that of Cohn regarding the nature of their conversation, and is, as seen, to the effect that he (Arp) in said conversation told Cohn that he was entitled to an offset as against Mrs. Blake upon the judgment held by her against him, and that he intended to seek the enforcement of said offset.

The argument advanced in the brief of

counsel for appellant that, inasmuch as the court found that the conversation between Cohn and Arp occurred before the former's purchase of the Blake-Arp judgment, the further finding that Arp's version of the conversation was true justifies the conclusion that the conversation referred to by Arp must have occurred subsequent to the purchase of said judgment by Cohn, is obviously destitute of merit. Both Cohn and Arp in their testimony were as one upon the fact that there was only one conversation had between them relative to the purchase of said judgment by Cohn. The latter testified that said conversation occurred before he purchased the judgment. Arp did not expressly fix the time that the conversation was had with reference to the time of the purchase of the judgment by Cohn, but did say that in said conversation Cohn told him that he *had bought* the judgment, from which the inference may be deduced that at the time of the conversation Cohn had already purchased the judgment. The court, as we have seen, found the other way. But it is clearly immaterial, upon the record here, whether the purchase was made prior or subsequent to the time the conversation occurred. If before, then the finding that Arp's version of the conversation—that is, that in said conversation he informed Cohn that he had certain offsets against his (Cohn's) assignor which he (Arp) intended to set up against the judgment—derives sufficient support from the testimony of Arp to that effect. If the conversation occurred at a time subsequent to the purchase of the judgment by Cohn, then obviously, what was said or omitted to be said by Arp in the conversation could not have been a factor entering into the act of Cohn in purchasing the judgment.

Although we have herein given the points presented rather extended consideration, we are constrained to suggest that the case should have been left where the trial court left it.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

78 Cal. App. 743

NELSEN v. JOSEPH. (Civ. 5444.) *

(District Court of Appeal, First District, Division 1. California. July 20, 1926.)

Appeal and error ⚷1024(4).

Findings, on motion to set aside defendant's default, that service was made as stated in affidavit of service, finding support from evidence, are conclusive on appeal.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action on a promissory note by N. E. Nelsen against Joaquin Joseph. From a judgment for plaintiff, and from an order denying a motion to set aside default, defendant appeals. Affirmed.

L. A. Kottinger, of Oakland, for appellant.
F. H. Arb, of Hayward, for respondent.

CASHIN, J. A judgment was entered against defendant after default, and the denial of a motion to set the default aside on the ground that the summons had not been served. The appeal is from the judgment, and presents for review the action of the court in denying the motion.

The summons issued and returned was regular in form, and was shown by the affidavit attached to have been served by a qualified person upon appellant personally in the county in which the action was pending, by delivery to the latter of a copy of the summons, to which was attached a copy of the complaint in the action. While the evidence presented on the motion was conflicting, the conclusion of the trial court that service was made as stated in the affidavit of service finds support therefrom, and cannot be disturbed on appeal. Doak v. Bruson, 152 Cal. 17, 91 P. 1001; Flood v. Goldstein, 158 Cal. 247, 110 P. 916; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232.

No other question being raised by the appeal, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

78 Cal. App. 638

In re WHITNEY'S ESTATE.

WHITNEY et al. v. BURNHAM et al.

(Civ. 5520.)

(District Court of Appeal, First District, Division 1, California. July 10, 1926.)

1. Wills ⚷685—**Testamentary trust held intended primarily to reduce corpus of estate into cash, to be distributed among beneficiaries, not to keep it invested.**

Trust created by will, directing trustees to keep all money received and invest it as deemed best, and authorizing them to dispose of surplus unnecessary for businesslike care of estate to legatees, *held* intended primarily to reduce corpus of estate into cash, to be distributed among beneficiaries, not to have trustees keep it invested.

2. Trusts ⚷219(1)—**Refusal to charge trustees with interest on balances at short periods of year held not error (Civ. Code, § 2261).**

Where trustees were endeavoring to carry out purposes of trust by three distributions to beneficiaries within little over year, and declared purpose to continue practice whenever accumulated amounts were sufficient, consistent with judicious management of estate, court did not err in not charging them with interest on balances at certain short periods of year, under Civ. Code, § 2261.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court September 16, 1926.

3. Trusts 🔑219(1).

Trustees' liability for interest must be determined from character of trust and circumstances attending its administration.

4. Trusts 🔑219(1).

Generally, trustee acting in good faith in keeping funds in his hands ready to distribute should not be charged with interest thereon.

5. Trusts 🔑179.

Trustees must be held to strict and rigid accountability.

6. Trusts 🔑179.

Trustees must exercise degree of care and diligence which man of ordinary prudence would exercise in managing his own affairs.

7. Trusts 🔑219(1) — Trustees, not investing sums as business prudence would dictate, are liable for interest they should have received, and any losses resulting, though no personal gain was made or intended.

Trustees, failing to invest or place at interest sums that simple business prudence would dictate should be invested, are subject to payment of interest they should have received, and will be held to strict personal accountability for any losses resulting, though they neither made nor intended to make personal gain.

8. Trusts 🔑219(1).

That bank, in which trust funds are deposited, pays no interest on sums awaiting distribution, will not relieve trustees from placing funds in another reliable interest-paying bank, in case of delay in making further distributions.

9. Trusts 🔑295—Notes, bonds and real estate dealer's commission, accounted for by testamentary trustees as executors, held not part of trustees' account (Code Civ. Proc. § 1699).

Notes and bonds, sold in course of administration of estate for amount fully accounted for, with interest thereon, by testamentary trustees as executors, and sum paid as real estate dealer's commission, which was likewise so accounted for, *held* not part of trustees' account, under Code Civ. Proc. § 1699.

10. Trusts 🔑322—Trustees' account, omitting details of rent payments by different tenants, held not objectionable.

Trustees' account, showing collection of stated sum monthly in rents, *held* not objectionable in omitting details of various payments by different tenants, where monthly detailed statements to trustees by broker who collected rents were in evidence.

11. Trusts 🔑225.

Agent's charge for collection of rents is proper, in necessary care and management of estate by trustees.

12. Trusts 🔑315(1)—Will held to show that legacies were given executors and trustees in part consideration for services, so as to bar additional compensation for services as trustees after decree of distribution (Civ. Code, § 2274).

Will providing that executors and trustees, for their services as such "and in addition to the portions heretofore provided to be given them," are to receive stated sum in full of all their services, *held* to show that legacies were given in part consideration for such services, so as to bar additional compensation for services as trustees after decree of distribution, under Civ. Code, § 2274.

13. Trusts 🔑315(2).

Under Civ. Code, § 2274, trustees are entitled to no more than compensation specified in instrument creating trust.

14. Trusts 🔑315(1)—Finality of order allowing fees to executors does not entitle them to compensation for services as trustees, in addition to that provided by will for services in both capacities.

That order allowing executors certain fees as such has become final does not entitle them to compensation for services as trustees after decree of distribution, in addition to amount provided by will for their services in both capacities.

15. Trusts 🔑316(2).

Commission of over $48,000, provided for by will, *held* not inadequate compensation of executors and trustees for administering estate valued at over $500,000.

16. Trusts 🔑315(2) — Trustees, accepting trust under will limiting compensation, are bound thereby, and court cannot allow greater sum.

Trustees, accepting trust created by will limiting amount of their compensation for services, both as executors and trustees, are bound thereby, and court cannot allow them greater amount.

17. Appeal and error 🔑417(1)—Notice of appeal held not objectionable, as ungrammatical, inartificial and meaningless.

Notice that appellants "hereby appeal to the Supreme Court," etc., "from that certain judgment made in the above-entitled matter on the 5th day of June, 1925, settling, allowing, and approving the first annual account of trustees of said estate, * * * and which judgment or order was rendered in favor of said trustees," *held* not objectionable, as ungrammatical, inartificial, and meaningless.

18. Trusts 🔑271½.

Court of equity will not interfere with reasonable exercise of trustees' discretion under will in distributing property.

19. Trusts 🔑280—Trustees' refusal to distribute $100,000 to beneficiaries from corpus of estate held not abuse of discretion under will.

Trustees, making three distributions, amounting to some $75,000, within year, and intending to make distributions as frequently as income warranted, *held* not to have abused discretion under will to so dispose of surplus, not necessary for businesslike management of estate, by refusal to distribute $100,000 to beneficiaries from corpus of estate.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of Willard W. Whitney, deceased, and the administration of the trust under decedent's will. From an order settling the first annual account of George Burnham and another, trustees, Mary E. Whitney and others, beneficiaries, appeal. Affirmed in part, and reversed in part, with directions.

Adam Thompson and Renwick Thompson, both of San Diego, for appellants.

Haines & Haines, of San Diego, and B. J. Bradner, of Los Angeles, for respondents.

TYLER, P. J. Appeal from certain portions of an order settling the first annual account of trustees under a will. The facts necessary for a discussion of the objections raised show that one Willard W. Whitney died testate in January, 1923, leaving a large estate, consisting of real and personal property. His will was duly admitted to probate in San Diego county, and George Burnham and Herbert E. Anthony were appointed his executors. They proceeded to administer upon the estate, and regular proceedings were had leading up to the distribution, which was made on the 29th day of February, 1924. Under the terms of the will, as modified by its codicils, Mr. Burnham and Mr. Anthony, who were made executors, were also named trustees, and the decedent's entire property was devised and bequeathed to them as such, in trust to manage and dispose of the same, for which purpose they were allowed a period of 10 years to distribute the proceeds in aliquot parts among numerous beneficiaries, some of whom are appellants herein. Under the decree of distribution the assets of the estate on hand at the close of administration were accordingly distributed to them as such trustees and they have since managed them in that capacity. In due time they filed their first annual account as such trustees, which embraced their transactions from February 29, 1924, the date of the decree of distribution, to and including March 24, 1925. This account was settled, the order being made June 5, 1925, and it forms the subject of the present appeal.

We will discuss the various objections in the order in which they are made. The first objection to the account is that it does not appear therefrom what amount of interest, if any, has been received by the trustees from any bank or other deposit source whatever under said trust; nor does it appear from the account what money, if any, has been invested by the trustees under the trust from the money collected from the various sources for said estate; nor does it appear in what banks the funds received were or are invested. It was and is claimed under this objection that the trustees had received not less than $2,500 per month as rents from the real property of the estate, and that they also had received some $25,389.89 distributed to them in cash under the decree of distribution, and it is charged that the trustees, from the commencement of their trusteeship, have had as high as $43,735.57 on deposit in a certain bank in the city of San Diego, without any interest being paid thereon, and that there was, at the time the first account was presented, over $25,000 belonging to the trust fund, and it was not credited with any interest whatsoever; that the trustees should, under the provisions of section 2261 of the Civil Code, be made to account for interest upon these items. That portion of the decedent's will which refers to the duties of the trustees concerning the investment of the funds reads as follows:

> "I hereby direct my said trustees to keep all moneys that may come into their hands as rental, income or otherwise, and to invest and reinvest the same as in their judgment may seem best for the purpose of securing the highest and safest income therefrom for the uses and purpose of the estate."

It also provides that:

> "They are further authorized and empowered to dispose of surplus moneys not necessary for the businesslike management, maintenance and care of the estate from time to time, and in such amounts as they deem best, to the said hereinafter named legatees, said distributions to be pro rata."

Then follows the further provision limiting the trustees to a period of 10 years within which to sell and convert into cash all the real and personal property of the estate and to distribute the same to the beneficiaries. The record shows that, at the time of distribution to the trustees of the assets of the estate, there came into their hands a cash balance of $25,389.89. This balance was on deposit in a bank at San Diego, of which the trustees were officers. It further shows that between the date of the distribution on February 29, 1924, and March 14, 1924, the collections of the trustees amounted to but a few hundred dollars. On the latter date, a period of about two weeks from the date of the making of the decree of distribution, the trustees made a pro rata distribution, in addition to proper disbursements, to the beneficiaries by checks which, after deductions for certain taxes advanced on the distributive shares, aggregated the sum of $25,931.43. The result of this distribution substantially exhausted all the money in the hands of the trustees at this time.

This true condition was not reflected on the ledger account, for the reason that the beneficiaries are widely scattered throughout this country and Canada, and the checks sent them were for some time outstanding. The record further shows that the trustees had sold certain Michigan bank stock belonging to the estate, and had forwarded to the purchaser the certificate, with draft attached for the amount due. At this time the trustees charged themselves with the amount of the sale, though the proceeds thereof did not reach their hands until some time later; the delay being caused by the state of Michigan demanding the sum of $841.08 as an inheritance tax on the same. The actual sale price had been credited to the estate. The amount ultimately received by the trustees for the sale of this stock was the sum of $25,920, which was some $874 less than the amount they had credited the estate with. The difference was thereupon charged back to the trustees' account. During this period of delay, as above described, the ledger sheet showed this amount to be actually in the estate from the time the amount of the draft was credited to it by the trustees, when, as a matter of fact, the sum was not actually on hand. In September, 1924, the trustees made another distribution to the beneficiaries, and the greater portion of the checks representing the amount thereof were outstanding on October 1, 1924. The apparent balance shown by the books did not, therefore, correctly reflect the actual balance. There is also evidence in the record to show that, in addition to these distributions, the trustees made a third one to the beneficiaries immediately after filing their account and before the hearing thereof, so at the time of the settlement of the account the balance appearing was greatly reduced by outstanding checks. Certain oral testimony given by bankers at San Diego was had to show upon what accounts interest would be allowed. There was testimony to the effect that 3 per cent. would be credited on balances upon certain character of checking accounts, but with restrictions upon the checking privilege, and that, where special arrangements were not made, the right to demand advance notice of withdrawals was retained in the event of some banking stringency.

[1, 2] The testimony upon this subject is conflicting. The court found that no interest should be charged to the trustees on account of any balance of cash from time to time in their hands or in the bank during the period covered by the first account. The express and primary object of the trust was to reduce the corpus of the estate into cash and have it distributed among the beneficiaries. It was not the purpose of deceased to have the trustees keep the corpus of the estate invested. It is manifest from the evidence that the trustees are endeavoring to carry out the purposes of the trust, for they have made three distributions to the beneficiaries, amounting to some $75,000 in a little over a year's time, and there is testimony of one of the trustees to the effect that it is the policy of the trustees to make a distribution every 90 days, if possible. Their declared purpose is to continue this practice whenever accumulated amounts are sufficient to warrant a disbursement, consistent with judicious management of the estate. Under these circumstances, we cannot say that the court erred in not charging the trustees with interest upon the balances they may have had at certain short periods of the year.

[3-6] We do not wish to be understood, however, as declaring that, where accumulated funds have reached an amount where interest thereon can be obtained, and the distribution of such funds is held in abeyance for any reason for such a length of time that it would amount to a lack of ordinary business prudence for the trustees not to deposit them where they might earn some interest, the trustees would not be liable for a loss of interest. The liability of a trustee to pay interest must be determined from the character of the trust, and the circumstances attending its administration. The general rule is that a trustee, acting in good faith, who keeps funds in his hands ready to distribute should not be charged with interest thereon. 39 Cyc. 422. It is, however, of the most vital importance that trustees be held to a strict and rigid accountability. They must exercise, in the execution of the trust, the degree of care and diligence which a man of ordinary prudence would exercise in the management of his own affairs.

[7] If, then, in carrying out the manifest intention of the testator, delay in distribution occurs for any reason, and sums accumulate that simple business prudence would dictate should be invested, and such sums are not invested or placed at interest, such omission should and will subject trustees to the payment of the interest they ought to have received. If they become short of this duty, they will be held to a strict personal accountability for any losses which may result from such omissions; and the fact that they neither made nor intended to make any personal gain from their omission would not exonerate them from liability. Here many of the beneficiaries are aged persons, who are in a necessitous condition, and they are desirous of having the amounts due them speedily paid, and the trustees, it seems, are endeavoring to carry out their wishes in this respect, instead of temporarily investing the funds, which they might be justified in doing under the power given them by the terms of the trust. Under these circumstances we are of the opinion that the court properly refused to charge the trustees with interest.

[8] In concluding this subject, it might be well, however, to point out that, in the event of a delay in the making of further distributions, the mere fact that the bank in which the trust funds are deposited, and in which the trustees are officers, pays no interest on sums awaiting distribution, will not relieve the trustees from placing the funds in some other reliable bank that does pay interest.

[9] The next objection is to the effect that the account does not comply with section 1699 of the Code of Civil Procedure, as it lacks the detail contemplated by that section. In this connection appellants first complain

that the account fails to contain any reference to certain notes and bonds. These notes and bonds were appraised in the estate as being of the value of $17,780. Under the final account in the estate, respondent trustees, as executors, had charged themselves with the full face value of these securities. In their first account as trustees, they have charged themselves with the entire value of the estate distributed to them as trustees after administration. In this list of assets on hand, these securities do not appear, for the reason that they were sold in the course of the administration of the estate, and the amount received for each security, together with the interest thereon, had been there fully and completely accounted for. The decree of distribution in the estate was in evidence at the hearing upon the trustees' first account, and it clearly shows the history of these items. There is no merit in the objection. The same may be said of the item of $300 paid as a real estate dealer's commission for the sale of certain lots. This matter was likewise disposed of in the settlement of the final account of respondents as executors in the estate. The item was therefore properly found by the court to form no part of the trustees' account.

[10] Appellants next object to a lack of detail in the account with respect to the rents collected by the trustees from the real property belonging to the estate. They claim that the account merely shows that an amount in excess of $2,000 has been collected monthly, but that no details of the various payments by the different tenants are set forth, which omission renders the account objectionable. It appeared in evidence that the broker who collected the rents rendered monthly detailed statements to the trustees both as to the names of the tenants and the amount paid by each, accompanied by a check representing the amount of the collections. These statements were in evidence at the hearing. Under these circumstances, the court held, and we think properly so, in passing upon the objection, that no useful purpose would be accomplished by requiring the account to be amplified with respect to the same. The monthly receipts from the real estate were constant, and only varied a few dollars, and were fully accounted for. There is no merit in the objection.

[11] Objection is also made to the agent's charge for the collection of the rents. We are of the opinion that there is no merit in this objection. It cannot be expected that trustees should personally collect the rents due from tenants by making a personal call upon each of them. The charge was a proper one, made in the necessary care and management of the estate. 2 Beach on Trustees, §§ 460, 588; Estate of Graham, 187 Cal. 222, 201 P. 456, 18 A. L. R. 631.

[12] The next objection relates to the order concerning the compensation of respondent trustees under the will. This objection requires a somewhat extended recital of the facts in relation thereto. Under the terms of the will the testator divided his estate into 17 parts, and gave to the recipients of his bounty certain parts or portions thereof. The third clause of the will of the deceased provided in part as follows:

> "In recognition of the many services performed for me during my lifetime, and in appreciation thereof, I direct that there shall be paid to George Burnham of San Diego, California, two-thirds of one part; to William R. Rogers of San Diego, California, two-thirds of one part."

These parties were named as executors and trustees under the will. William R. Rogers predeceased the testator, and in consequence thereof the testator by codicil provided that, in view of the death of Rogers, he nominated and appointed respondent Herbert E. Anthony in the place and stead of Rogers, and he directed that said Anthony be paid the same quantum of his estate as Rogers had been bequeathed, namely, two-thirds of one part. Two-thirds of one part of the estate, according to the report of the inheritance tax appraiser, amounts to the sum of $21,860.72. The seventh clause of the will of the deceased provided as follows:

> "As a consideration and compensation to my said executors and trustees for their services in the performance of their duties as executors and trustees under this trust, and in addition to the portions heretofore provided to be given them, and upon a full understanding with them, the said executors and trustees, they are to receive the sum of twenty-five hundred ($2,500.00) dollars each, which said sum is to be paid in full of all their services as such executors and trustees."

At the close of the administration of the estate Burnham and Anthony, as executors, filed their final account and petition for distribution. They filed a waiver of the compensation fixed by the will, and asked for and were given the statutory commissions as executors in lieu thereof, which were fixed in the sum of $4,363, to be divided between them. In the order settling the final account it was provided that the sum allowed was for executors' commissions only, and was exclusive of such compensation as might thereafter be allowed by the court for such services as might be rendered by the executors as trustees under the terms of the will. No appeal was taken from this order, and it became final. When the first account of the trustees as such was heard, they petitioned the court for a reasonable allowance to them as trustees for services rendered in relation to the trust subsequent to the decree of distribution. Appellants herein filed their objection to any order being made for any allowance whatsoever, for the reason that their compensation had been specifically fixed and determined by the will of the deceased, and under the express provisions of section 2274 of the Civil Code they were entitled to the sum specified therein, and no more.

The court disregarded the objection. In the order settling the first annual account of the trustees, the court decreed that the bequests made by decedent to Burnham and Anthony of two-thirds of one part each of the estate, and the value of the same, were not matters having any connection with their compensation as executors or trustees, and adjudged them to be entitled to the sum of $2,500 each for their services as trustees. It was further ordered, however, that payment of the same should be held in abeyance until the further order of the court. We are of the opinion that the court erred in giving such a construction to the instrument. That the legacy of two-thirds of one part of the estate given to respondents was given as part consideration for their services in both capacities there can be no question. The language of the will is plain and unequivocal in this respect. It recites that as a consideration and compensation, and in addition to the portions heretofore provided to be given them, which has reference to these legacies, and upon a full understanding with them, the said executors and trustees are to receive the sum of $2,500 each, which sum is to be paid for all their services as such. We cannot conceive what language could be employed to more plainly indicate that the legacies were given to respondents in part consideration for the services to be performed under their two functions and duties. Any other construction would be contrary to the letter and spirit of the will. We do not deem an extended discussion of the subject necessary. The instrument speaks for itself.

[13, 14] The order of the court allowing respondents an additional sum, was therefore without authority. Where an instrument by which a trust is created fixes the compensation of the trustees they cannot claim a larger sum. They are entitled to the amount specified, and no more. Civ. Code, § 2274; Estate of Runyon, 125 Cal. 195, 57 P. 783. Their acceptance of the trust will be held as an agreement to receive such compensation as the instrument directs. In any event, they may not elect, as here, to take a legacy given as part consideration for their services, and a larger additional amount than the instrument provides for, and the mere fact that respondents attempted to separate their duties as executors from that as trustees and to have their fees apportioned can in no manner affect the limitations contained in the will, which recites that the compensation provided for shall be in full for their services as executors and trustees. The order settling the final account of respondents as executors, wherein they were allowed certain fees as such, in no manner attempts to change or alter the situation. The mere fact, therefore, that this order has become final, does not have the effect of enlarging the limited amount which the will provides for the services of respondents in both capacities, and the amount of the payment to them as executors should be taken into account when they ultimately receive the fees provided for.

[15, 16] Something is said in the brief of respondents concerning the inadequacy of their compensation for administering upon an estate the value of which is over $500,000. If we are correct in our construction of the will with reference to the compensation of respondents, there is no force in this suggestion, as the total commissions provided for amount to the sum of $48,721.44, or nearly one-tenth of the value of the estate. Then, again, if the amount was deemed by them inadequate they could have refused to act. However this may be, the will having limited the amount which respondents should receive as compensation for their services, both as executors and trustees, and they having accepted their trust, they are bound thereby, and the order of the court allowing them a greater amount is without authority.

[17] Respondents have taken exception to the form of the notice of appeal. They claim it is ungrammatical, inartificial, and meaningless. The notice, among other things, recites that appellants "hereby appeal to the Supreme Court," etc., "from that certain judgment made in the above-entitled matter on the 5th day of June, 1925, settling, allowing, and approving the first annual account of trustees of said estate and trust of said deceased as presented to said court, and which judgment or order was rendered in favor of said trustees and against the aforesaid objectors." We do not feel that any useful purpose would be gained by following the argument of attorneys for respondents in their analysis or grammatical construction of the notice. It is sufficient to say that in our opinion the objection is hypercritical and without merit.

[18, 19] Appellants finally complain of the action of the court in refusing to direct the trustees to distribute the sum of $100,000 to the beneficiaries from the corpus of the estate, it being claimed that such a distribution can be made in the proper exercise of a reasonable discretion considering the condition of the estate. Upon the subject the will expressly provides that the trustees shall keep all of the real estate that may come into their possession rented and producing income, so far as the same is possible, and it directs them to make such repairs as in their judgment may seem best for the purpose of securing the highest rentals possible. It further provides that the trustees keep all funds that may come into their hands as rental, income, or otherwise, and invest or reinvest the same as in their judgment may seem best, and authority is expressly conferred upon them to dispose of surplus money not necessary for the businesslike man-

agement and care of the estate, by making distributions from time to time to the legatees. In the event of a sale of the real estate the will directs that the trustees shall make immediate distribution of the proceeds received therefrom among the different legatees. By another subdivision a period of 10 years is given the trustees to dispose of and distribute the entire estate.

Under these provisions it is manifest that a certain discretion is vested in the trustees in the matter of distributing the personal property. Under such circumstances a court of equity will not interfere with the reasonable exercise of such discretion. There is nothing in the record to show that up to the present time the trustees have abused this power. They have already made three distributions, amounting to some $75,000, within a year's time, and it was in evidence that they intend to make distributions as frequent as the income amounts to proper proportions. Under these circumstances, the court was justified in refusing the order requested.

From what we have said, it follows that the order must be affirmed upon all questions except that relating to the compensation of the trustees. That portion of the order must be and it is hereby reversed, with directions to the court below to strike therefrom the amount awarded to the trustees, and to confine the compensation of respondents to the amounts given to them under the express provisions of the will, as full compensation for their services in both their capacities as executors and trustees. In determining this amount the trustees should be charged with the sum already received by them as executors.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 472

BERETTONI v. SARGENTINI et al.
(Civ. 5527.)

(District Court of Appeal. First District, Division 2, California. June 22, 1926.)

1. Fraud ⚿59(2).

Measure of damages for deceit is difference between actual value of property and its value, had it been as represented, and depreciation in value of improvements placed on it by plaintiff.

2. Fraud ⚿58(1)—Evidence held not to sustain verdict for deceit for amount of purchase price of restaurant and amount paid for improvements.

In action for deceit in sale of one-fourth interest in restaurant for 6 months on false representation that abatement proceedings had been continued for 6 months, where restaurant was closed by abatement before expiration of 6 months, evidence not showing depreciation in value of improvements added by purchaser, nor actual value of estate bargained for, nor for the time while the restaurant was open, *held* not to sustain verdict for amount of purchase price and amount paid for improvements.

3. Fraud ⚿47—Complaint for deceit in sale of interest in restaurant held to state cause of action.

Complaint for deceit in sale of interest in restaurant *held* not to fail to state cause of action, because not directly alleging injury and the elements of injury, since it alleged deceit and matters out of which general damages would necessarily arise and these need not be specified.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action for deceit by Romeo Berettoni against A. Sargentini and another. Judgment for plaintiff, and defendants appeal. Reversed.

Devoto, Richardson & Devoto, of San Francisco, for appellants.

H. S. Young, and R. G. Hudson, both of San Francisco (B. F. Rabinowitz, of San Francisco, of counsel), for respondent.

STURTEVANT, J. Action for deceit. Judgment for plaintiff as prayed, and from that judgment the defendants have appealed, bringing up a bill of exceptions. In their brief the appellants present several points. Among others are the points that the plaintiff's complaint did not state a cause of action, because no damages were alleged nor the amount of the damages; and, second, that the evidence was insufficient to support the verdict, because there was no evidence that the plaintiff was damaged, or, if he was damaged, the extent or amount of his damage. In view of the conclusion which we have reached, we do not find it necessary to consider any other question than the sufficiency of the evidence.

Prior to the 22d day of June, 1922, 5 different persons owned the Buon Gusto Restaurant, situated at 503 Broadway, San Francisco. On the date last mentioned, the prohibition authorities commenced abatement proceedings against the restaurant. Process was duly served on the owners, and, from time to time, orders were made extending the time for the defendants to appear and plead. The last order extending time was filed on the 31st day of August, 1922. Thereafter on the 16th day of October, 1922, the plaintiff and the defendants had a conversation regarding the purchase by the plaintiff from the defendants of their one-fourth interest in the restaurant. In the oral negotiations the plaintiff testified that the defendants represented to him that the abatement proceeding had been continued 6 months from the last part of September, 1922, and, relying on that statement, that he bought their one-fourth interest and paid down $500 on October 16, 1922, and later that he paid $2,000, the balance of the purchase price. He further testified that for $2.-500 he bought a one-fourth interest in the restaurant for 6 months. It was stipulated by counsel that on February 20, 1923, the restaurant was locked pursuant to the decree rendered in the abatement proceedings. When the second payment was made, a bill of sale was executed acknowledging the payment of the money, and that bill of sale recites:

> That the vendor had sold "all his right, title, and interest in that certain restaurant known as Buon Gusto Restaurant at 503 Broadway, in said city, and all tables, chairs, benches, counters, furnishings, fixtures, linens, dishes, silverware, cooking utensils, ranges, cash register, glassware, and all other personal property being at and used in connection with the carrying on of said restaurant business, together with the good will of said business, and the municipal dance license."

Much evidence was introduced regarding what conversations were had between the contracting parties, but no evidence was introduced by either party regarding the value of the tangible assets, or intangible assets, of the entire restaurant, nor of any interest therein. No evidence was introduced regarding the income derived from the restaurant business either before or after the date of the sale. In addition to the fact that the plaintiff paid $2,500 in 2 payments as above recited, the plaintiff testified:

> "My share of a bill paid Mr. Jesti for improvements in the restaurant was $75. My share for fixtures, lamps, was $31. My share of allowance on the old piano traded in was $212.50. My share of a bill for painting was $25."

No other evidence was introduced that could be said to be evidence on damages. The jury returned a verdict as follows:

> "We, the jury in the above-entitled cause find a verdict in favor of plaintiff, Romeo Berettoni, and against defendants A. Sargentini and A. Micheletti for the sum of $2,500 investment plus $300 paid for improvements."

At the close of the case, and after all of the evidence had been received and taken, the defendants made a motion that the trial court direct a verdict in their favor, because there was no evidence whatsoever that the plaintiff had sustained any damage. The motion was denied. In due time the defendants made a motion for a new trial based on each and all of the statutory grounds. Their motion for a new trial was denied.

[1, 2] The measure of damages in this kind of an action has been differently stated in 2 different rules. Under the first rule, the injured party is given compensatory damages in such sum as will reimburse the injured party for the injury he has sustained. Where he retains the property, he will be given damages amounting to the difference between the sum that the property is actually worth and the purchase price. That rule is not the one that obtains in California. The rule that does obtain in California, and which we will call the second rule, is that the damages will be ascertained as the difference between the actual value of the property and its value had the property been as represented. In connection with this rule, the plaintiff may likewise show and recover for the depreciation in the value of improvements which he may have placed upon the property. Hines v. Brode, 168 Cal. 507, 510, 143 P. 729. Acting upon the request of the respondent, the trial court read to the jury an instruction which embodied the first rule. No other instruction concerning the measure of damages was given. The instruction was more favorable to the appellants than they were entitled to. However, be that as it may, there was no evidence before the court from which the jury could compute what was the actual value of the estate which the plaintiff took and enjoyed. The jury were wholly unable, therefore, to apply the first rule.

Although the jury was not instructed as to the elements of the second rule, there was introduced some evidence regarding the cost of improvements installed by the respondent, but there was no evidence showing depreciation in the value of those improvements either before or after the restaurant was abated, neither was there any evidence introduced by either party of the actual value of the estate bargained for, to wit, a one-fourth interest in the restaurant for a period of 6 months, nor was any evidence introduced by either party showing the value of a one-fourth interest in the restaurant for 4 months and 7 days. From the face of the verdict, it appears that the jury adopted an interpretation of the instructions which it had received that was at variance with each of the rules which we have stated. In arriving at what it considered compensatory relief, the jury awarded to the plaintiff the total amount of all his expenditures and did not charge him with anything of value as having been received and retained by him; whereas, as the case was presented to the jury, there was no showing to the contrary but what the properties received by the plaintiff were worth as much or more than the plaintiff paid therefor, and that he had not been injured at all. The contention of the appellants, that the evidence on the elements of damage was insufficient, must be sustained. Munson v. Fishburn, 183 Cal. 206, 219, 220, 190 P. 808; Stouffer v. Eymann, 41 Cal. App. 556, 183 P. 210.

[3] The appellants urge that the complaint failed to state a cause of action because it did not directly allege that the plaintiff was injured and the elements of his injury. The authorities cited by the appellants are not exactly in point. This case falls within the

doctrine stated in George Cople Co. v. Hindes, 34 Cal. App. 576, 170 P. 155.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

---

78 Cal. App. 745

CAMPBELL v. CAMPBELL. (Civ. 3118.)*

(District Court of Appeal, Third District, California. July 20, 1926.)

1. Marriage 🔑54, 60(1)—Marriage between adult woman and boy under 21 and over 18 years old without consent of parents is not void, but voidable, and only by him (Civ. Code, §§ 69, 80, 82, subd. 1, and section 56 as amended by St. 1921, p. 333).

Marriage between adult woman and boy under 21 but over 18 years old, without written consent of his parents, guardian, or person having charge of him, is not void, but voidable, and only by him, in view of Civ. Code, § 56, as amended by St. 1921, p. 333, providing any male under 21 and over 18 years with consent of parents or guardian is capable of consenting to and consummating marriage, and in view of sections 69, 80, 82, subd. 1.

2. Appeal and error 🔑882(19)—In action for annulment of marriage on ground of defendant's insufficient age, where defendant defaulted and subsequently filed answer asking for annulment, but did not take further proceedings, plaintiff might not urge that court should have granted defendant relief.

In action for annulment of marriage on ground of defendant's insufficient age, where defendant's default was entered December 28th, and defendant, on February 8th, filed an answer admitting the allegations of complaint and asking for annulment, but was not present nor represented on trial and did not appeal or file brief on appeal, *held*, plaintiff might not urge that court should have granted relief to defendant.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action for annulment of marriage by Bertha Maye Campbell against James Stanley Campbell. Judgment of dismissal, and plaintiff appeals. Affirmed.

Frank G. Falloon, of Los Angeles, for appellant.

L. R. Godward, of Los Angeles, for respondent.

NEEDHAM, Justice pro tem. This is a suit brought by a wife, an adult, against her husband, a minor, to have her marriage to the minor husband annulled. Defendant appeared by his guardian ad litem and admitted the allegations of the complaint, and prayed for like relief. The record shows that the case came on regularly for trial on February 19, 1924, the plaintiff appearing by counsel, "the defendant not being present and not being represented," etc. The court found the facts as follows:

> "I. That plaintiff and defendant are residents of the county of Los Angeles, state of California; that a marriage license was issued to them on June 12, 1922, by the county clerk of San Bernardino county, Cal., and that they thereafter, and pursuant to said marriage license, went through a marriage ceremony.
>
> "II. That at the time of said ceremony defendant was under the age of 21 years, and he did not then and there, or at all, have the consent, either verbally or written, of either one of his parents or of his guardian to said marriage, and no written consent of any kind, character, or nature whatsoever was filed with the county clerk of San Bernardino county at the time of issuing the marriage license under which said marriage was solemnized.
>
> "III. That the parties hereto have not cohabited or lived together since August 1, 1922; that defendant will not be 21 years of age until March 5, 1924."

And as conclusions of law from the foregoing facts, the court concludes:

> "I. That plaintiff does not have the right to bring this action. Wherefore, it is ordered, adjudged, and decreed that plaintiff is denied relief, and said action is hereby dismissed."

This is an appeal upon the judgment roll. The respondent has filed no brief. Appellant has filed a very short brief of only three pages.

[1] The findings above quoted show that at the date of marriage, June 12, 1922, the defendant husband was under 21 years of age, but over 18 years of age, and that no written consent was filed with the clerk issuing the marriage license, and that at the time of the trial of the case the defendant was under 21 years of age.

The court evidently denied plaintiff relief on the theory that subdivision 1 of section 82, Civil Code, prevented plaintiff from instituting the case. Subdivision 1 of section 82, Civil Code, which has remained substantially unchanged since enactment in 1872, reads:

> "82. *Causes for Annulling Marriages.*—A marriage may be annulled for any of the following causes, existing at the time of the marriage:
>
> "One. *That the party in whose behalf it is sought to have the marriage annulled* was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife." (Italics ours.)

The plaintiff is, of course, "the party in whose behalf it is sought to have the marriage annulled," and she was *not* "under the age of legal consent", etc., at the time of the marriage, as the findings above quoted show,

---

*Hearing denied by Supreme Court September 16, 1926.

and it would seem that the action of the trial court was proper and should be upheld if subdivision 1 of section 82 of the Civil Code is to be given full force and effect.

Section 80 of the Civil Code treats of void marriages, and reads:

> "80. *Void Marriages.*—Either party to an incestuous or void marriage may proceed, by action in the superior court, to have the same so declared."

Section 69 of the Civil Code deals with marriage licenses, and, among other matters, contains the following:

> "If the male is under the age of twenty-one years, or the female is under the age of eighteen years, and such person has not been previously married, no license must be issued by the county clerk unless the consent in writing of the parents of the person under age or one of such parents, or of his or her guardian is presented to him, duly verified by such parents or parent, or guardian; and such consent must be filed by the clerk, and he must state such facts in the license. For the purpose of ascertaining all the facts mentioned or required in this section, the clerk, at the time the license is applied for, may, if he deems it necessary in order to satisfy himself as to matters in this section enumerated, examine the male applicant for a license on oath, which examination shall be reduced to writing by the clerk, and subscribed by him." Amendment approved 1907, St. 1907, p. 305.

Prior to an amendment approved May 23, 1921, section 56 of the Civil Code read:

> "56. *Capability of Minors to Contract Marriage.*—Any unmarried male of the age of twenty-one years or upwards and any unmarried female of the age of eighteen years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage."

By an amendment approved May 23, 1921, the following was added to section 56 of the Civil Code:

> "Provided that any male under the age of twenty-one years and over the age of eighteen years and any female under the age of eighteen years and over the age of sixteen years, with the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian, where such written consent is filed by the clerk issuing the marriage license, as provided in section sixty-nine of the Civil Code, is capable of consenting to and consummating marriage."

See St. 1921, p. 333.

It will be seen that the amendment to section 56 of the Civil Code, adopted May 23, 1921, raised the ages of parties "capable of consenting to and consummating marriage" from 18 to 21 years in males, and from 16 to 18 years in females, and also added the proviso above set forth.

The appellant contends that the addition of the proviso by the amendment of May 23, 1921, to section 56 of the Civil Code, the Legislature intended to make void ab initio the marriage of a male under the age of 21 and a female under the age of 18, *unless* the consent in writing of the parents of the person under age is filed with the clerk issuing the marriage license, and, therefore, as such a marriage is absolutely void, either party can have such a marriage so declared. We do not think the Legislature intended such a result. We think the purpose of the proviso added to section 56 of the Civil Code in 1921 was to raise the age of consent of a female from 15 to 16 years, and was a re-enactment in legal effect of the portion of section 69, Civil Code, relative to the issuing of marriage licenses.

A construction that such language does not make a marriage so contracted void is in harmony with the weight of authorities. In 38 Corpus Juris, p. 1305, it is there stated:

> "By statutes now in force in practically all the states the consent of parent or guardian is required to the marriage of an infant, but the general rule is that, unless the statute expressly declares a marriage contracted without the prescribed consent to be a nullity, it is to be construed as only directory in this respect, so that this marriage will be valid, although the disobedience to the statute may entail penalties on the licensing or officiating authorities"—citing authorities including In re Ambrose, 170 Cal. 160, 149 P. 43.

The same doctrine is stated in California Jurisprudence, vol. 16, p. 913, where it is stated:

> "The marriage of a minor below the age of consent is voidable only"—citing People v. Souleotes, 26 Cal. App. 309, 146 P. 903.

To the same effect is the leading case of People v. Pizzura, 10 A. L. R. 405, and notes. See, also, for very full discussion, 3 Am. Ruling Cases, p. 64, where the case of State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358, and where many notes will be found especially note on Infancy, p. 71.

> "A statute providing at what ages marriage may be entered into will not change the common-law rule, and statutes prohibiting a marriage under an age specified, in the absence of an express declaration that it should be void, are commonly held directory merely, and the contract not void, but voidable." Schouler on Marriage and Divorce (2d Ed.) vol. 2, § 1122.

In section 1123 of the same volume is found the following:

> "Where one of the parties is under the age fixed by the statute, but is competent by the common law, the marriage is not void, but merely voidable and is valid until annulled."

While the foregoing states the general rule, there is authority to the contrary. See Keezer on Marriage and Divorce (2d Ed.) p. 150, § 199, citing Johnson v. Alexander, 39 Cal. App. 117, 178 P. 297. This case holds that a marriage is neither void nor voidable because of the failure of the county clerk to obtain consent of the parent in issuing a license to a female under the age of 18 years, and decides an annulment of a marriage of a female is possible under subdivision 1 of section 82, Civil Code, only when she was under the age of 15 at the time of the marriage and the consent of her parents or gaurdian had not been previously obtained. This decision was handed down in December, 1918.

But in June, 1923, in the case of West v. West, 62 Cal. App. 541, 217 P. 567, the Appellate Court, Second Appellate District, Division 2, speaking through Mr. Justice Craig, decided that a male under the age of 18 at the time of marriage, which was contracted without the consent of his parents or guardian, and he and the defendant never having cohabited together, after he attained the age of 18 years was entitled to have the marriage annulled under section 82 of the Civil Code. See, also, notes in 22 L. R. A. (N. S.) 1202; L. R. A. 1916C, 740; 17 Ann. Cas. 94.

It will thus be seen that upon reason and the great weight of authority a marriage contracted by an adult with a minor is not void ab initio under our statutes, but voidable, only, and cannot be annulled by the adult, but by the party who, at the time of the marriage, was under the age of legal consent, as provided in subdivision 1 of section 82 of our Civil Code.

[2] The appellant contends that as the defendant (respondent minor) filed an answer admitting all the allegations of appellant's complaint and prayed for the same relief, that such answer was in effect a cross-complaint, seeking annulment, and that appropriate relief should have been granted. But the record shows that the default of defendant was entered December 28, 1923. Subsequently, however, on February 8, 1924, the defendant filed an answer. Thereafter, upon the day the case was tried, the record shows: "The defendant not being present and not being represented." The defendant took no appeal and he has filed no brief in the case upon appeal. Under such a state of the record the plaintiff and appellant cannot be heard to complain and urge that the court should have granted relief to the defendant and respondent.

For reasons stated the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

78 Cal. App. 310

PURDY v. JOHNSON et al. (Civ. 4764.)

(District Court of Appeal, First District, Division 1, California. June 11, 1926. Hearing Denied by Supreme Court Aug. 9, 1926.)

1. Trusts 🔑279—Trustees authorized under trust to provide for minor beneficiaries held warranted under facts in making payment for such purpose, for which they should be allowed credit.

Trustees, authorized under trust to provide for minor beneficiaries out of trust estate if beneficiaries' father failed to support them, were justified in paying sum for support and maintenance to their stepmother upon authorization of their father, as their guardian, he being without funds, and should be allowed credit therefor on an accounting.

2. Trusts 🔑219(2)—Trustees mingling trust funds with their personal funds and using them for their own advantage will be charged compound interest (Civ. Code, § 2262).

Where trustees have mingled money belonging to trust with their own funds and used them for their own advantage, courts will charge them with legal interest compounded annually, in view of Civ. Code, § 2262, to carry into effect rule that trustee shall make no unauthorized profit from use of trust funds.

3. Trusts 🔑179.

When acting in good faith, trustees should be treated with liberality and indulgence.

4. Trusts 🔑219(2)—Imposition of compound interest on balances found due was unjustified, where these were constructive only and trustees had acted in good faith.

Where trustees at no time had any trust funds to invest and had at all times acted in good faith, imposition of compound interest on annual balances found due was unjustified, notwithstanding inadvertent errors in their accounts, where these balances were constructive only.

5. Trusts 🔑315(2)—Compensation of $500 per annum to each of two trustees for management of estate, consisting of agricultural property valued at over $120,000, held reasonable.

Compensation of $500 per annum, allowed each of two trustees, *held* a reasonable amount, where the estate consisted of agricultural property originally valued at over $120,000, and which had during their management trebled in value, and where their duties were onerous.

6. Trusts 🔑321—Upon casting new account with consent of trustees, disallowance of compensation to them and charging interest on compensation previously allowed held unwarranted.

Where trustees consented to have their prior accounts vacated and that a new account be taken, action of court in disallowing trustees any compensation and charging them with interest on reasonable compensation allowed them on settlement of prior account, *held* unwarranted, notwithstanding errors in their accounts, when made in good faith.

7. Trusts ⚿219(1)—Allowance of sum to trustees for current accounts from annual balances found due with interest charge on remainder held improper, where disbursements exceeded receipts.

That trustees were allowed to retain sum to meet current accounts from each annual constructive balance found in favor of beneficiary on casting their account and were charged interest upon remainder for failure to invest *held* unwarranted, under showing that for several years disbursements exceeded receipts with such allowance permitted to be retained.

Appeal from Superior Court, San Benito County; John L. Hudner, Judge.

Action by Anita Christal Purdy against Robert Johnson and another, as trustees under the will of Alberto Trescony, deceased, to enforce a trust and for an accounting. From a judgment for plaintiff, defendants appeal. Judgment affirmed as modified.

C. F. Lacey, of Salinas, for appellants.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for respondent.

TYLER, P. J. Appeal by defendants from a judgment obtained against them in an action to enforce a trust and for an accounting. This is the second appeal in the case.

At the first trial the court found a balance in favor of the defendant trustees in the sum of $8,996.17. An appeal was taken by the plaintiff and the judgment was reversed. Purdy v. Johnson, 174 Cal. 521, 163 P. 893. Upon retrial a different department of the superior court found a balance in favor of the plaintiffs amounting to the sum of $10,981.74. The present appeal is from this judgment.

The plaintiff is the granddaughter of one Alberto Trescony, who died testate in the year 1892. The appellants J. A. Trescony and Robert F. Johnson were respectively son and son-in-law of the testator and were the executors of his will, and they were also named therein as trustees of an undivided one-third of the residue of the estate for the benefit of the plaintiff and her brother, Leo A. Christal, who were the children of a deceased daughter of the testator. At the close of the administration of the estate a decree of distribution was made by the terms of which one-third of the residue of said estate was distributed to the defendants as trustees for the benefit of plaintiff and her brother until they should reach the age of 30 years, at which time their respective shares were to be transferred over to them upon certain conditions. The estate was distributed April 2, 1894, and for a time all of the real property was managed as a whole, but on August 2, 1895, partition was had, and through these proceedings there was set apart to the defendant trustees some 15,336 acres of land in severalty in lieu of the one-third interest theretofore distributed to them.

The complaint contains two counts, the second of which charges misconduct and impropriety on the part of the defendants in the management of the trust estate. It is there alleged that while acting as trustees defendants filed some six accounts of their transactions, five of which were settled by the court and had become final. It is then charged that plaintiffs did not have notice or knowledge of the presentation of these accounts, or of the hearing and settlement thereof. Then follow averments that defendants have carelessly and negligently managed their trust in certain particulars and so carelessly kept the accounts thereof as to deprive plaintiff of a large amount of rents, income, and assets to which she is entitled. With reference to the sixth account it is charged that as a result of the failure of the trustees to keep proper accounts the plaintiff has been wrongfully debited with a sum of money as due from her to the trustees, whereas, in truth and in fact, the trustees are indebted to her in a sum exceeding seven thousand dollars. The prayer of the complaint is that the court enforce the trust by directing that defendants convey to plaintiff an undivided one-half interest in the trust property; that the orders of the superior court settling the first five accounts be set aside and corrected and modified to conform with the true facts; and that said trustees be compelled to account to the plaintiff for all their dealings and transactions with the property of the trust estate; that on such accounting the trustees be charged with interest from the time of the reception by them of all funds wrongfully withheld.

The answer of the trustees denies all of the alleged misconduct and declares the willingness on their part to transfer to plaintiff her share of the estate. It alleges that plaintiff is indebted to defendants in a sum approximating $14,000. The answer further denies all of the charges affecting the propriety or conclusiveness of the settling of the first five accounts, but declares that, "inasmuch as the plaintiff seems to be dissatisfied with the accounts referred to in her complaint," the defendants join in plaintiff's prayer and ask that the orders settling said five accounts be vacated, and that a new account be taken covering the entire period of the duration of the trust, and that upon payment of the amount found to be due by or to the plaintiff, she receive from the defendants a conveyance of her interest in the trust property.

Upon the first trial as above indicated judgment went in favor of defendants in the sum of $8,996.17. All of the charges made by plaintiff with reference to concealment, misconduct, or negligence by the trustees were there negatived by the findings. It was also found that, while there were some errors in the accounts, such errors were inadvertently made, and that in all matters connected with the trust estate and the management thereof

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the trustees had acted with the utmost fidelity toward the beneficiaries and had conducted their trust with prudence and economy. Among the findings was one to the effect that the sum of $500 per annum was a reasonable amount to be allowed to said trustees as their compensation.

The findings were attacked on appeal. The judgment in favor of the trustees was reversed. Several of the disputed items in the account were reviewed on this appeal, and it was there held that the allowance of these disputed items by the lower court justified a reversal of the judgment. The case was therefore remanded for the taking of a new account in accordance with the established principles of equity. In reversing the judgment the court had occasion to point out that the lower court adopted a course with reference to the trial that was irregular. The plaintiff had insisted that the trustees prove the correctness of the account. The course adopted permitted them to take the stand and subject themselves to cross-examination without any direct examination on their own behalf. This was held to be a fundamental misapprehension of the nature and extent of the obligation of trustees to account to their beneficiaries. It was declared that the burden of proof was upon the trustees to establish affirmatively the propriety of the charges and credits which were assailed, and that, while the adherence of this rule might result, considering their method of keeping the accounts, in the trustees being compelled to forego repayment of sums which they may have had properly and in good faith expended for the benefit of the trust, and being charged with having received money in cases where they had not in fact received it, their good faith could not save them from the consequences of this neglect, and whatever doubts might arise from their failure to keep proper records, or their inability to establish all the items of their accounts, must be resolved against them.

Appellants do not here complain of this rule, as it is admitted that the trustees were farmers, unfamiliar with bookkeeping, and who had large interests of their own to attend to and did not keep full and accurate accounts of their transactions, in consequence of which they are mulcted in a large sum of money for which they are morally entitled to credit. They do contend, however, that, although the trial took place some 24 years after the creation of the trust, the record shows clearly that as to certain of the disallowed items everything necessary to support them as proper charges fully appeared. The denial of a credit of these charges, and the infliction of compound interest as a penalty, it is claimed, accounts for the wiping out of the balance which was found in favor of the trustees at the first trial, as predicted by the court on appeal, and is largely responsible for creating the heavy balance now found against them, a sum, it is admitted, considering the passing of time and the accumulation of legal interests, with annual rests, has reached such proportions as will tax the ability of appellants to pay. One of the items which it is contended was wrongfully disallowed has reference to the sum of $2,500 claimed to have been paid by the trustees for the maintenance and support of the beneficiaries. With reference to this item the record shows that on November 9, 1895, the trustees filed their first account, which included the item in question. The trial court on the instant hearing refused to allow the trustees credit for this expenditure, and charged them 7 per cent. simple interest thereon from November 30, 1894, to November 30, 1908, a period of some 14 years, aggregating in principal and interest the sum of $4,950. The facts in connection with this item show that one Dr. J. F. Christal, a son-in-law of the testator, was the father of the two beneficiaries. That there was ill feeling between these parties is evidenced by the will of Alberto Trescony, for it is provided therein that in case Dr. Christal shall fail, for any reason, to properly provide for these beneficiaries, the trustees shall pay out of their interest in the estate such amount as will, in their judgment, suitably and properly provide for them. The will also contains a direction that in no event shall any of the moneys so paid or expended be placed in the hands of or be handled by Christal. In this connection the will further declared it to be the unqualified wish and direction of the testator that the executors and trustee see to it that the said Christal did not enjoy or get into his hands anything that the testator ever owned.

The will was admitted to probate in October, 1892. Thereafter Dr. J. F. Christal, the father of the beneficiaries, was appointed guardian of their persons and estates, and these beneficiaries, through their guardian, brought an unsuccessful proceeding to revoke the probate thereof. S. F. Geil and Messrs. Pierson and Mitchell were the attorneys representing the guardian in this litigation. The beneficiaries during the early years of the trust resided with their relatives, the trustees, and also at times with their father and Nellie Christal, their stepmother. Dr. Christal, being without means, addressed a communication as guardian of the minors to the trustees on April 3, 1894, authorizing and directing them to pay to Nellie Christal the sum of $2,500 for the maintenance and support of the minors from the date of the death of Alberto Trescony to the date of the order, a period of some two years. The notice further authorized them to continue the payment of the sum of $200 per month from the date of the order until written notice to the contrary. The trustees were further advised that a receipt for the amount of $2,500 had been intrusted to Nellie Christal, who had placed the same in the hand of Pierson and Mitchell and S. F. Geil for the purpose of collection.

Acting upon the authority given them under the will and in pursuance of the demand of the guardian, the trustees paid the amount, and a receipt was given to them signed by the guardian, Dr. Christal, and his wife, Nellie Christal, and countersigned by the attorneys above mentioned. Thereafter an order was made by the superior court directing the trustees to pay to the guardian the sum of $250 monthly for the care and maintenance of the minors. The first account filed by the trustees included the charge of $2,500. This account was prepared by the attorney for the trustees, and in listing the expenditures in the account he recited that it was paid to Geil under an agreement with the executors of the estate of Trescony. The instant account was prepared by an expert accountant, who listed the item as "S. F. Geil, Legal Expenses." The first account was settled and allowed on May 16, 1896, and from that time until the commencement of this action on November 21, 1911, a period of some 15 years, no objection was ever made to it. Plaintiff had been represented by a guardian until March 21, 1898, when the period of her minority ended. She reached the age of 30 years on March 21, 1910, and on November 18, 1911, she instituted the present litigation, the other beneficiary not joining. In passing upon this particular item of the account in the instant proceeding the trial court was of the opinion that it was an improper payment to attorneys employed by the guardian to contest the will of Trescony, and for that reason rejected it.

We are of the opinion that there is no evidence in the record to support this action. While it appears that an order was on September 6, 1893, made by the superior court authorizing the guardian to enter into a contract with the attorneys for such purpose, the order expressly provided that compensation should be paid to them in the event only of a successful prosecution of such contest. The litigation being unsuccessful, they were entitled to nothing. The voucher accompanying the accounts shows that the item was paid for the support and maintenance of the minors. It recites the demand of the guardian upon the executors for the amount covering the period above mentioned, the receipt of the sum, signed by both the guardian and his wife, and countersigned by the attorney. The manner of the listing of the item by the parties who prepared the different accounts no doubt controlled the court in reaching the conclusion that the expenditure was for legal services. The voucher disproves any such theory, and the positive testimony of the trustee, Trescony, shows that he was no party to any agreement that the sum should be used for the payment of attorney's fees, but that, on the contrary, the payment was made for the support and maintenance of the minors for the period stated as recited in the vouchers from which the accounts were made up. There is nothing in the record to dispute this evidence. It is true that during his examination he stated that he presumed that some of it might have been used for attorney's fees, but that he knew nothing at all about the matter. The only fair construction to be given to his testimony as a whole is that the trustee paid the sum for the support of the beneficiaries under the power given to them and in compliance with the imperative demand of the guardian and his attorneys. Mr. Geil, Mr. Mitchell, Dr. Christal, and Nellie Christal were all dead at the time of the instant hearing, and in consequence no evidence could be obtained from them on the subject. Even conceding that an improper use of the funds had been made by the guardian of the beneficiaries, the trustees were in no position to control such a situation. That was a matter to be settled by the court appointing the guardian when his account came up for settlement. However this may be, and in conclusion upon this subject, we are of the opinion that there is no evidence in the record from which the trial court could rightfullly conclude that the item in question was paid for any other purpose than that stated in the voucher, namely, for the support and maintenance of the minors.

[1] The trustees were authorized under the express terms of the trust to make such a payment, and were justified under the facts in doing so. The rejection of this item therefore was without warrant, and the trustees should receive credit for the same. Appellants further complain that the portion of the decree which charges them with compound interest with annual rests is neither equitable nor just, as there was no actual bad faith or intentional wrongdoing on their part. The theory upon which this charge was imposed is reflected in the findings of the trial court to the effect that the trustees failed to invest the trust funds, and wrongfully and fraudulently mingled a large amount thereof with their own, for their private use and benefit. It is claimed that there is nothing in the record that supports this conclusion.

[2] The rule is firmly established in this state by a long and unbroken series of decisions, and may now well be regarded as one of the elementary truths of the law, that where trustees have mingled money belonging to a trust with their own funds and used them for their own advantage, courts will charge them with compound interest. Section 2262 of our Civil Code provides, in substance, that if a trustee omits to invest trust funds he must pay simple interest thereon, if such omission is negligent, and compound interest if it is willful. The latest expression upon this subject is found in Gaver v. Early, 191 Cal. 123, 215 P. 394. This principle is indisputable and in fact it is not here disputed. The rule is not adopted for the purpose of punishing the trustee for any intentional wrongdoing in the use of the trust funds, but rather to carry into effect the principle, enforced by courts of

equity, that a trustee shall not be permitted to make any profit from the unauthorized use of such funds; it is intended to secure fidelity in the management of trust estates in order to fully realize any profit that the trustee may have made. In cases where the rule is properly applied legal interest compounded annually will be charged. Miller v. Lux, 100 Cal. 609, 35 P. 345, 639. The question whether such interest should or should not be charged depends, however, upon the circumstances of the particular case, and they may be such that a mere restoration of the property, or its value, without any interest, would be all that justice may require. Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360.

The record in the case is very voluminous, consisting of several thousand pages, covering receipts and expenditures for a period of over 15 years. We have read the same carefully, and a somewhat extended review of the facts becomes necessary for a complete understanding of the situation. While the estate consists of a large acreage, the lands are arid, and in consequence their yield is uncertain, and during dry years they are practically unproductive. Under these circumstances the rents and profits from the estate have been comparatively small, though the value of the estate is admitted to be greatly in excess of $300,000.

As indicated above, the testator died in the year 1892. Since that time and up to the commencement of this action, some 18 years thereafter, the trustees had filed five accounts. They were not more frequently filed for the reason that there was little or no balance to account for. These accounts had all been settled, and no appeal was ever taken from any of them, and they had become final. In the present action fraud on the part of the trustees was charged. Defendants thereupon consented to have the settlement of the accounts vacated and set aside so that the truth of the charges might be investigated. Upon the first trial the findings of the court were against plaintiff's charges, it being determined that the trustees had acted in good faith and without any intent to deceive or overreach the plaintiff in any way. Our Supreme Court, in passing upon the finding, expressed the view that it did not dissent from this conclusion and that it was fully supported by the evidence. Purdy v. Johnson, 174 Cal. 521, 527, 163 P. 893. The case was reversed, however, for the reasons heretofore stated. Upon the present trial the court found defendants to have been guilty of fraud and with failure to invest the trust funds, and it imposed the interest here complained of, with the result that the amount of defendants' former judgment was completely wiped out and the present judgment resulted. A perusal of the first five accounts shows that the trustees at no time during the period covered by them had, as a matter of fact, any funds whatsoever to invest, but, on the contrary, the estate was indebted in a large sum. The balance which the trial court here found to be due is a constructive one merely, and is made up by the rejection of certain items contained in the original accounts, including the $2,500 item above discussed, together with the rejection of all claims for any compensation whatsoever to the trustees covering the many years of their stewardship and the imposition of compound interest with annual rests on yearly balances, except upon the amount of $2,500, paid for the maintenance and support of the minors and the amount allowed the trustees as compensation for their services, upon which items simple interest was charged. But for this action of the trial court no balance would have existed each year, and there would have been, in consequence, no funds to invest. The present accounting includes a calculation only to November 30, 1908. The trial took place in 1918. If the action of the trial court finds support in the evidence it will result in the accounting for the intervening nine years in penalizing these defendants with 7 per cent. interest compounded annually on the present balance, which additional interest amounts to the sum of $10,829.93. Had the other beneficiary joined in this action the sum would be twice the amount. It is conceded by plaintiff that the judgment here recovered, considering the passage of time, will tax the ability of the defendants to pay. Of course, if the evidence justifies this result defendants cannot complain. In support of their contention that they have acted in good faith, our attention is called to the circumstance of their agreement to have the settlement of their former accounts, which had long been settled and had become final, set aside, an act it is claimed they would have not consented to had they been dishonest or disloyal to the trust reposed in them. These accounts, as has been stated, showed that at no time did the trustees have any funds to invest, and but for the fact that they had waived any right to stand upon the same, a large balance would appear in their favor.

[3] When acting in good faith, trustees should be treated by a court of equity with liberality and indulgence. Ellig v. Naglee, 9 Cal. 695. It has been said that the hardest demand that can be made in equity is to hold a trustee answerable for what was never in his hands, or for a loss not caused by his willful default. Estate of Cousins, 111 Cal. 451, 44 P. 182. From a careful reading of the voluminous record we are of the opinion that there is nothing therein contained to show that there was any serious malversation of the trust, as by mingling the trust funds with the private funds of the trustees or misappropriating or losing them. There is no claim here made that every cent received by defendants from the estate has not been fully accounted for. They were farmers and inexperienced with the proper method of keeping accounts, but they attempted to do so in their

own way. They had large farming interests to look after. They kept proper vouchers, however, for all their expenditures except in a few instances. They were late at times in crediting sums collected, but such funds were all fully accounted for. They made some mistakes, but with no desire on their part to defraud their young relations. These errors did not always operate in their favor. On two occasions the trustees, in anticipation of the allowance of the annual compensation awarded them, drew checks upon the trust fund for their own private purposes before an account was approved and settled. On one occasion, through mistake, they charged the entire cost of a division fence to the estate, when the charge should have been but one-half only. These omissions and errors were fully explained and accounted for by them, and no attempt was ever made to conceal the true state of facts. There were, in the five accounts rendered, hundreds of items of receipts and expenditures, but comparatively few of these were challenged. Some were disallowed, and properly so, as they could not be satisfactorily explained. Our Supreme Court, however, on the former appeal predicted that this very condition would happen, for it is there said, that, considering the circumstances of the case, that in the taking of a new account it would be probable these trustees would be compelled to forego repayment of sums which they had properly and in good faith expended for the trust, and would be charged as having received money in cases where they had not, in fact, and could not with reasonable diligence have received it.

[4, 5] As above recited, in their original accounts the trustees were allowed an annual compensation for their trusteeship. Under the present accounting these items were rejected and the trustees are charged with simple interest upon these sums. It does not seem equitable or just to declare that these amounts should have been invested by them when under the order settling the accounts the trustees were declared to be entitled thereto. The retention by the trustees of these sums was legal and justified at the time they were withheld. The evidence is voluminous, but enough has been reviewed to indicate the character of the wrongdoing that is charged. The estate, however, so far as the record shows, has lost nothing, but all receipts have been fully accounted for, and the former accounts as settled and allowed showed no balance of funds at any time that could have been invested. The present annual balances are, as before stated, constructive only, and are entirely built up and created in the manner above indicated. Under these circumstances we are of the opinion that the imposition of compound interest on the annual balances was unjustified. The same may be said of the action of the court in denying the trustees any compensation for the long period of their stewardship. It is not disputed that when the original application was made by the trustees for compensation the sum of $500 per annum each was allowed at the suggestion of the trial court. No formal order was made fixing this amount, but it formed the basis of the charge made thereafter by the trustees, and the amount was never subsequently objected to. That this sum was a reasonable amount there can be no question. The estate was a large one, being originally valued at over $120,000, and the statement of counsel for appellants that it has since trebled in value and been preserved intact is not denied. The duties of the trustees were onerous. They consisted of the overseeing of the properties, the keeping up of the buildings and fences, borrowing and advancing money for the payment of taxes and the support of the beneficiaries and other expenses, keeping accounts, procuring tenants, looking out for the grain when it was threshed, the placing of insurance, the building of roads, digging of wells, and other active duties incident to the proper management of an estate of this character.

[6] The trustees in the settlement of their various accounts were allowed the sum stated for their services, and in consequence were justified in retaining the same to their own use. The court in casting the instant account disallowed any allowance whatever to them, and they are penalized with a charge of 7 per cent. simple interest on these sums so previously allowed for their failure to invest the same for the benefit of the estate. The disallowance was made on March 30, 1922, some 13 years after the entry of the order settling the trustees' fifth account and 26 years after the decree settling their first account, at which time their compensation had been definitely fixed. Under these circumstances it seems manifest to us that the action of the court in disallowing the trustees any compensation whatsoever, and charging the interest mentioned upon sums that the trustees were found to be entitled to and which they were therefore under no obligation to invest for the benefit of the estate at the time they were received, was without warrant. Conceding them to have been entitled to compensation, the amount allowed them was certainly reasonable considering their duties, and, as suggested by appellants' counsel, it would be a hard task to procure a manager, good or bad, for the vast estate involved for the allowed compensation.

[7] Complaint is also made of the action of the court in permitting the trustees to retain only the sum of $1,000 to meet current accounts and charging compound interest continuously upon the remainder found to be due. It appears from the record that the 30th day of November of each year was fixed by the court as the date for casting annual balances. The trustees were allowed to retain the sum of $1,000 from each annual balance found in

favor of the beneficiary to cover expenditures for current operating expenses for the succeeding year before any new income could be derived from the trust property. That this sum was entirely inadequate for a number of the years there is no question. It is not disputed that for at least seven years the disbursements exceeded the receipts even with the allowance of the $1,000 permitted to be retained, and yet the trial court in the present account under the adopted method, in effect, charged the trustees with interest on the amount they actually paid out under approved vouchers for failure on their part to invest the same. The action of the court in this particular cannot be sustained. And, finally, appellants complain of the disallowance of certain items that had been approved in the former accounts. A review of each of these items would involve a critical statement of the facts concerning each expenditure and add to this lengthy opinion without answering any useful purpose. It is sufficient to say, so far as this objection is concerned, that we have examined the evidence upon the items, and are of the opinion that, while there is doubt concerning some of them, the court was justified in resolving that doubt against the trustees.

In conclusion it may be said that, while the record contains some errors affecting the trustees' accounts, it appears therefrom that such errors arose through inadvertence and without any intention on the part of the trustees to commit a deliberate wrong or to take advantage of their relations, and the evidence is insufficient to justify the penalizing of the trustees by the imposition of compound interest and the forfeiture of any commission for the services performed by them for the benefit of this large estate. As above indicated, the annual balances found to be due are constructive ones merely, made up in the main by the rejection of the $2,500 item discussed; the rejection of all claim for services and the imposition of interest for failure to properly invest funds which were never actually in the hands of the trustees, but for the rejection of the items previously allowed.

The finding of the trial court, therefore, that the trustees wrongfully mingled the trust funds with their own and failed to invest the same, finds no support in the evidence, as there were no actual funds in their hands at any time which they could possibly have invested. Plaintiff and defendants both join in the request that in the event of a reversal no new trial be ordered, but that the trial court be directed to modify its judgment as will in the opinion of this court do justice between the respective parties. In compliance with this request it is ordered that the court below strike a new account, in which the trustees be credited with the $2,500 item expended by them for the support and maintenance of the beneficiaries, that the trustees be allowed a reasonable sum for their compensation in accordance with equitable principles, and that simple interest only be charged against them for the amount, if any, found to be due the plaintiff.

With this modification the judgment will stand affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

78 Cal. App. 673

BANK OF ITALY v. SIERRA VALLEY BANK. (Civ. 3057.)

(District Court of Appeal, Third District, California. July 10, 1926. Hearing Denied by Supreme Court Sept. 7, 1926.)

Estoppel ⚷72—Bank held not negligent in forwarding note and collateral for collection to bank of which maker was president, or precluded from recovering amount of note from such bank by statute affecting rights as between innocent persons, one of whom must suffer.

Bank *held* not negligent in forwarding note and collateral security for collection to bank of which maker was president nor precluded by Civ. Code, § 3543, relative to rights as between innocent persons, one of whom must suffer from act of a third, from recovering amount of note from collecting bank which permitted the collateral to get into its president's, the maker's, possession without obtaining payment.

Appeal from Superior Court, Sierra County; W. I. Redding, Judge.

Action by the Bank of Italy against the Sierra Valley Bank for conversion of personal property. Judgment for defendant, and plaintiff appeals. Reversed.

C. E. McLaughlin, of Sacramento, and Louis Ferrari and Richard Fitzpatrick, both of San Francisco (J. J. Posner, of San Francisco, of counsel), for appellant.

U. S. Webb, of San Francisco, and Henry B. Neville, of Downieville, for respondent.

BARTLETT, Presiding Justice pro tem. By its complaint in this action appellant, a banking corporation organized under the laws of the state of California, seeks judgment against respondent, also a banking corporation organized under the laws of the state of California, for the sum of $60,000, in which amount appellant claims it has been damaged through an alleged conversion of certain personal property by respondent belonging to appellant. At the time of the transactions out of which the action arises the principal place of business of appellant was at the city and county of San Francisco, Cal., and that of respondent was at Loyalton, Sierra county, Cal., and between the two places there was a daily communication by United States mail.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The evidence introduced at the trial of the action, and which consists largely of undisputed letters and telegrams passing between the parties, shows that on August 16, 1921, two individuals, named Mont Berg and W. H. Duncan, appeared at the head office of appellant in San Francisco, and that Berg made application for a loan of $25,000 to be secured by 250 shares of the capital stock of a bank known as the Indian Valley Bank of Greenville and 176 shares of the capital stock of the respondent Sierra Valley Bank of Loyalton. Said Mont Berg signed a note for $25,000 in favor of appellant and left the note with appellant with an authorization to appellant to pay a draft drawn on said Berg signed by said W. H. Duncan, in care of the Bank of Italy, and accompanied by 176 shares of the capital stock of the respondent. The note was not dated, but one of the vice-presidents of the appellant, one A. J. Gock, with whom this transaction was had, was authorized to insert the date in the note when the draft was presented. With the note and authorization Berg also left with appellant a collateral agreement pledging collateral and 250 shares of purported capital stock of the Indian Valley Bank. Nothing further occurred until August 23, 1921, when W. H. Duncan appeared at the Bank of Italy in San Francisco with a messenger from the Crocker National Bank of San Francisco and presented a draft for $25,000, accompanied by 176 shares of the capital stock of the respondent bank. Appellant paid the draft by a cashier's check and delivered the same to the messenger from the Crocker National Bank, which cashier's check was subsequently paid through the clearing house. The draft was mailed by appellant to Mont Berg, the 176 shares of capital stock of respndent were placed with the other collateral, the note was dated and put in force, and the loan transferred to the note department of appellant and carried as a loan evidenced by the promissory note of said Mont Berg secured by the said capital stock of respondent and the Indian Valley Bank.

On August 25, 1921, appellant received at its place of business in the city of San Francisco the following telegram from Mont Berg:

"Loyalton, Cal. Aug. 25, '21. 8:40 A. M. 4839.

"Bank of Italy, San Francisco, Cal. Attention Mr. Fickett. I have made arrangements for the payment of my note. Please forward same together with collateral to Sierra Valley Bank Loyalton for collection.

"Mont Berg. 9:07 A. M."

This telegram was received by appellant at 9:07 a. m., August 25, 1921, and upon its receipt the note of Mont Berg to appellant for $25,000 and the shares of capital stock of the Indian Valley Bank and of the respondent deposited as collateral with said note were transferred from the note department of appellant to its collection department, and sent to the Sierra Valley Bank at Loyalton, Cal., by registered and insured United States mail, for collection. The written instructions as to collection contained a direction to "deliver documents only on payment," and special instructions, "collect interest at the rate of 6 per cent. from 8—23—21 to date of payment," "collect $2.50 for postage charges," and gave as list of property: "Note, 250 shares of Indian Valley Bank #103–117, 176 shares of Sierra Valley Bank, attd. #124–126–137–136 106–133–132–139–103–121."

The note and collateral reached the post office at Loyalton, Cal., on August 27, 1921, and the package containing the same was on the same day delivered at said post office to one G. C. Brooks, who was then the assistant cashier of the respondent, and who signed the registry card for the package, the signature thereon being as follows: "Sierra Valley Bank, G. C. Brooks, Asst. Cashier." After its signature by said assistant cashier of respondent this card was forwarded to appellant at San Francisco, Cal., and received by it.

Respondent's assistant cashier, Brooks, after receiving the registered and insured package containing the note and collateral stock, proceeded with the same to the place of business of the respondent and laid the package with other mail upon his desk, which Mr. Brooks testifies passed on August 27, 1921, into the possession of Mr. S. H. Sherwood, the cashier of respondent, and Mr. Mont Berg. Several days passed without appellant receiving any further information concerning the collection, and it thereupon sent what is denominated a tracer, a card written in red ink, directed to Mont Berg asking payment of the $25,000. This card came into the hands of S. H. Sherwood, the cashier of the respondent, who states that on taking the same to Berg that he was informed by him that it was a proposition he (Berg) was handling, and that Berg dictated the following letter, which he, Sherwood, signed as cashier and mailed to appellant on September 7, 1921:

"Loyalton, Cal. September 7, 1921.

"Bank of Italy, San Francisco, Calif. Attention of Mr. Gock—Gentlemen: We are in receipt of your collection No. 666217, note and collateral of Mr. Mont Berg. We got in touch with Mr. Berg today, and he informs us that he will be in a position to pay this up within a very few days, as he is expecting to consummate the sale of some live stock. We shall forward draft immediately upon receipt of payment.

"Yours very truly,
"S. H. Sherwood, Cashier."

This communication was received by the appellant on September 8, 1921, at its main office in San Francisco. On September 10, 1921, Mr. Sherwood, the cashier of respondent, wrote and mailed appellant the following letter, relating to the collection, which letter was received by appellant at its San Francisco place of business, this letter, like the one of September 7, 1921, being written upon the letterheaded paper of the Sierra Valley Bank:

"Loyalton, Cal., September 10, 1921.

"Bank of Italy, San Francisco, Calif. Attention Mr. Gock—Gentlemen: Referring to your collection No. 666217, note and collateral of Mr. Mont Berg, we are sorry to report that Mr. Berg was compelled to go into the St Mary's Hospital at Reno, Nevada, for an operation last Friday morning. This will delay the payment of this collection for a few days, as the sale of Mr. Berg's live stock will go on just the same, and with your permission, we shall hold this note and collateral until we hear further from Mr. Berg.

"Yours very truly,
"S. H. Sherwood, Cashier."

No further information regarding the collection being received by appellant on October 5, 1921, it wired respondent to ascertain the fate of the collection, and received a reply from respondent to the effect that the note and collateral sent by appellant for collection had been stolen with other notes and bonds by bandits. In response to this notification appellant wrote respondent to have the stolen certificates canceled and new ones issued. On November 3, 1921, appellant again wired respondent concerning its collection, and was wired by respondent in effect that remittance in full would be made the next day. On November 30, 1921, demand was made by appellant for the payment of the collection and was refused by the respondent.

Neither the note nor the stock hypothecated as security for the same nor the money represented thereby has ever been returned to appellant, the evidence showing that the capital stock of respondent that was pledged was surrendered on August 28, 1921, by Berg to the secretary of respondent, who issued to Berg new certificates in lieu of the ones deposited with appellant as security. These new certificates the evidence shows Berg used as pledges with other banks on loans made to him. The new certificates, at the request of Berg, were dated back to August 23, 1921.

At 3 o'clock p. m. of August 23, 1921, a purported special meeting of respondent's board of directors was held at Loyalton. The bylaws of respondent did not provide a mode of procedure for calling special meetings of its directors, and no written notice was given any of the directors of this meeting, but verbal notice was given to all but two of them. At this meeting the directors who were present proceeded to elect Mont Berg president of the Sierra Valley Bank to fill the vacancy occasioned by the resignation of one Raffaelo Dotta, former president of the bank. After this election on August 23, 1921, and after 3 o'clock p. m. of that day, the following letter, written on stationery of the respondent bank, by S. H. Sherwood, its cashier, was sent to the appellant at its main office in San Francisco, Cal.:

"Loyalton, Cal., Aug. 23, 1921.

"Bank of Italy, San Francisco, Calif. Attention Mr. Fickett—Gentlemen: At a meeting of the board of directors of this bank held this day, Mr. Mont Berg was elected president succeeding Mr. Raffaelo Dotta; Mr. Dotta, together with Mr. A. P. Laffranchini, remains as vice president.

"Authorization was also made for the depositing of our San Francisco reserve account with your institution. This will be done immediately upon receipt of the necessary permission from the state banking department, which has been already requested. Kindly forward signature cards.

"Assuring you that we will look forward to our future relations with a great deal of pleasure, we are,

"Very truly yours,
"S. H. Sherwood, Cashier."

The foregoing communication was received by the appellant and the following answer sent by appellant to respondent written and mailed at San Francisco, Cal., on the 25th of August, 1921:

"San Francisco, Cal., August 25, 1921.

"Mr. S. H. Sherwood, Cashier Sierra Valley Bank, Loyalton, California. Dear Mr. Sherwood: We have your letter of the 23d of August, addressed to Mr. Fickett, and note that Mr. Mont Berg was elected president of your institution at a meeting of the board of directors. We also note that you have applied for permission to designate our institution as a depository for you in San Francisco. As required, we herewith inclose signature cards, and would ask that you have two of the cards signed by the officers who will be authorized to draw against your account with us.

"Very truly yours, Vice President."

The evidence shows that a letter mailed on a given date in Loyalton would reach San Francisco in one day after leaving Loyalton, and that all mail deposited at Loyalton after 3 o'clock p. m. of any day would stay over until the next day at three o'clock p. m., at which time it would leave Loyalton.

By its answer respondent sets forth a special defense of nonliability to appellant because of alleged negligent acts on the part of appellant through which Mont Berg as an individual became possessed of the note and stock in controversy, and that by his individual fraudulent acts therewith, and not because of any act on the part of respondent, the injuries complained of resulted to appellant. This special defense was upheld by the trial court, and judgment was given that appellant take nothing as against the respondent by the action. From said judgment this appeal has been taken by respondent.

When appellant, in response to the telegram which it received from Mont Berg on August 25, 1921, mailed to respondent for collection the note and collateral which appellant then held, was such sending such negligent act on its part as to preclude a recovery against respondent in this action because of respondent's failure to carry out the instructions accompanying said collection, is the question presented for solution. This telegram is a most important instrument in the transactions involved in this action. There is nothing in the telegram itself which would warrant a suspicion that any fraudulent act was being contemplated on the part of Mont Berg concerning his note and the collateral accompanying the same at the time the telegram was sent to the Bank of Italy. While the note in question was not due at the time of the sending of the telegram, that fact would not have justified appellant in declining to send the collection, as the telegram said nothing as to the amounts of money Berg would pay to satisfy the collection on presentation. The telegram was sent from Loyalton, the place of business of respondent. It was the only bank doing business at that place. The shipment was carefully made. It was registered and insured. It was addressed to the Sierra Valley Bank, and no one had a right to receive the package from the United States post office at Loyalton save the Sierra Valley Bank or its authorized representative. A return receipt for the package was requested by the sender. The package was delivered to an officer of the respondent at the post office in Loyalton. It was receipted for at said post office by the Sierra Valley Bank through its assistant cashier. This receipt was transmitted to appellant, and it had no reason to believe the note and collateral were not in the possession of the respondent until it received from respondent on October 5, 1921, the telegram in which it was stated "Mont Berg note and collateral taken by bandits together with all other papers." If this statement was true it would indicate that respondent had the note and collateral in its possession up to the date of that telegram. The evidence shows that respondent did not deny its liability for this collection until November 30, 1921, and none of its communications, either letters or telegrams, prior to that date to appellant, indicate a dispute of its liability to appellant for the collection.

Respondent urges that because of the provisions of section 3543 of the Civil Code, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer," the appellant is not entitled to any relief in this action. The act claimed as the negligence on appellant's part barring relief is appellant's not preventing the delivery of the package containing the note and collateral after appellant was notified that Mont Berg had been elected president of respondent. A number of authorities are cited in respondent's brief wherein it has been held in some jurisdictions that the sending of a collection by a bank to the bank which is to pay the collection is a negligent act. The authorities are not uniform, however, in this regard, and there are decisions holding that such action is not negligence of itself, and that it is not negligence where there are no other banks in the place where the collection is to be made. In the case at bar the only bank at Loyalton was the Sierra Valley Bank, to which the collection was sent.

Section 3543 of the Civil Code has received but few constructions in the appellate courts of this state. The case of Walsh v. Hunt, 120 Cal. 46, 52 P. 115, 39 L. R. A. 697, is an apparently clear one determining when the section should be applied. There a mortgagor had signed a mortgage for $500 which the agent raised to $1,200 and then transferred to an innocent third party for the $1,200. The amounts in the mortgage were written in pencil, and the claim was made that the mortgagor in signing a mortgage in pencil, the amount of which could be raised, was so negligent that the terms of section 3543 of the Civil Code should be applied. But the Supreme Court of this state in reversing the judgment of the lower court held that this section did not apply where the result would come from the wrongful act of the third party, even if it was made possible by reason of some act of one of the innocent parties. Applying this ruling to the facts in the case at bar, respondent is precluded from receiving the benefit of the section invoked, for the acts of Mont Berg with the note and collateral cannot be considered as other than a wrongful act towards both appellant and respondent. Besides, the section can be applied only where there are two innocent parties. The facts in this case will not justify considering respondent an innocent party such as section 3543 of the Civil Code applies to. In due course of business respondent received by registered mail from appellant a package addressed, not to Mont Berg or any other individual officer of respondent, but to the Sierra Valley Bank, the package showing on its address that it was from appellant and the amount of stamps thereon showing that it contained inclosures of a large value. It came into the possession of the assistant cashier of the bank, an officer authorized to receive it, and from that moment it must be deemed in the possession of the Sierra Valley Bank. Respondent nowhere questions that at this time the assistant cashier who received the package, and the cashier, Sherwood, and the president, Mont Berg, were qualified officers of the respondent. Whatever was thereafter done with the package by any of these three parties cannot be held to be other than an act of the Sierra Valley Bank. If Mont Berg took possession of the properties, as it clearly appears he did, his possession was without right, and respondent was responsible for the loss of the properties to appellant.

It cannot well be said that respondent should be regarded in any sense as an innocent party in the transactions herein involved. Its actions towards appellant from the time appellant sent its tracer concerning the collection are not such acts as would have been performed by an innocent party. Both its assistant cashier and cashier knew that a valuable package sent it by the Bank of Italy had disappeared, and that it was not among the papers of the bank; the cashier demanded its return from Mont Berg, he requested its payment, and, still knowing it was not paid and knowing that Berg had received it and had transferred to himself some of the collateral sent in the collection, wrote in the name of the bank that the collection would be paid, and at no time informed appellant that respondent did not have the note and collateral in its hands.

Banks, like all other business institutions, are liable for the acts of their officers. Those who deal with them in due course of business are entitled to protection, and they have a right to presume that their officers are men of integrity and trust. Should it be held otherwise the worth of credit on which so much of modern business transactions is conducted would be most seriously impaired.

As this action turns upon the question of whether or not section 3543 of the Civil Code applies, and it seems clear to this court on the evidence in the action that the section does not apply, it is not necessary to discuss the other propositions argued in the briefs.

The judgment appealed from should be reversed, and it is so ordered.

We concur: HART, J; PLUMMER, J.

---

78 Cal. App. 660

CAINE v. BRISCOE. (Civ. 3073.)

(District Court of Appeal, Third District, California. July 10, 1926.)

1. Brokers 🔑84(1)—Burden was on defendant, in broker's action for commissions, to prove contents of writing not produced by which he was to have right to inquire into financial standing of buyers and refuse to consummate contract, if their standing was unsatisfactory.

In broker's action to recover commissions, burden was on defendant to prove contents of writing, not produced, by which it was agreed that, before sale was to be completed, defendant was to have right to inquire into financial standing of buyers, and, if they were not satisfactory, to refuse to accept their offer.

2. Brokers 🔑86(1)—Defendant held not to have proved contents of instrument, not produced, defeating broker's right to commissions.

In broker's action for commissions, defendant failed to sustain burden of proving contents of instrument, which was not produced, that before sale was completed he was to have right to inquire into financial standing of buyers, and to refuse to accept their offer, if such inquiry did not result satisfactorily to him.

3. Brokers 🔑88(1)—Whether defendant sustained burden of establishing contents of instrument defeating broker's action for commissions held for jury.

In broker's action for commissions, whether defendant sustained burden of establishing contents of instrument by which he was to have right to inquire as to financial standing of buyers, and to refuse to accept their offer, if inquiry did not result satisfactorily, *held* for jury.

4. Evidence 🔑186(7).

Secondary proof of contents of written instrument, imposing obligations on parties thereto, should be clear, or not of doubtful character in probative worth.

5. Brokers 🔑54.

Where customer procured by broker was accepted by employer, he was thereafter estopped from denying purchaser's ability or willingness to complete the contract.

6. Appeal and error 🔑1002—Implied finding of jury on conflicting evidence held conclusive on reviewing court.

In broker's action for commissions, implied finding of jury, on conflicting evidence, that broker did not waive his right to compensation for procuring purchasers of property, *held* conclusive on reviewing court.

7. Brokers 🔑63(1)—Broker procuring purchasers for defendant's property held entitled to commissions, notwithstanding defendant's failure to execute deed of conveyance.

Where broker's obligation was to negotiate sale of the properties, and he procured purchasers ready, willing, and able to buy same, and but for defendant's acts sales would have been effected according to defendant's own terms, broker was entitled to his commissions, notwithstanding failure of defendant to execute deed of conveyance to buyers.

8. Brokers 🔑52—Offer of purchasers and acceptance by seller constituted agreement of sale, entitling broker to his commissions.

Offer of purchasers to buy property placed in broker's hands for sale at price and terms set forth in writing, and written acceptance thereof by seller, constituted agreement of sale entitling broker to his commissions.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by C. L. Caine, doing business under the firm name and style of C. L. Caine & Co., against E. V. Briscoe. Judgment for plaintiff, and defendant appeals. Affirmed.

George Cosgrave, of Fresno, for appellant.

N. Lindsay South, of Fresno, for respondent.

HART, J. The plaintiff brought this action to recover a judgment from the defendant for the sum of $10,000, alleged to be the amount of the compensation which defendant agreed to pay plaintiff for negotiating the sale of certain real property and certain personal property belonging to the former. The issues of fact were tried by a jury, who returned a verdict in favor of the plaintiff for the sum of $4,000. Judgment was entered accordingly, and this appeal is by the defendant from said judgment, upon a record made up according to the terms of section 953a of the Code of Civil Procedure.

The real property involved herein consists of 120 acres, with improvements, the property of defendant, and is situated in Fresno county. Eighty acres of the land, at the time of the negotiations herein concerned, were in producing grapevines of the Alicante variety and 40 acres in producing grapevines of the Thompson variety.

In July, 1922, the defendant, Briscoe, entered into a written agreement with C. L. Caine, plaintiff, a real estate broker of the city of Fresno, authorizing said Caine to sell said property. Said agreement is, in part, as follows:

> "Fresno, Calif., July 22, 1922.
>
> "I hereby appoint C. L. Caine Co., of Fresno, my agent with exclusive right to sell the property described on the reverse side of this card, for the price and under conditions hereon described or for any less amount hereafter authorized by me, and receive deposit on the same. I agree to furnish deed and abstract showing clear title in me to date, and should C. L. Caine Co. sell such property or be instrumental in selling the same, I agree to pay them. And for and in consideration of the sum of one dollar paid to me by C. L. Caine Co. receipt of which is hereby acknowledged, I do hereby grant to said C. L. Caine Co. during the life of this agreement the exclusive option to buy said property for said price, less the amount of said commission, and upon said terms and conditions.
>
> "This authorization is to remain in full force and effect for 5 days only, $10,000.00 Com.
>
> "Name: E. V. Briscoe.
> "Address: Kerman, R. R. 2, Box 79.
> "Phone: ——."

The "reverse side" of said agreement contained a description of the real property, the several buildings, including the residence, situated thereon and an enumeration of various articles of personal property—equipments commonly employed in the cultivation and growing of grapes, also wagon, horses, other cattle, chickens, etc. The terms were:

> "Cash $50,000; balance, $50,000 every year; $50,000 out of this year's crop above $240,000, Jan. 1, 1923."

Acting upon the foregoing authorization, the plaintiff immediately started negotiations for the sale of the properties described in the writing to Vincent Masciello, Nick Iannello, Dominican Masciello, and Louis Albino, residents of Brooklyn, New York, who had been for some time and were engaged as copartners in the business of buying, shipping, and selling grapes in said city, and who were at the time of said negotiations, in the city of Fresno. These parties thought favorably of the proposition of sale and purchase upon the description of the properties given by the plaintiff, and, accordingly, either upon the day the agreement between plaintiff and defendant was executed, or the day following, accompanied one Harry Faith, a clerk in the office of plaintiff, to the land and inspected the properties. It appears that no particular price to be paid for the properties was stated by plaintiff or Faith to Albino and his partners before arriving at the ranch. The buyers, as we shall hereafter refer to Albino and his partners, looked the properties over and, stating that they desired to consider among themselves the proposed deal before reaching a conclusion with respect thereto, returned with Faith to the city of Fresno. On the following day they again, accompanied by Faith, visited the premises, and examined and inspected the properties. On this occasion the buyers, for the first time, met Briscoe, the owner of the properties and the defendant herein. The former discussed the properties and the proposition to buy the same with Briscoe, and then asked him the total amount he desired for the properties and as to the terms of payment. Briscoe asked the total sum of $300,000, or approximately that sum, for the properties. After some discussion as to the price, the proposed purchasers offered Briscoe the sum of $270,000 for the ranch and the personal property specified in the listing agreement executed to plaintiff by Briscoe. The latter agreed to accept the last-mentioned sum and the terms of payment were also agreed upon. On the 25th day of July, 1922, in pursuance of an understanding to that effect, Briscoe and the proposed buyers met at the office of the plaintiff in Fresno and there the proposed buyers executed a written offer and agreement to purchase the properties. Upon the execution of said written offer or agreement the proposed buyers delivered to plaintiff for defendant and in the latter's name their certified check for the sum of $5,000. The initial language of said writing expresses acknowledgment of the receipt of the check just referred to "as and for deposit and partial payment of $270,000, the full purchase price of certain real property" (described), together with certain described personal property, including a large crop of grapes, "which the purchasers agree to purchase" for the total sum above named, payable as follows:

> "15,000 cash (including the amount herein receipted for) upon the execution and delivery of a good and sufficient deed or contract for a deed conveying said property to purchasers, together with abstract or certificate of title, to be furnished at the owner's expense, showing title to said property to be in the said owner, free and clear of all incumbrances whatsoever, except as otherwise herein expressly stated.
>
> "Balance of the purchase price to be secured and paid as follows: By contract payable $35,000 October 15, 1922. It is understood that this $35,000 will be secured by promissory

> notes made in the sum of $1,000 each from the date that the first car of grapes reaches its destination, then the balance of the notes shall become due in 45 days. Purchasers agree to make a payment of $50,000 on January 1, 1923. Balance of $170,000 shall be paid on the following terms: $50,000 in 1924, January 1, and $50,000 each year thereafter until the purchase price has been paid. It is further agreed that the seller will guarantee 1922 crops to be 800 tons of green grapes on the above described property. It is understood that in case a frost shall damage the crops growing on the above described property to make less than 400 tons of green grapes second party for that year only shall pay interest and no principal.
>
> "Time is made of the essence of this agreement, and it is understood and agreed that the sale of said property upon the terms herein set forth is subject to the approval of the owner of said property, but that said terms and conditions shall be agreed to and accepted by said owner within three days from this date, or the deposit herein receipted for shall be refunded to said purchasers immediately thereafter, upon demand. * * *
>
> "If the purchaser does not complete the purchase as hereinbefore provided within five (5) days after notice from the owner of his ability and readiness to convey said property as herein provided, then the said deposit shall be forfeited as liquidated damages, and it shall thereupon be paid, less the commission of the undersigned agents, to the owner." (Signed by buyers.)

The terms of said offer were, immediately or on the same day that the offer was executed, accepted in writing by defendant, the same being indorsed or written on the sheet or sheets of paper containing the offer itself. The acceptance was in the following language:

> "I hereby agree to all the conditions herein contained.
>
> "Telephone: ——— Address: ———.
>
> "I hereby accept the above price and terms, and agree to execute and deliver a good and sufficient deed or contract for a deed conveying said property to said purchaser as above stated, together with abstract or certificate of title showing title to said property to be free and clear from all incumbrances except as otherwise herein expressly stated, and I further agree to pay C. L. Caine Co. $10,000 as their commission for negotiating said sale.
>
> "Telephone E. V. Briscoe, Owner.
> "Address: ———.
>
> "Duplicate."

The above documents were prepared in triplicate, one being retained by the buyers, one by the seller (defendant), and the third by the plaintiff. For reasons to be hereinafter explained, the defendant refused to convey the properties to the buyers.

The foregoing embraces a general statement of the facts. They are substantially so stated in the complaint, together with the allegation that the plaintiff, after being authorized as indicated to negotiate the sale of the properties, procured, within the time specified in the authorization, purchasers ready, willing and able to purchase the same on the terms prescribed by and in the writing last referred to.

The answer denies the averments of the complaint, except as to the writing vesting plaintiff with the authority of agent to sell or negotiate the sale of the properties and the written offer by the buyer to purchase the properties and the like acceptance by defendant of said offer. As to these agreements, the answer alleges:

> That, on the real property described in said documents and in the complaint, there was, at the time of the execution thereof, "a crop of grapes of the value of $75,000; and defendant stated to plaintiff that the said Exhibit B (the writing last above referred to) was not satisfactory to him because, by the execution thereof, the purchasers would be able to and would convert the said crop upon said premises to their own use, and defendants would have no security for the further and additional payments, and unless the said purchasers were financially responsible, he would not agree to sell upon the terms and conditions contained in said Exhibit B; that plaintiff then and there advised defendant that he could take a reasonable time to investigate the financial standing and worth of the said purchasers named in said contract, being plaintiff's said Exhibit B, and unless he were satisfied with the result of such inquiries, defendant need not accept the said contract; that said Exhibit B was written in duplicate and one copy thereof delivered to defendant; that plaintiff thereupon indorsed upon defendant's copy of said Exhibit B, a writing to the effect that defendant should have a reasonable time in which to inquire into and ascertain the financial standing and worth of the said purchasers named in said contract, and would then notify plaintiff whether or not he elected that said contract became effective; that within said time, defendant made such injury and ascertained that the said proposed purchasers were not financially responsible and thereupon notified plaintiff that the result of his inquiry was not satisfactory and by reason thereof the said contract never became effective and was never executed on behalf of defendant."

The defense thus set up presents the point first relied upon for a reversal by defendant. The second point urged is that the written offer and acceptance (Exhibit B) "contemplated an additional and complete agreement between the parties when, and when only, the sale would be completed, and that the purchasers found by respondent were never willing to enter into such an agreement." A third point is practically that the jury were instructed upon matters of fact.

The point first adverted to arises out of the following circumstances: Within a few minutes (15 or 20) after Exhibit B and the acceptance of the terms thereof were executed, respectively, by the buyers and the defendant, the latter, with Faith, entered another and separate room from that in which the documents were executed, and there entered into and executed a writing, the nature of the real tenor of which is in dispute. This writing, which was upon a "slip of paper," could not, after this action was instituted by plaintiff, be found, and was therefore not available at the trial, although defendant, so he testified, attached it to Exhibit B, and delivered it as so attached to his attorneys. The loss of the "slip" having been shown, an attempt was made to prove the contents thereof by parol. The defendant testified that said writing embraced an agreement between him and Faith to the effect that the sale should not be consummated until he, after a reasonable time, was able to secure a report from New York on the financial responsibility of the buyers to purchase the properties and fulfill in every material particular the terms of Exhibit B.

Mark Hall, assistant cashier of the Valley Bank of Fresno, but at the time the transactions involved herein were in progress, holding a like position in the Fidelity Bank, of the same place, testified that he was familiar to some extent with said transactions; that, while he never saw the "slip of paper" containing an agreement between Briscoe and Faith, to the effect that the former, before consummating the sale, was to be accorded an opportunity to investigate the financial standing of Albino and his partners in New York, he had, nevertheless, heard it discussed by Faith and Briscoe, and, in effect, he said, from such discussion, understood that such an agreement was contained in said "slip," signed by Faith and Briscoe.

[1-4] Faith testified that, within a short time after Exhibit B was executed by Briscoe and the buyers, he and the former stepped into an adjoining room primarily for the purpose of discussing the matter of the time at which the buyers should be given possession of the properties and also the proposition of selling his furniture to the buyers. Faith testified that the writing on the "slip of paper" prepared by Briscoe, and signed by the latter and the witness, so far as he was able to recall, referred entirely to the sale of the furniture to the buyers, the latter having agreed to pay the sum of $5,000 therefor. Faith, further referring to said "slip of paper," stated that, after it was signed by him and Briscoe, the latter took possession of it and that he (Faith) had never thereafter seen it, nor did he know what Briscoe did with it. This is substantially all the testimony relative to the stipulations of the writing now in question. The burden was upon the defendant to prove the contents of said writing. This is so for the reason that the allegation of the answer that by said writing it was agreed that, before the sale was to be completed, the defendant was to have and exercise the right to inquire into the matter of the financial standing of the buyers, and if such inquiry did not result satisfactorily to him, the defendant might refuse to accept the offer of the buyers, as set forth in Exhibit B, involved special or an affirmative defense. It is manifest, from the face of the record, that defendant failed to sustain that burden. The testimony introduced by the defendant respecting the contents of said writing seems upon its face to be unsatisfactory. Indeed, the only direct testimony as to the nature of the stipulations of said writing, so far as defendant's position was concerned, was Briscoe's testimony. Hall's testimony amounted to no more than a conjecture that the alleged stipulation accorded to the defendant a reasonable time, after he accepted the offer of the buyers, within which to prosecute an inquiry with regard to the financial ability of the latter before the offer and the acceptance were to become binding upon him. The only testimony, other than that of Briscoe and Hall, bearing upon the matter, was that of Faith, testifying for the plaintiff. His testimony, it is true, was not of a positive character, but it represented his best recollection, and, as seen, was to the effect that the said writing contained no stipulation that defendant was to be given an opportunity to investigate the financial standing of the buyers before he would be required to convey the properties to Albino and his copartners, he stating, however (it may here be added), that subsequent to the making and the signing of the writing regarding the sale of the property, and consequently, after Exhibit B was executed by the buyers and the terms thereof accepted by him, the question of the financial ability of the buyers to consummate the deal according to the terms of the written offer and acceptance (Exhibit B) was, for the first time, raised by the defendant.

The question whether the defendant succeeded in sustaining the burden cast upon him to establish the special defense now being considered was, of course, one for the jury. Peculiarly is it true in cases where, as here, the contents of a lost or destroyed written document must be proved by parol testimony, thus placing sole reliance, for the support of an important issue, upon the frailties, or, as truly it may be said, the treachery, of human memory, the burden of proving the fact necessarily carries with it more than the usual measure of responsibility. In other words, secondary proof of the contents of a written instrument imposing duties or obligations upon the parties thereto should be clear or not of a doubtful character in probative worth. Whether, therefore, we say that the testimony of Faith appears to be sufficient to have justly warranted the jury in concluding that the burden upon defendant to prove said special defense had not been satisfactorily supported or that Faith's testimony was such as to create in the evidence upon the question involved in said defense a substantial conflict, the result is the same. The trial court specifically instructed the jury upon the question and to the effect that if they found from the evidence that the plaintiff and defendant agreed in writing that the last named should have a reasonable time within which to inquire into and ascertain "the financial standing and worth of the purchasers," that defendant signed the contract to sell on the condition that he be given the opportunity to prosecute such inquiry, and that, upon making such inquiry, he "notified plaintiff that he was not satisfied with the financial responsibility of the purchasers," then the "contract to pay (plaintiff) the commission never became effective." The court further instructed the jury that, before plaintiff would be entitled to recover in this action, the jury would be required to find that he (plaintiff), within the time specified in the contract vesting him with authority to sell or negotiate the sale of the properties, procured "purchasers who were able, ready and willing to buy on terms satisfactory to the seller."

[5] Thus the special defense in question was directly submitted to the jury, and the verdict necessarily implies a finding by the jury that the writing executed by Briscoe and Faith immediately after Exhibit B was executed by the buyers and Briscoe contained no stipulation giving to Briscoe the right or an opportunity to investigate the financial standing of Albino and his copartners before the terms of said Exhibit B were to become binding upon Briscoe. The situation as it is presented to this court, then, is this: That Briscoe, without previously raising any objection to the proposed purchasers, either upon the ground that they were not possessed of the financial ability to carry out the deal or upon the ground that they were not willing to do so, entered into an agreement to sell the properties to the buyers and accepted their check for $5,000 as a payment. There was and is no claim made by defendant that he was induced to accept the offer of the buyers to purchase the properties by any act of fraud on the part of the plaintiff or that such acceptance was brought about through a mutual mistake regarding the facts or the terms of the offer. Hence the case, so far as the present point is concerned, falls within the rule stated as follows in 4 Ruling Case Law, page 309:

> "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against the claim except fraud on the part of the broker in inducing the acceptance."

The said rule has been approved by a number of California cases among which are Carrington v. Smithers, 26 Cal. App. 460, 461, 147 P. 225, and Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 384, 173 P. 1109, an application for a hearing in the Supreme Court in the latter case having been denied. See, also, Freeman v. Creelman, 60 Cal. App. 14, 23, 24, 212 P. 56.

[6] It is next contended that plaintiff is not entitled to recover in this action because, as is the claim, the contract of sale was rescinded by the mutual agreement of the buyers and the defendant, and that the plaintiff, in the transaction, culminating in the rescission, agreed to waive any right he might have to a commission from defendant for negotiating the sale of the properties. This proposition was set up in the answer as a special defense. Upon that issue the evidence was in sharp conflict, and the court specifically instructed the jury that, if they should believe from the evidence that plaintiff, as alleged in the answer, waived his right to compensation for procuring purchasers of the property, it would be their duty to find for defendant and also stated he converse of that proposition. It follows that the implication from the verdict is that the jury concluded that the plaintiff made no such waiver, and this conclusion is conclusive upon this court.

In view of the foregoing considerations, it is not necessary that we should minutely examine herein the testimony disclosing the controversy which led to a refusal by the defendant to perform the terms of the contract of sale. It is enough to say that defendant claimed that a report he received as to the financial ability of the buyers to carry out the contract on their part was unsatisfactory to him; that, after much bickering between the defendant and the buyers followed the execution of Exhibit B, it was finally agreed that the contract of sale should be rescinded upon the payment by the defendant to the buyers of the sum of $750, and that said agreement was carried out. Albino testified that he and his copartners were at all times able and willing to purchase the properties upon the terms set forth in Exhibit B. One Luscher testified:

> That, just prior to the time when the agreement of sale was canceled by the parties, he met the defendant in plaintiff's office; that he then said to defendant: "I heard you sold your place out at Biola," to which defendant replied that "he could sell it, if he wanted to go on with the deal, but the price of Alicantes had advanced so fast that he considered it a bad deal and wanted to get out of it; and I said, 'Maybe you can't;' and he said he didn't know. He wasn't going on with it, if he could help it. I suggested to him that, if he would settle with Caine on the commission end of it, I was sure Caine would help him get out of the deal and he went out, saying that he would rather pay the commission than go on with the deal."

This testimony would seem to have had the effect of weakening the foundation of defendant's special defenses. The jury, we may assume, so viewed said testimony.

[7, 8] The point that the language of Ex-

hibit B clearly indicates that, before the sale should be completed, the parties contemplated and intended that an additional agreement involving or amounting to an actual sale of the properties should be executed, that plaintiff's right to the specified commission depended entirely upon the execution by the parties of such contract of sale, and that, no such contract having been executed, the plaintiff, therefore, did not earn the commission prescribed, is without merit. The plaintiff's obligation was to negotiate a sale of the properties, or to be "instrumental in selling the same." He procured purchasers ready, willing, and able to buy the properties, and but for the act or acts of the defendant the sale would have been effected according to the defendant's own terms. Indeed, the offer of Albino and his copartners to buy the properties at the price and on the terms set forth in the writing designated in the record and herein as Exhibit B, and the written acceptance of said offer and the terms thereof by defendant, constituted an agreement of sale. The execution of a deed of conveyance by defendant to the buyers was not required as a prerequisite to the right of plaintiff to claim and recover his commission. As above suggested, the failure to consummate the deal, as we are authorized to assume from the verdict, was due entirely to the defendant, and his failure to perform in full his part of the contract cannot have the effect of denying to the plaintiff his right to the compensation for the services he rendered defendant, as the same was fixed by the agreement between them.

The last point urged for a reversal involves an attack upon one of the instructions given to the jury by the court. It is said that the instruction "ignored the element of the admitted facts in evidence concerning appellant's special defenses." There are, as above shown, no "admitted facts" relative to said special defenses. The criticism of the instruction is wholly devoid of merit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

78 Cal. App. 536

LE BARON et al. v. BERRYESSA CATTLE CO. (Civ. 5529.)

(District Court of Appeal, First District, Division 2, California. June 26, 1926. Hearing Denied by Supreme Court Aug. 23, 1926.)

1. Pleading 🔑354(2)—In minors' action to rescind purchase of cattle restored to seller February 10, seller's pleading that, between sale on November 15 and February 1, cattle decreased in value $20 per head, was properly stricken out.

In action to rescind contract for purchase of ranch and cattle, possession of which was restored on February 10, 1921, defendant's pleading that, between the time of the sale on November 15, 1920, and February 1, 1921, cattle decreased in value $20 per head, was properly stricken out because not showing that cattle were not worth as much when returned as when sold, and because change in value was contrary to experience and common knowledge.

2. Evidence 🔑474(19).

Where party alleged that cattle decreased in value $20 per head in 2½ months after November 15, his witness, who had not seen the cattle after August 1, was not qualified to testify as to their value on November 15.

3. Equity 🔑65(2)—In minors' action to rescind purchase of cattle, where seller alleged they decreased in value $20 per head during minors' possession for 2½ months, whether restoration was sufficient need not be determined, since seller was in equity without clean hands (Civ. Code, § 35).

In minors' action to rescind purchase of cattle, where seller alleged they decreased in value $20 per head during the 2½ months before restoration to him, court need not determine whether restoration in kind was sufficient, under Civ. Code, § 35, though the market value through no fault of the minors decreased, since defendant was asking for equitable relief without clean hands.

4. Infants 🔑72(1).

Seller may not recover from minors rescinding purchase of ranch for failure to properly till and sow the land, or for loss of opportunity to lease it.

5. Infants 🔑31(2)—Where minors, rescinding purchase of ranch, offered to execute any paper to cover return of cattle brand, seller might not complain of failure to transfer it to him.

Where infants, rescinding purchase of ranch, offered to return entire consideration received upon return of the entire consideration given by them, which offer seller refused, but seller accepted return of all property, including cattle brand, and in complaint in and trial of action to rescind they renewed offer and during trial offered to execute any paper to cover the matter of the cattle brand, seller might not complain that minors did not transfer the cattle brand to him.

6. Infants 🔑31(1).

Minors, who, after purchase of cattle ranch, bore expense of caring for it and the cattle, on rescission, were entitled to recoupment therefor from the seller.

7. Appeal and error 🔑931(7)—That trial court considered right of recoupment would be presumed in support of judgment.

In minors' action for rescission of purchase of cattle ranch, court may presume in support of judgment that trial court considered right to recoupment for caring for ranch before rescission, where it tried case as if such was pleaded, and found that entire consideration had been returned.

8. Infants 🔑98.

Evidence *held* to sustain finding that minors, attempting to rescind purchase of ranch and cattle, had returned the entire consideration received by them.

9. Infants ⚷73—**Minor's action for rescission is equitable.**

Action of minor over 18 years to rescind contract by restoring or offering to restore the consideration, or paying its equivalent, as required by Civ. Code, § 35, is equitable, and vests in the trial court broad discretion to see that equity is done.

10. Infants ⚷31(2)—**When minors attempt to rescind, equities running through entire transaction might be balanced, to determine whether consideration or its equivalent had been restored.**

Where minors, attempting to rescind purchase involving various classes of property and a number of separate transactions, offered return of entire consideration received on return of entire consideration given by them, and the sellers accept what the minors claim to be the entire consideration received, equities running through the entire transaction may be balanced to determine whether the consideration or its equivalent has been restored.

11. Infants ⚷31(2).

Under Civ. Code, § 35, allowing a minor to disaffirm his contract on restoring consideration or paying its equivalent, payment of the equivalent may be in cash, property, or benefits received.

12. Infants ⚷31(2).

Minors, rescinding contract of purchase, are entitled to interest on the money paid to the seller from date of its payment.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Henry C. Le Baron, a minor, by Lora Le Baron, his guardian ad litem, and another, against the Berryessa Cattle Company, to rescind a contract for the purchase of real and personal property, for recovery of money paid thereunder, and for the cancellation of notes and a chattel mortgage. Judgment for plaintiffs, and defendant appeals. Affirmed.

Charles E. Trower, of Napa, J. E. McCurdy, of San Mateo, and J. W. Coleberd, of South San Francisco, for appellant.

E. M. Norton, of Healdsburg, J. R. Leppo, of Santa Rosa, and Fred W. McConnell, of Healdsburg, for respondents.

NOURSE, J. The plaintiffs, who are husband and wife and both minors, sued the defendant for the rescission of a contract for the purchase of real and personal property, for the recovery of $20,000 paid under the contract, and for the cancellation of two promissory notes, aggregating $30,000, and a promissory note of $55,000, and a chattel mortgage securing the same. Judgment went for the plaintiffs, as prayed, and the defendant has appealed upon the judgment roll and a bill of exceptions.

On the 15th of November, 1920, the plaintiff Henry C. Le Baron was of the age of 19 years, and the plaintiff Leota Le Baron was of the age of 17 years. They both sue herein through their guardian, Lora Le Baron, but the two minors will hereafter be referred to as the plaintiffs. On the date mentioned they entered into a written contract with the defendant corporation, wherein the plaintiffs agreed to buy from the defendant real and personal property located in Napa county for the total purchase price of $340,000. Pursuant to the terms of the contract and at the time of its execution, the plaintiffs paid to the defendant the sum of $20,000 in money, and executed and delivered to it their two joint and several promissory notes each in the principal sum of $15,000, and also their joint and several promissory note in the sum of $55,000 secured by a chattel mortgage on the personal property described in the written contract. The plaintiffs immediately entered into possession of the premises and continued in possession thereof until the 10th day of February, 1921, when possession was delivered to the defendant in accordance with their notice of disaffirmance and rescission, which had been given to the defendant in writing on the 28th day of January, 1921. The trial court held that at that time the plaintiffs restored and returned to the defendant the entire consideration moving to them from said defendant under the contract, but that the defendant refused and has still refused to return the sum of $20,000 which had been paid by the plaintiffs, and that it also refused to deliver up or cancel any of the promissory notes or the chattel mortgage.

At the time of the execution of the contract and as a part of the same transaction, the defendant executed to plaintiffs its bill of sale reciting that, in consideration of the sum of $62,500, all the personal property, including a large number of farm implements, 20 head of horses, 20 head of sheep, and approximately 1100 head of cattle was transferred to the plaintiffs, and of this personal property plaintiffs also took immediate possession. In the agreement of sale of the premises, the purchase price of the real property was stated to be $277,500 and the purchase price of the personalty was recited to be $62,500. On January 28, 1921, while both the plaintiffs were still in their minority, they notified the defendant in writing that they each disaffirmed and rescinded the contract and every part thereof, and then offered to restore to the defendant the entire consideration for the contract, and demanded the return to them of everything of value received from them by the defendant. On or about the 1st day of February following, the plaintiffs left the premises in the care of competent employees, and, in accordance with stipulation of counsel, the actual transfer of possession from the plaintiffs to the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendant took place on February 10th, following, without any of the parties hereto being present. From that date on, the defendant retained possession of all the property, both real and personal, covered by the contract except as hereinafter stated.

Included in the bill of sale of the personal property were about 200 tons of hay and 20 tons of cotton seed meal. During the plaintiffs' occupancy of the premises they fed to the stock in their possession about 100 tons of this hay and about 10 tons of the cotton seed meal. These were the only items of all the property transferred which were not returned to the defendant in kind, and the trial court found that the reasonable value of the hay used by the plaintiffs was about $1,000 and that the reasonable value of the cotton seed meal was about $800. It was found that this hay and meal had been fed to the cattle in the regular daily course of care and proper treatment of them, and was necessary for the purpose of nourishing them and keeping them in a healthy condition. A second cause of action was in the form of a common count praying for judgment for $20,000, as for money had and received.

The defendant answered, admitting the execution of the contract and the minority of the plaintiffs, but denying the allegation that they offered to restore the consideration for the contract and that they disaffirmed the same. As a separate defense the defendant alleged that the plaintiffs had willfully and fraudulently concealed from the defendant the fact that each was a minor, and had conducted themselves in such manner as to lead the defendant to believe that they were adults and competent to contract; that, in accordance with the provisions of the written contract and the bill of sale hereinbefore referred to, the defendant on the 15th day of November, 1920, delivered to the plaintiffs 1,100 head of cattle, which were then of the reasonable value of $70 per head, but that between that date and the 1st day of February, 1921, said cattle had declined and diminished in value to the amount of $20 per head, so that the total value thereof had decreased from $77,000 on November 15, 1920, to $55,000 on February 1, 1921. As a second defense, the defendant alleged that as a part of the contract the plaintiff had undertaken to till and plant to grain about 1,000 acres of the land conveyed, and that they failed to do so to the damage of the defendant in the sum of $15,000. As a third defense, the defendant alleged that by reason of the occupany of said land by the plaintiffs the defendant had been unable to secure a tenant for the premises; that the reasonable rental value for the land for the year beginning November 15, 1920, was $15,000, and that the defendant was therefore damaged in that sum. As a counterclaim the defendant pleaded all the facts appearing in its first, second and third defenses as just noted and claimed a set-off to the extent of the damages which they had pleaded in their various defenses. In this same pleading the defendant affirmatively alleged, contrary to the preceding denials in its answer, that the plaintiffs did, as alleged in their complaint, notify the defendant of their election and intention to disaffirm and annul the contract, and that they did propose to return to the defendant the consideration which they had received. As a second counterclaim the defendant pleaded, that within the 2 years last past, it had sold to the plaintiffs 100 tons of hay of the reasonable value of $1,500 and 20 tons of cotton seed meal of the reasonable value of $1,500.

As a first cross-complaint, the defendant repeated the allegations of its first separate defense relating to the depreciation in the value of the cattle; as a second cause of action and cross-complaint, it repeated the allegations relating to the plaintiffs' failure to till and sow the land; as a third cause of action and cross-complaint, it repeated the allegations relating to the loss to the defendant through its inability to lease the premises; as a conclusion to the entire pleading, the defendant prayed for judgment against the plaintiffs in the sum of $20,000.

The plaintiffs demurred to the answers, counterclaims, and cross-complaints and moved to strike out portions of each. The demurrer was sustained to certain portions and overruled as to other portions, and the motion to strike out was granted to all those portions of the pleading relating to the depreciation in the value of the cattle, the loss through the failure to till and sow the land, and the loss through the inability of the defendant to procure a tenant for the premises. It was denied as to the second counterclaim relating to the sale of the hay and cotton seed meal.

With the pleadings so framed the cause went to trial before the court without a jury, and evidence was offered without contradiction tending to prove all the material allegations of the complaint. The written notice of disaffirmance and rescission of the contract, due service of which was admitted, was offered in evidence, and from this it appears that on January 27, 1921, the plaintiffs notified the defendant in writing that because of their minority they elected to disaffirm, cancel, annul, and abrogate the agreement, and every part thereof, and that they thereby offered to restore to the defendant the entire consideration moving to them at the residence located upon the premises on the 10th of February, 1921. This notice contained the specific offer to restore the entire consideration for the agreement and all property received by either of the plaintiffs and was accompanied by the demand that, at the same time and place, the defendant return to them everything of value which it had received from them, and particularly the sum of $20,000 which they had paid on November 15, 1920.

Evidence was further offered to the effect that, by stipulation of counsel for both parties, neither of the principals would be required to appear upon the premises on the day mentioned, but that the transfer would be effected by counsel at that time without any prejudice to either party by reason of the absence of the principals.

The defendant offered no testimony in contravention of the allegations of the complaint, or in support of the allegations of its answers, other than a witness who was asked to testify as to the value of the cattle covered by the contract. An objection to this line of inquiry was sustained, and defendant's counsel thereupon offered to prove by this and another witness that the value of said cattle was on the 15th day of November, 1920, approximately $72 a head and that on the 10th day of February, 1921, they were valued from $18 to $20 less per head. This offer was also rejected, and the defendant rested with the stipulation that the reasonable value of the hay consumed by the cattle during plaintiffs' occupancy of the premises was $10 a ton. During the course of the trial the defendant brought out that, as a part of the transaction of November 15, 1920, the defendant had conveyed to the plaintiffs all his right, title, and interest in a certain cattle brand which had been used by the corporation, and that no reconveyance of this cattle brand had been made to the defendant. The plaintiffs insisted that their offer to restore the entire consideration was broad enough to include the cattle brand, and that they were at all times ready and willing to make such transfer or conveyance thereof as the defendant might indicate. At the same time the plaintiffs executed a written conveyance and quitclaim of all their right, title, and interest in this cattle brand, but this the defendant refused to accept. The conveyance was thereupon filed with the papers in the case, and the plaintiffs renewed their offer in open court to execute any paper which the defendant might demand for the purpose of clearing up the title to the cattle brand.

The case rests upon an interpretation of section 35, Civil Code, relating to the right of a minor to disaffirm his contract and which reads as follows:

> "In all cases other than those specified in sections 36 and 37, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent."

The appellant's position is that, under this section, a minor may not disaffirm his contract without restoration to the other party of the full value of the consideration which passed to the minor, while the respondents' position is that the section permits the restoration of the consideration in kind, or that if this cannot be done, the payment of its equivalent.

[1-3] Taking up the first item relating to the depreciation in value of the cattle, it will be noted that the appellant in all portions of its answer alleged that the value of the cattle on November 15, 1920, was $70 per head and that the value of the same cattle on *February 1*, 1921, was $50 a head. These allegations are made in face of the written stipulation of the parties, contained both in the written contract and in the bill of sale, that the purchase price of all the personal property conveyed, including not only these same cattle, but a number of horses, mules, sheep, chickens and farm implements, and all the furniture of the house, was but $62,500 on November 15, 1920. Thus, without any explanation of this discrepancy, the appellant has alleged that the value of the cattle alone was $77,000 or $14,500 more than the stipulated purchase price of all the personal property. In all portions of its pleading the appellant alleged that the value of the cattle had declined $20 per head on the first day of February, 1921. Inasmuch as the admitted pleadings all showed that all these cattle had been restored to the appellant on the 10th day of February, 1921, the value on the first day of that month was, of course, a matter of no importance. If their value could decrease so rapidly from November 15, 1920, to February 1, 1921, it is not altogether improbable that this value might have increased from February 1 to February 10, the day upon which they were returned to the possession of the appellant. In any event, the admitted pleadings are that on February 10, 1921, the appellant accepted the respondents' offer to restore the cattle and actually received them into its possession, and it does not appear in any portion of the pleadings what value they had at that time.

There is, therefore, nothing in the pleadings to show that when the cattle were returned to the appellant they were not of the same value as when they were delivered to the respondents, or, in other words, that the respondents did not on February 10, 1921, restore to the appellant, and that the appellant did not at the same time accept from the respondents, the entire consideration so far as the cattle alone were concerned. All these pleadings regarding the rapid change in the value of the cattle are so contrary to human experience and common knowledge that they appear to be merely sham and frivolous, and the trial court must have viewed them in the same light when it granted the motion to strike out. If, however, any error occurred in striking out these pleadings, the appellant was nevertheless at liberty upon the trial to prove that the respondents had not restored or offered to restore the full consideration. For this purpose it offered to prove by a witness who was a cattle buyer in the neighborhood the value of the cattle on November 15, 1920. In attempting to qualify this witness for that purpose he testified that he had not seen these cattle since August 1, 1920. The question covering his opinion as to the value of those particular cattle per head on November 15, 1920, was objected to upon the ground that it was incompetent, immaterial, and irrelevant. This objection was sustained, and properly so. If, as alleged in their pleadings, these cattle were of such a nature that their value would change $20 per head in a period of 2½ months after November 15, 1920, the information of the witness on August 1 previous was not sufficient to qualify him to give an opinion as to their value on the later date. It is not, therefore, necessary to pass upon the legal question involved as to whether the restoration of the property in kind is sufficient under section 35, Civil Code, though the market value thereof has through no fault of the minors decreased since the time of the execution of the contract, because upon this feature of the case, at least, the trial court was sitting in equity and must have assumed from the character of the answer that the appellant was asking for equitable relief without clean hands.

[4] Appellant does not seriously claim error in the order striking out the portions of its pleading relating to the failure of the respondents to properly till and sow the land or as to the appellant's loss of the opportunity to lease the premises to another. The obvious answer to both propositions is that to permit appellant to recover on either issue would be nothing more than to award it damages for respondents' failure to carry out the contract. As under section 35, Civil Code, a minor may disaffirm and rescind a contract by restoring the consideration, it is patent that the other party may not by way of counterclaim or cross-complaint have a specific performance or recover damages for the minor's failure to carry out the terms of the contract which is rescinded. See 1 Black on Rescission and Cancellation, § 312, pp. 790, 791.

[5] Appellant makes mention of the point that, at the time of the delivery of the possession of the premises, the respondents did not actually transfer to the appellant by written conveyance their right to use the cattle brand. The facts are that the cattle brand itself was left upon the premises and the appellant had used it continuously from February 10, 1921, to the time of the trial. The written notice of disaffirmance expressly offered to transfer to the appellant the entire consideration which the respondents had received. This offer, it will be remembered, was conditional upon the return to the respondents of the consideration which the appellant had received. This condition the appellant refused to meet. It did, however, accept from the respondents all the real and personal property, including the cattle brand itself. It is also to be remembered that, in the original complaint and during the trial of the action, the respondents expressly renewed their offer, and that during the course of the trial they specifically offered to execute any paper which the appellant might demand to cover the matter of the cattle brand. This offer was again refused and the appellant cannot be heard at this time to complain.

[6-8] The further contention is made that the trial court erred in refusing to allow the appellant a set-off upon its counterclaim for the use of the hay and cotton seed meal which had been fed to the cattle during the time of respondents' occupancy of the premises. The trial court made the general finding that the respondents had restored and returned to the appellant the entire consideration moving to them under the contract. Upon the special issue of the use of the hay and cotton seed meal, the court found that the respondents fed to the cattle, purchased under the contract, about 100 tons of the hay and about 10 tons of the cotton seed meal, all of the reasonable value of $1,800, and "that said feeding of the said hay and meal to said cattle was done daily during said time in the regular daily course of proper care and treatment of said cattle, and was necessary for the purpose of sustaining and nourishing said cattle and keeping them in a healthy condition during said time. That all other hay and meal, except as fed to said cattle as aforesaid, were returned and restored." Inasmuch as it became respondents' duty under section 35, Civil Code, to either restore the consideration received in kind or to pay its equivalent, the finding that they had done either in respect to the hay and meal would have been sufficient to support the judgment. We do not understand that the code section requires a restoration of the consideration in kind or a payment of its equivalent in cash. Payment of any obligation may be made in cash or other property, when the obligatee is satisfied to accept other property in lieu of cash. When this is done the obligation is, of course, satisfied even though the terms of the obligation call for payment in cash.

A reasonable interpretation of the findings of the trial court, taken as a whole, is that the entire consideration moving to the respondents under the contract was returned to the appellant either in kind or its equivalent; that the appellant accepted what was offered in satisfaction of respondents' obligation under the Code section; and that there was, therefore, nothing due from the respondents to the appellant under any item of the transaction. During the period of respondents' occupancy of the premises they assumed the entire responsibility of caring for the ranch, as well as all the personal property transferred to them, including the feeding of the cattle and other live stock and all the expense thereof was borne by the respondents. For this expense and service they were entitled to recoupment from the appellant, and it is fair to assume in support of the judgment that the trial court took all these matters into consideration when it found that the entire consideration moving to the respondents had been returned to the appellant. Though it is true that the respondents did not in their pleading demand compensation for their services in caring for the properties or for the expense incurred, the case was tried as if such pleading had been made, and the trial court, therefore, had before it all the evidence covering the question of the benefits which had come to the respondents out of the contract, as well as the matter of what they had outlayed for the benefit of the appellant. Offsetting the one against the other, the trial court found that the entire consideration moving to the respondents had been returned, and we cannot say on the record before us that there was any error in his finding.

[9-11] The demands of the Code section are that a minor over the age of 18 years may disaffirm his contract upon restoring or offering to restore the consideration which he had received, but that if this cannot be done he must pay its equivalent. In seeking to avoid a contract under these circumstances the minor is governed in many respects by the ordinary rules relating to rescission of contracts in general, and in such a case, the action being in equity, the trial court is vested with a broad discretion to see that equity is done. When the contract involved includes various classes of property and a number of separate transactions, it is not necessary for the court in equity to segregate the contract into its separate parts, and to demand a restoration in kind of the separate items of property involved, but where, as here, the contract is disaffirmed upon an offer to restore the *entire consideration* upon the condition of the return to the minors of the consideration which passed from them, and the other parties accept from the minors the return of that which the minors claim to be the entire consideration which they received, the trial court should be permitted to balance the equities running through the entire transaction and to determine whether the consideration *or its equivalent* has not in fact been restored. The purpose of the Code section is to place the party dealing with the minors in statu quo, as far as this may be done, either by the return of the entire consideration in kind or by the payment of its equivalent (which may be in cash, property, or benefits received). The reasonable interpretation of the finding of the trial court, taken as a whole, is that this has been done, and we are satisfied that in this respect the findings are sustained by substantial evidence.

[12] Finally, it is argued that the trial court erred in awarding respondents interest on the sum of $20,000 from the date of payment rather than from the date of their disaffirmance of their contract. In reply the respondents point out that, in so far as Leota Le Baron is concerned, the contract in question was absolutely void as she was at the time of its execution a minor under the age of 18 years. As to the respondent Henry C. Le Baron, he being over the age of 18 years at the time the contract was made, his contract become void ab initio upon his disaffirmance. This being so, the money paid to the appellant by the minors was in effect an advancement without legal consideration on their part. The appellant enjoyed the use of this money from the date of the execution of the contract and upon its recovery was liable for interest from that date.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

78 Cal. App. 551

WOOD v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (Civ. 5672.)

(District Court of Appeal, First District, Division 2, California. June 28. 1926.)

1. Certiorari ⚷64(2)—Jurisdiction of superior court to reverse order of justice court, made after final judgment, only question on certiorari to review.

On certiorari to review an order of superior court reversing an order of justice court, made after final judgment, only question before reviewing court is jurisdiction of superior court to enter order complained of.

2. Justices of the peace ⚷184.

An appeal from a default judgment in the justice court raises questions of law alone.

3. Justices of the peace ⚷147(6).

There is no right to a separate appeal from an order of the justice court refusing to set aside default after judgment has been entered, in view of Code Civ. Proc. § 874.

4. Justices of the peace ⚷183(½).

Superior court *held* without jurisdiction to set aside order of justice court, made after final judgment, in view of Code Civ. Proc. § 980, where appeal to superior court was not heard on a statement of the case.

Application by Charles V. Wood for certiorari to review an order of the Superior Court of the State of California, in and for Alameda County and Hon. J. D. Murphey, Judge thereof, reversing an order of the justice court, made after final judgment. Order annulled.

Hill & Mays, of Oakland, and E. Coke Hill, of San Francisco, for petitioner.

Richard Liebman and Stanley R. Sterne, both of Oakland, for respondents.

NOURSE, J. This is an original proceeding in certiorari to review an order of the respondent court which reversed an order of the justice court made after final judgment, which denied a motion to set aside a default of one of the defendants. The proceeding in the justice court was an action for damages for personal injuries in which the petitioner herein was plaintiff. The default of the defendant Campana was duly entered upon his failure to appear after service of process, and judgment was thereafter duly entered against him. Notice of judgment was served upon him in accordance with the requirements of the Code, and more than ten days thereafter he served and filed his notice of motion to set aside the judgment as to him. This motion was denied, and thereafter that defendant served and filed his notice of appeal from the default judgment and from the order of the court denying his motion to set aside his default. This notice of appeal recited that the appeal was taken on questions of both law and fact, and it was not accompanied by any statement of the case.

On the hearing of the appeal in the superior court the petitioner herein objected to a trial of the case de novo upon the following grounds: That the appeal from the judgment, being one from a default judgment, was necessarily an appeal upon questions of law alone; that the appeal from the order denying the motion to set aside the defendant's default was not authorized by the Code, and the superior court was therefore without jurisdiction to hear it; that, no statement of the case having been filed, the only question before the court was one of law upon the face of the judgment alone; and that accordingly the superior court was without jurisdiction to review any order made after the judgment. The superior court apparently held with the petitioner on the first two objections urged, but, overruling him as to the last, proceeded to hear the case de novo on the question of the discretion of the justice court in denying the motion to set aside the default. Evidence was taken on this subject the same as if the matter was one arising originally in the superior court and addressed to the discretion of that court. Following the hearing the superior court ruled that the justice of the peace had improperly exercised his discretion in refusing to set aside the default and that the order should have been granted. Judgment followed reversing the order of the justice of the peace and directing him to set aside the default.

[1-3] On this proceeding the only question before us is the jurisdiction of the superior court to enter the order complained of. It is apparently conceded, as it must be, that an appeal from a default judgment in the justice court raises questions of law alone (Lugo v. Superior Court, 55 Cal. App. 561, 203 P. 812), and that there is no right to a separate appeal from an order of the justice court refusing to set aside the default after judgment has been entered. Section 974, Code Civ. Proc.

[4] The only question remaining is whether when a party appeals from a judgment of the justice court on a question of law alone without a statement of the case he may have a review of orders made after the entry of the judgment. Concededly the only power of the superior court to review such orders is found in section 980, Code of Civil Procedure. The section reads in part:

> "Upon an appeal heard *upon a statement of the case*, the superior court may review all orders affecting the judgment appealed from, and may set aside * * * proceedings subsequent to * * * such judgment." (Emphasis ours.)

It will be noted that this right of review of orders made subsequent to the judgment is dependent upon a statement of the case, and it is only when an appeal is presented in that manner that a review of orders made subsequent to the judgment can be had. Such was the ruling of the Supreme Court in Wells v. Torrance, 119 Cal. 437, 441, 51 P. 626, and such is the unmistakable meaning of the Code section cited. For this reason we are satisfied that the respondent court was without jurisdiction to hear and determine any question affecting orders made after the final judgment in the justice court because the appeal to the respondent court was not heard upon a statement of the case.

Order annulled.

We concur: LANGDON, P. J.; STURTEVANT, J.

199 Cal. 249

SCHAINMAN v. KIERCE. (S. F. 11842.)

(Supreme Court of California. Aug. 18, 1926.)

1. Appeal and error 🔑356.

Appeal not taken within 60 days from entry of judgment, as required by Code Civ. Proc. § 939, must be dismissed on motion, in absence of motion for new trial.

2. Appeal and error 🔑348(1).

Code Civ. Proc. § 939, does not require service of notice of entry of judgment to set time for appeal running.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Paul Schainman against F. J. Kierce. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal. Appeal dismissed.

Harold Jacoby, of Oakland, and Milton Shepardson and F. J. Kierce, both of San Francisco, for appellant.

Hilton V. Christensen, Jacob W. Ehrlich, and Leon Samuels, of San Francisco, for respondent.

RICHARDS, J. Motion to dismiss an appeal. The plaintiff on July 28, 1923, commenced this action to quiet title to certain property situated in the city and county of San Francisco. An answer was duly filed by the defendant and a trial had upon the merits, which resulted in the rendition of a conditional judgment in favor of the defendant, wherein the defendant was ordered to pay to the plaintiff certain sums of money expended by the plaintiff in pursuit of his title to the property, and requiring that such payment be made before the title should vest in defendant, in accordance with the terms of said judgment. The defendant failed to make the payment above required, with the result that on May 1, 1924, a decree quieting title was entered in favor of the plaintiff. No motion for a new trial was made, nor does it appear that any notice of the entry of said judgment was given. On November 1, 1924, the defendant served and filed a notice of appeal to this court. On November 13, 1924, the defendant filed his request for a transcript on appeal, under the alternative method. On October 31, 1925, said transcript on appeal was filed with the clerk of the trial court by the court reporter who reported the proceedings in said action. On the 7th day of November, 1925, the plaintiff served notice of motion to dismiss this appeal, and the hearing thereon was had before this court on April 6, 1926. Thereafter and on May 10, 1926, the said motion was submitted to this court for decision.

[1] It would seem clear that the motion to dismiss this appeal must be granted.

The time within which an appeal from a judgment or order of the superior court may be taken is fixed by the provisions of section 939 of the Code of Civil Procedure, which section provides that such appeal must be taken within 60 days from the entry of said judgment or order, unless proceedings on motion for a new trial are pending, in which case the time of appealing from the judgment shall not expire until 30 days after entry of the order determining such motion, or other termination of the proceedings upon such motion in the trial court. No motion for a new trial having been made in this action, the time within which the defendant could have taken this appeal expired on July 1, 1924. The defendant's notice of appeal was not served until October 30, 1924, nor filed until November 1, 1924, both of which dates were long after his right to take and prosecute such appeal had expired, under the foregoing provisions of the Code of Civil Procedure.

[2] The defendant's contention that he was entitled to 6 months' time within which to take such appeal, in view of the fact that no notice of entry of judgment had been served upon him, is without merit, since the foregoing section of the Code does not require the service of notice of entry of the judgment in order to set the time running within which an appeal from a judgment may be taken.

It follows that the appeal must be dismissed, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

---

199 Cal. 235

PEOPLE v. NAGY. (Cr. 2852.)

(Supreme Court of California. Aug. 16, 1926.)

1. Criminal law 🔑552(3).

Circumstantial evidence is legal evidence, and may be as conclusive as the testimony of direct witnesses to the overt act, and circumstances may justify conviction if they exclude any other reasonable theory than guilt.

2. Arson 🔑8.

By express terms of Pen. Code, § 454, the presence of a human being in the building at the time of its burning is an essential ingredient of arson in the first degree.

3. Criminal law 🔑419, 420(1).

Hearsay evidence is not as a rule competent to establish any specific act which in its nature is susceptible of being proven by witnesses who can speak from their own knowledge.

4. Criminal law 🔑562.

Testimony that woman living in burned building stated that she was sleeping there on night of fire, being hearsay, and inadmissible under Code Civ. Proc. § 1845, *held* insufficient to sustain conviction of arson in first degree.

5. Criminal law 🔑1186(7).

Where evidence does not sustain conviction of arson in first degree though it would sustain conviction of arson in second degree, Supreme Court cannot correct verdict, but judgment must be reversed.

6. Witnesses 🔑79(1).

Competency of a witness to testify as to accused's general reputation is largely within the trial court's discretion.

7. Criminal law 🔑1153(2).

Supreme Court cannot interfere with discretion of trial court as to competency of witness to testify as to accused's general reputation, unless discretion is abused.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Louis Nagy was convicted of arson in the first degree, and he appeals. Reversed.

Samuel Hamburg, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary and H. H. Linney, Deputy Attys. Gen., for the People.

SEAWELL, J. [1-3] The appellant was convicted of arson of the first degree. The grounds urged upon this appeal for a reversal of the judgment are the insufficiency of the evidence generally to justify a verdict of guilty of arson in any degree, and more specifically the total absence of any legal evidence to support the implied finding of the jury that there was present in the building described by the information at the time the fire was created a human being or human beings, proof of which is necessary to constitute arson of the first degree. The only evidence offered by the prosecution which tends at all to support that portion of the implied verdict of the jury that a human being was in said building at the time the alleged offense was committed is the purest kind of hearsay. We have made careful examination of the evidence, which, though circumstantial in its incriminatory bearing, was nevertheless sufficient to sustain a finding that the burning of the building was the willful and malicious act of the defendant, done with the intent to destroy it. Applying the well-known tests, the deductions made by the jury from the facts and circumstances would have supported a verdict of first degree arson had legal proof been made that a human being was in said building at the time the fire was started. In other words, we are of the opinion that the facts and circumstances were of such an incriminatory nature that the jury may well have found that there was no reasonable theory upon which the defendant could be innocent provided said facts and circumstances were true. Circumstantial evidence is legal evidence and may be as conclusive in its convincing force as the testimony of direct witnesses to the overt act. Circumstances very largely control the conduct of men in the most important affairs of life and may be sufficient to justify a conviction of crime where they are such as to exclude any other reasonable theory than that of the guilt of the accused. We will not enter into a discussion as to the evidentiary weight or effect of each particular circumstance or the relation of any one to the many other circumstances that appear in the record and from which a legal deduction of guilt may have been drawn. The case must be reversed upon the single ground that there was no legal evidence adduced by the prosecution to establish arson of the first degree. A brief statement of the facts is sufficient to illustrate the failure of the proof. The defendant occupied the upper flat of a two-story building. The lower flat was inhabited in the sense that it was occupied by tenants. But the burning of a building that is inhabited is not sufficient to justify a conviction of arson of the first degree. In addition thereto it must be "an inhabited building in which there is at the time [of the burning] some human being," etc. Pen. Code, § 454. The presence of a human being in the building at the time of burning is an ingredient absolutely necessary to sustain a conviction of arson of the first degree. People v. Abrams, 174 Cal. 172, 162 P. 395. Proof of this essential element must be established by competent evidence. Section 1845, Code of Civil Procedure, provides:

> "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible."

The witness in this case had no knowledge derived from his own perception concerning the presence of said persons in the building at the time it was burning, nor does he come within any of the few exceptions mentioned in the statute. "Hearsay evidence is not, as a rule, competent to establish any specific fact which in its nature is susceptible of being proven by witnesses who can speak from their own knowledge (1 Greenl. Ev. sec. 99)." Pfister v. Dascey, 68 Cal. 572, 10 P. 117.

[4, 5] The evidence offered to prove the presence of human beings in the building at the time of the fire falls far short of meeting the plain requirements of the statute. The only witness who testified at all as to the issue was the fire marshal. Asked whether or not he knew of his own knowledge that the lower flat was occupied, he answered that he did. No claim is made that any person other than the defendant was in the upper flat. Counsel for the defendant objected to the question on the ground that it was irrelevant, incompetent, and immaterial. The examination proceeded:

> "Q. Was it occupied? A. Yes, I *interviewed* the woman down there if she could tell me. (Italics supplied.)
>
> "Q. And she was living there that night that the fire was discovered? A. Yes, sir.
>
> "Q. Sleeping there? A. Yes, sir.
>
> "Q. Anybody else besides the woman sleeping there? A. Yes, sir; members of her family.
>
> "Mr. Hamburg: I object to that as calling for a conclusion, and it, necessarily, is based upon hearsay testimony.
>
> "The Court: You yourself did not go into the lower flat? A. Yes, sir.
>
> "Q. And in going into it you saw these people? A. Yes; spoke with them and talked with them.
>
> "Q. And they were occupying it at that time? A. Yes, sir.
>
> "Q. Did you go into their bedrooms? A. Yes; I was in the front bedroom talking to the woman who ran the flat.
>
> "Q. The bed appeared to have been used? A. Yes, sir.
>
> "The Court: I will overrule the objection.
>
> "Mr. Skillin: Q. And you say besides the woman there were how many? A. There were three or four more; the house was occupied."

The foregoing is all the evidence given as to this issue. Waiving its hearsay character, it is weak, inconclusive, and unsatisfactory. At no time did the witness state that the woman tenant or any of the other persons was in the building at the time the fire was started. In a general sense the persons mentioned were occupants of the lower flat and slept there, but the requirement of the statute was not squarely met. The witness did not arrive at the building until 2:30 a. m., almost an hour after the fire had been extinguished and the firemen had departed. Whether the conversation which he had with the lady occupant of the lower flat occurred upon his first visit, or whether it was after 8 o'clock of the same morning upon the return of the witness to the premises, is not made clear, but the sequence of events would indicate that the interview occurred upon the second visit. But whatever construction may be reasonably placed upon the foregoing evidence, the fact remains that it was hearsay as to a specific, material fact, and the defendant cannot be deprived of the right which the statute and Constitution guarantee to every person accused of the crime. to wit, the right to be confronted by his accusers. In the instant case the defendant was denied the opportunity of cross-examining the only persons whom it is claimed were in the building at the time the fire was created, and the question of the degree of the crime was left to extrajudicial statements alleged to have been made by parties who were not placed under oath at the time and whose absence at the trial was unaccounted for. No circumstance of sufficiently conclusive character was offered to show the presence of said persons in the building at the time it was burning. Whether the defendant was guilty of arson of the first degree or of the second degree was a very important matter as arson of the first degree is punishable by imprisonment in the state prison for not less than two years and may extend to the entire life of a person convicted, while arson in the second degree is punishable by imprisonment of not less than one year nor more than twenty-five years. We are presented with a somewhat anomalous situation. The evidence in our opinion is sufficient to sustain a judgment of conviction of arson of the second degree, and insufficient to sustain a conviction of arson of the first degree, as found by the jury, and this court has neither the constitutional nor statutory authority to modify or interfere with the verdict of the jury in any respect. It is within our power only to affirm or reverse judgments in criminal cases. The case must therefore be remanded for a new trial.

[6, 7] Appellant complains of certain rulings of the court limiting him in the cross-examination of certain witnesses. The subject-matter of the examination in which this occurred was not very important. The better practice, however, is either to permit cross-examination of witnesses on all matters brought out in direct examination or to strike out the testimony of the witness deemed by the court to be immaterial or irrelevant. The ruling which resulted in the exclusion of the testimony of two character witnesses called by the defendant was not prejudicial. The defendant did not show that the witnesses were competent to testify as to his general reputation. The competency of a witness to so testify is largely a matter of discretion with the court, and we cannot interfere with the court's adverse ruling unless it appears to amount to an abuse of discretion. It does not appear that there was an abuse of discretion in the instant case. The matters complained of will probably not arise in case a retrial is had.

The judgment and order appealed from are reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; RICHARDS, J.

---

199 Cal. 240

PEOPLE v. MARTIN et al. (Cr. 2881.)

(Supreme Court of California. Aug. 17, 1926.)

1. Criminal law 🔑912—Order granting new trial before expiration of time for pronouncing judgment after denial of former motion held a nullity (Code Civ. Proc. § 473).

Order granting defendants' second motion for new trial before expiration of time for pronouncing judgment *held* a nullity, in absence of showing that order, from which appeal was announced, denying first motion was entered prematurely or inadvertently, or that any application for relief or showing pursuant to Code Civ. Proc. § 473, was made.

2. Criminal law 🔑912—Court could not reconsider motion for new trial or similar one after announcement of appeal from order denying motion (Pen. Code, §§ 1182, 1237).

Defendants having announced appeal, which lies under Pen. Code, § 1237, from order denying motion for new trial, before pronouncement of judgment under Pen. Code, § 1182, court could not reconsider motion or similar one and enter order thereon unless appeal was premature.

3. Criminal law 🔑912 — Defendants granted new trial pending appeal from order denying former motion, before expiration of time for pronouncement of judgment held entitled to new trial after expiration of such time without judgment (Pen. Code, § 1191).

Order granting second motion for new trial pending appeal from order denying first motion before time for pronouncement of judgment had expired under Pen. Code, § 1191, being a nullity, defendants are entitled to new trial at trial court's hands after expiration of such time without judgment having been pronounced.

4. Criminal law 🔑913(1)—Trial court may order new trial when judgment is not pronounced within statutory time (Pen. Code, § 1191).

When judgment is not pronounced pursuant to verdict within time prescribed by Pen. Code, § 1191, jurisdiction continues in trial court to order new trial and proceed to verdict and judgment.

5. Criminal law 🔑950 — Supreme Court cannot order new trial, for failure to pronounce judgment within statutory time, on appeal from order granting second motion for new trial before expiration of such time (Pen. Code, § 1191).

Supreme Court cannot order new trial for failure to pronounce judgment against defendants within time prescribed by Pen. Code, § 1191, on appeal from order erroneously granting new trial, before expiration of such time, pending appeal from order denying former motion.

In Bank.

Appeal from Superior Court, Orange County; F. C. Drumm, Judge.

Frank Martin, Mrs. J. Wall, E. R. Wall, and Mrs. E. S. Ward were convicted of contributing to the delinquency of a minor. From an order granting them a new trial, the People appeal. Reversed.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Alex. P. Nelson, Dist. Atty., of Santa Ana, for the People.

Wm. T. Kendrick, of Los Angeles, Frank H. Gray, of Burbank, and Oscar M. Gipson, of Los Angeles, for respondents.

SHENK, J. The defendants were jointly tried in the the superior court of Orange county on an information charging them with contributing to the delinquency of a minor, one Ivory Shields, a youth over the age of 20 years, in that they did solicit, induce, and procure said Shields to purchase for them eight ounces of intoxicating liquor, in violation of the Wright Act (St. 1921, p. 79), and did furnish and give said intoxicating liquor to said Shields to drink.

On March 24, 1925, the jury returned a verdict finding the defendants guilty as charged in the information. On the same day the defendants presented a motion for a new trial on numerous grounds. The motion was denied, and the defendants gave immediate no tice of appeal from the order. The court thereupon continued the matter to March 27th for judgment and sentence or to entertain an application for probation. On March 27th the defendants presented a new motion for a new trial on substantially the same grounds set forth in the motion, which was denied on March 24th, with the additional specification, however, that the jury received evidence out of court. The court permitted the new motion to be presented and received oral evidence on the additional specification to the effect that two of the jurors who tried said cause were present at the preliminary examination of the defendants and had heard the evidence there presented. After the taking of said evidence was concluded the court granted said second motion for a new trial. The matter is now before us on appeal by the people from the order granting the said motion.

[1] It is the contention of the Attorney General, among other things, that the order appealed from was a nullity and in nowise affected the status of the case with respect to the order denying the first motion. The point is well taken. There is no statutory or other authority for the presentation or consideration of a second motion for a new trial under the circumstances here shown. There was no showing that the order denying the first motion was entered prematurely or by inadvertence, as was disclosed in Robson v. Superior Court, 171 Cal. 588, 154 P. 8, nor was there any application for relief or showing pursuant to section 473, Code of Civil Procedure, and at the time the second motion was made the time for pronouncement of judgment had not expired. If such a proceeding were sanctioned the results pointed out in Coombs v. Hibberd, 43 Cal. 452, would be apparent, and the time limited within which a motion for a new trial might be made would be enlarged, and new trial proceedings would become interminable. See, also, People v. Center, 61 Cal. 191; Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 4 P. 1173; Dorland v. Cunningham, 66 Cal. 484, 6 P. 135; Carpenter v. Superior Court, 75 Cal. 596, 19 P. 174; Holtum v. Greif, 144 Cal. 521, 78 P. 11. While the cases cited involved new trial proceedings in civil cases no authority has been noted which prescribes a different rule in criminal cases.

[2] Furthermore, an order denying a motion for a new trial in a criminal case is an appealable order. Pen. Code, § 1237. The appeal from the order denying the first motion was announced in open court by the defendants immediately after the denial of the motion and prior to the pronouncement of judgment. Pen. Code, § 1182. Assuming that the said appeal was not premature, it would follow that said new trial proceedings were removed from the jurisdiction of the trial court by the taking of the appeal. This would afford an additional reason why the court could not thereafter, under the facts here shown, reconsider the same or a similar motion and enter an order thereon.

[3] In reply to the position taken by the Attorney General, the defendants contend that they are entitled to a new trial by operation of law for the reason that judgment was not pronounced against them within the time prescribed by law, nor at all, citing Rankin v. Superior Court, 157 Cal. 189, 106 P. 718, People v. Winner, 31 Cal. App. 352, 160 P. 689, and People v. Boling, 32 Cal. App. 42, 161 P. 1169. It is clear that the defendants' appeal from the order denying the first motion did not operate to stay the hand of the court in proceeding to pronounce judgment. As the order granting the second motion was a nullity, the time within which the court was required to pronounce judgment pursuant to the verdict expired March 29th, or five days after the verdict (Pen. Code. § 1191); by reason whereof the respondents are entitled to a new trial at the hands of the trial court.

[4, 5] Jurisdiction still continues in that court to order a new trial and proceed with the cause to verdict and judgment when, as here, judgment has not been pronounced pursuant to the verdict within the time prescribed by law. Rankin v. Superior Court. supra. The power to order the new trial does not inhere in this court on the record before us, but would vest only upon appeal from an order denying a new trial to the defendants upon their application therefor on the ground that judgment was not pronounced against them within due time. The only matter now before this court is the validity of the order appealed from, and, as its entry was without authority of law, it should be reversed, and it is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LENNON, J.

199 Cal. 251

KENNEDY v. CITY OF GUSTINE.
(Sac. 3720.)

(Supreme Court of California. Aug. 20, 1926.)

1. Municipal corporations 🔑231(2)—Contract to pay for engineering work held not void on ground that engineer was officer interested in street improvement contract (Improvement Act 1911, § 41).

City's agreement to pay for specified engineering work 7 per cent. of cost of street improvements *held* not void on ground that engineer was city officer, interested to such extent in contract, trustees' minutes and contract clearly showing that he was employee, appointed pursuant to Improvement Act 1911 (St. 1911, p. 751), § 41, though referred to as "city engineer."

2. Officers 🔑1—Whether position is public office depends on powers, duties, functions, etc., irrespective of formal designation.

Whether position is public office depends on power granted and wielded, duties and functions performed, and other circumstances manifesting its true character, irrespective of formal designation by statute or otherwise.

3. Municipal corporations 🔑288(1).

City is not primarily liable for cost of street improvements, under Improvement Act of 1911, but such cost becomes lien on property benefited.

4. Municipal corporations 🔑220(2)—One appointed to discharge duties of city engineer is entitled to reasonable compensation (Improvement Act 1911, §§ 17, 41, 79, subd. 3).

Under Improvement Act 1911 (St. 1911, pp. 737, 766, §§ 17, 79, subd. 3), one appointed by city, under section 41, to discharge duties of city engineer is entitled to reasonable compensation for services.

5. Municipal corporations 🔑220(2)—Fixing compensation at percentage of cost of improvements does not invalidate contract with one appointed to discharge duties of city engineer (Improvement Act 1911, § 41).

Fixing compensation of one appointed by city, under Improvement Act 1911 (St. 1911, p. 751), § 41, to discharge duties of city engineer, at 7 per cent. of cost of street improvements, does not invalidate contract with him.

6. Municipal corporations 🔑220(8).

One suing city for compensation for engineering work need not show that funds in treasury were sufficient to pay claim and that latter did not exceed income for year.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by C. C. Kennedy against the City of Gustine. Judgment for plaintiff, and defendant appeals. Affirmed.

F. W. Henderson, of Merced, for appellant.
Nathan B. McVay, of Modesto, and Hugh K. Landram, of Merced, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Presiding Justice WILLIAM M. FINCH of the District Court of Appeal, Third Appellate District, while sitting as a justice pro tem. of this court, is adopted as the decision of the court:

The defendant is a city of the sixth class. At the times herein mentioned it had no city engineer, unless it can be said that the plaintiff was appointed to that office. The relation between the parties is shown by the minutes of the board of trustees of defendant and the contract entered into between the trustees and the plaintiff. In the minutes of July 12, 1920, the following appears:

"Mr. C. C. Kennedy, from Berkeley, being present, talking with the board in regard to street grades and so forth for the city of Gustine. On motion made and seconded, Mr. C. C. Kennedy was appointed as city engineer, his compensation to be 7 per cent. of cost of construction work."

The minutes of August 16, 1920, recite:

"The agreement between C. C. Kennedy and the city of Gustine was read, a motion was made and recorded that the president of the board of trustees be authorized to execute agreement."

Thereupon, at the same time, the agreement referred to was executed by the president of the board and the plaintiff. The agreement provides:

"This agreement made and entered into this 16th day of August, 1920, by and between the city of Gustine, state of California, and a city of the sixth class, party of the first part, and C. C. Kennedy, of the county of Marin, state of California, the party of the second part, witnesseth:

"That for and in consideration of the compensation to be paid by the party of the first part to the party of the second part at the times and in the manner hereinafter provided, the party of the first part hereby employs said party of the second part as city engineer of the said city of Gustine, for the purpose of performing the engineering work and supervising the construction of certain street improvements in said city of Gustine; namely, the construction of curbs, sidewalks, and pavement upon [naming certain streets] during the present and next succeeding calendar year.

"In the prosecution of the work of making said improvements, the party of the second part hereby agrees to perform the following services, to wit: To make all surveys, run all levels, cross-sections and profiles; to prepare all data necessary to the fixing of grades for the entire city of Gustine; to make all necessary maps and designs for the carrying out of said work; to prepare or pass upon all ordinances, resolutions, and notices required to be adopted or posted in the conduct and prosecution of such improvements; to prepare all specifications and inspect all work performed and materials furnished in said work; to prepare or pass upon all contracts and estimates, diagrams and certificates relating to such work from the commencement to the completion thereof.

"In consideration of said services, said city of

Gustine hereby agrees to pay to said party of the second part in accordance with law, the sum equal to 7 per cent. of the total cost of the construction of each of said improvements hereinabove referred to, payable in the following manner, to wit: Two and one-half per cent. of the estimated cost upon the completion and filing of the plans and specifications and estimate of quantities, 2½ per cent. of said estimated cost upon the completion of 50 per cent. of the work of construction, and the balance of the total 7 per cent. of the actual cost of construction upon the completion and filing of the engineer's certificate, the completion of the assessment roll, and diagram covering the cost of said improvement. In the event that any of said improvements are rescinded or postponed by the city, the party of the first part shall pay to the party of the second part as compensation the proper pro rata in accordance with the preceding schedule."

The plaintiff duly performed all services required of him by the agreement until the defendant abandoned the contemplated improvements. The proceedings were taken under the Improvement Act of 1911. Stats. 1911, p. 730. The complaint contains two counts. From the allegations and proofs it appears that the proceedings relative to the contemplated improvements referred to in the first count were carried forward to the point of advertising for and receiving bids and then abandoned, and that those referred to in the second count did not proceed further than the adoption of grades. The defendant thereupon "rescinded and canceled" all proceedings had in the matter and notified the plaintiff "that his services as city engineer are no longer required and for him to present his bill." The plaintiff duly presented his claims for $1,824.65 for services in connection with the first contemplated improvements, and $350 for the second. The defendant refused to allow the claims and this action followed. Judgment was entered in favor of plaintiff for half the amount of each claim, and the defendant has appealed.

The complaint alleges the foregoing facts and that the amounts stated are the reasonable value of plaintiff's services. The answer admits the execution of the contract and the performance of the alleged services by plaintiff, alleges that such services were performed "under and pursuant to the agreement," denies the alleged reasonable value of plaintiff's services, and alleges that he has been fully paid therefor.

[1] Appellant's first contention is that the agreement is void on the ground that at the time of its execution the plaintiff was an officer of the city, and that he was interested in any contract that might be made for street improvements, in that he was to receive 7 per cent. of the contract price thereof. It is clear, however, that the plaintiff was not an officer of the city, but that he was employed, not to discharge the general duties of the office of city engineer, but only the particular engineering work specified in the contract. Section 41 of the Improvement Act of 1911 provides:

> "In all those cities where there is no city engineer, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed. Said city council is hereby empowered to fix his compensation for such services."

[2] From the minutes of the board of trustees and the contract itself, it is clearly apparent that the plaintiff was not an officer of the city, but an employee thereof. Any reference to him in the minutes, or the contract, or in the evidence as "city engineer" is not controlling. Whether a position or office is a public office depends "not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position, and make, and mark it a public office, irrespective of its formal designation." Coulter v. Pool, 187 Cal. 181, 186, 201 P. 120, 123; Logan v. Shields, 190 Cal. 661, 662, 214 P. 45; Curtin v. State of California, 61 Cal. App. 377, 390, 214 P. 1030.

[3-5] A city is not primarily liable for the cost of street improvements made pursuant to the terms of the act of 1911, but the same becomes a lien on the property to be benefited, if the improvements are actually made. Section 17 of the act, however, provides: "In case the work is abandoned by the city before the letting of the contract, the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury." Section 79, subd. 3, provides: "The term 'incidental expenses,' as used in this act, shall include the compensation of the city engineer for work done by him." It thus appears by the terms of the act, as well as by the terms of the contract between the parties, that the plaintiff is entitled to reasonable compensation for his services. The percentage method of fixing such compensation does not render the contract invalid. Skidmore v. West, 186 Cal. 212, 220, 199 P. 497.

[6] Appellant says:

> "It was incumbent upon the respondent to allege and prove that there were funds in the treasury of the city of Gustine sufficient to pay the claims of respondent, and that said claims did not exceed the income and revenues provided for the year in which the indebtedness was incurred. Admittedly, there was no allegation whatsoever as to the condition of the funds, and there was no showing made whatsoever at the trial in reference thereto."

The burden was not upon the plaintiff to make such showing. In overruling a like objection in Johnson v. County of Yuba, 103 Cal. 538, 540, 37 P. 528, 529, it is said:

"Nor is it any ground of demurrer that it is not alleged that there was money in the county treasury to meet the demand, or that the allowance of the demand against the county would not exceed the limit of liability which the county was authorized to contract for the fiscal year. This was purely matter of defense, if it existed."

See, also, Dillon's Municipal Corporations, (5th Ed.) § 208, and 15 Corpus Juris, 575.

The evidence is amply sufficient to support the judgment, whether based upon the terms of the act or those of the contract. The evidence is also sufficient to show that plaintiff has not been paid for his services. The other errors assigned by the appellant are based upon contentions hereinbefore considered, and are without merit.

The judgment is affirmed.

---

199 Cal. 221

MONTEREY COUNTY et al. v. RADER.
(S. F. 11973).

(Supreme Court of California. Aug. 13, 1926.)

1. Sheriffs and constables 🔑27—Sheriff, without organizing posse, may orally summon any person to assist in making arrest, and such person has all authority of formally deputized officer (Pol. Code, § 4157, subd. 5; Pen. Code, §§ 150, 723).

Sheriff, without organizing formal posse comitatus, may orally summon any person to assist him in effecting arrest, and such person has all authority of formally deputized officer under Pol. Code, § 4157, subd. 5, and Pen. Code, §§ 150, 723.

2. Master and servant 🔑364—One compelled by sheriff to assist in making arrest held employee (Pen. Code, § 150; Workmen's Compensation, Insurance and Safety Act 1917, § 7, and section 8, subd. [a]).

One compelled by sheriff to perform service of deputy sheriff, under Pen. Code, § 150, in assisting sheriff to make arrest, was employee in service of employer, within Workmen's Compensation, Insurance and Safety Act 1917, § 7 and section 8, subds. (a) and (b), being St. 1917, p. 835, when killed by one sought to be arrested.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

3. Master and servant 🔑348.

Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), must be liberally construed.

4. Master and servant 🔑364—Persons in service of public officer under appointment held not excluded from Workmen's Compensation, Insurance and Safety Act 1917, § 7, and section 8, subd. (a); "employé."

Workmen's Compensation, Insurance and Safety Act 1917, § 8, subd. (a), being St. 1917, p. 835, including within term "employee" every person in service of employer, as defined in section 7, under "any appointment or contract of hire," and "all elected and appointed paid public officers," *held* not to exclude persons in service of public officer under appointment, not of hire.

5. Master and servant 🔑364—Deputy sheriff not appointed for his own convenience is entitled to benefits of Workmen's Compensation, Insurance and Safety Act 1917, § 8, subd. (a).

Under Workmen's Compensation, Insurance and Safety Act 1917, § 8, subd. (a), being St. 1917, p. 835, deputy sheriff, not appointed for his own convenience, is entitled to benefits, especially in view of controversy because of which 1917 amendment was enacted.

6. Evidence 🔑45.

Supreme Court will take judicial notice that many deputies, such as deputy sheriffs, are appointed at their own request to serve their personal interests.

7. Master and servant 🔑364—Inclusion of appointed paid public officers within benefits of Workmen's Compensation Act held not to annul provisions as to deputies (Workmen's Compensation, Insurance and Safety Act 1917, § 8, subd. [a]).

Inclusion of "appointed paid public officers" within benefits of Workmen's Compensation, Insurance and Safety Act, § 8, subd. (a), by amendment of 1917 (St. 1917, p. 835), does not vitiate or annul subsequent provisions as to deputy clerks, sheriffs, etc., not expressly excluded by act, such amendment being intended to apply to heads of departments.

8. Master and servant 🔑386(1)—Compensation for death of one compelled to assist sheriff is based on average annual earnings of deputy sheriff (Workmen's Compensation, Insurance and Safety Act 1917).

Compensation under Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), for death of one compelled by sheriff to assist in making arrest, should be based on average annual earnings of deputy sheriff of such sheriff's county.

9. Master and servant 🔑364—Right to compensation for death of one performing service of deputy sheriff is not affected by prior statutes authorizing sheriff to organize posse (Workmen's Compensation, Insurance and Safety Act 1917; Pen. Code, § 150).

Right to compensation, under Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), for death of one compelled by sheriff to perform service of deputy sheriff, under Pen. Code, § 150, is not affected by prior statutes merely authorizing sheriff to organize posse, as public necessity requires.

In Bank.

Petition by the County of Monterey and the State Compensation Insurance Fund for a writ of review to annul an award of compensation by the Industrial Accident Commission to Nellie Pearl Rader, by Anna K. Rader, her guardian ad litem and trustee, for the death of N. H. Rader, employee. Award affirmed.

Frank J. Creede, Thos. W. Slaven, and B. E. Pemberton, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondent.

SEAWELL, J. This matter is before us upon a petition for a writ of review praying for the annulment of the award made by the Industrial Accident Commission in favor of respondent, Nellie Pearl Rader, the minor daughter of N. H. Rader, killed under circumstances hereafter related. Anna K. Rader is the mother of and guardian ad litem of said Nellie Pearl Rader, but she makes no claim for herself.

The facts of the case are these: N. H. Rader, father of said Nellie Pearl Rader, was, on July 6, 1925, a citizen of the county of Monterey, this state, and engaged in the business of conducting a secondhand store at the city of Salinas, county of Monterey. He had attended a meeting of a fraternal organization on the night of July 6, 1925, and was returning to his home at about the hour of 11 o'clock, at which time he was commanded by the sheriff of Monterey county, who was then organizing a party of officers for the purpose of apprehending and placing under arrest certain violators of the Wright or Volstead Acts (St. Cal. 1921, p. 79; U. S. Comp. St. § 10138¼ et seq.) who were criminally connected with landing or seizing by force a cargo of intoxicating liquors, and who had earlier in the evening while engaged in said unlawful enterprise, fired upon the sheriff's deputies, and were lurking under cover of night at or near Moss Landing, said county, to join said party of officers in the pursuit of said violators of the law. The sheriff, as he was about to depart for Moss Landing, observed the presence of N. H. Rader, and commanded his services. The party then consisted of the sheriff, a regularly appointed deputy sheriff, and the chief of police of the city of Salinas. The sheriff had been in search of the constable of Salinas township to complete his aide, but, being unable to find him, mustered said Rader into service in his stead. A firearm, furnished by the deputy sheriff, was placed in the hands of Rader. Upon arriving at the objective spot at about 12 o'clock midnight, the party or posse was divided into two groups. While they were in the act of being stationed at certain points to block the avenues of escape and there to await the coming of day, they were viciously fired upon by the persons whom they were attempting to place under arrest and who were armed with machine guns, with the result that a bullet fired from a machine gun operated by said persons pierced the heart of Rader, and he was instantly killed.

The proceedings are governed by the act as amended in 1917, approved March 23, 1917, and which became effective January 1, 1918, St. 1917, p. 831. The Industrial Accident Commission awarded his daughter, 14 years of age, and wholly dependent, a death benefit of $4,900, payable at the rate of $20.83 a week, and $100 burial expenses. The death benefit is based upon the annual, actual wages or salary fixed by law as the compensation of a deputy sheriff of Monterey county. The commission found, and the finding is sustained by the evidence, that Rader had served the sheriff and county as an officer in other emergency cases. His per diem for previous services was fixed at $5, which was paid as a county charge upon one or two occasions, and by the sheriff from his personal account upon other occasions. Nothing was said in the instant case as to compensation. Petitioners insist that the commission exceeded its jurisdiction in making the award, for the reason that the deceased cannot be regarded as an employee within the terms and meaning of the Workmen's Compensation, Insurance and Safety Act, inasmuch as he was required to perform the services demanded of him by the sheriff by virtue of the statutory law of the state, and not by virtue of any contract entered into between him and the sheriff or the county. It is argued by petitioners that the deceased was commanded or conscripted by the sheriff under the provisions of statutory law which give the sheriff authority to summon a posse comitatus, and when killed he was but performing a duty which every citizen owes to his sovereign, the state, there being no warrant or authority in the law providing for the payment of wages or compensation to a person thus pressed into service.

The right of the respondent minor child to recover compensation on account of the death of her parent, caused in the manner herein related, exists, if at all, by virtue of the provisions of sections 7 and 8 (a), Workmen's Compensation, Insurance and Safety Act. Statutes and Amendments 1917, p. 831. The term "employer," as used in said section (section 7), is declared to mean the state, and each county, city and county, city, school district, irrigation district, all other districts established by law, and all public corporations and quasi public corporations and public agencies therein, and every person, firm, voluntary association, and private corporation, including any public service corporation, "who has any person *in service under any appointment* or contract of hire, or apprenticeship, express or implied, oral or written, and the legal representative of any deceased employer." (Italics supplied.) Section 8 (a) defines the term "employee" to mean:

> "Every person in the service of an employer as defined by section 7 hereof under any appointment, or contract of hire, or apprenticeship, express or implied, oral or written, includ-

ing aliens, and also including minors, whether lawfully or unlawfully employed, and all elected and appointed paid public officers, and all officers and members of boards of directors of quasi-public or private corporations, while rendering actual service for such corporations for pay, but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in household domestic service, farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising, and any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy; * * *"

[1] Clearly the deceased was in the service of the county of Monterey by the appointment of its sheriff, who was vested with power to confer upon the deceased the authority of a deputy sheriff or peace officer of said county. Pol. Code, § 4157, subd. 5; Pen. Code, §§ 150 and 723. The sheriff may, without organizing a formal posse comitatus, orally summon to his assistance any person when he deems it necessary to effect an arrest. 2 R. C. L. p. 491. The person thus summoned has all the authority of a formally deputized officer in such matter, and is in fact a de jure deputy sheriff. The deceased was at the time he was slain in the service of the county under appointment by a county officer, to wit, the sheriff.

[2] The next question presented for solution is whether he was excluded from the term "employee," as it is defined by said section 8 (a). It will be observed that said section by a general clause includes within the term *employee* "every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship," and then, out of an abundance of caution, proceeds, for reasons that will hereafter be related, to bring within the meaning of the term "employee," by specific mention, "all elected and appointed paid public officers."

The section concludes by specifically excluding from the meaning of the word "employee" all employees engaged in household domestic service, farm, dairy, agricultural, viticultural, or horticultural labor, etc., and "any person holding an appointment as deputy clerk, deputy sheriff or deputy constable *appointed for the convenience of such appointee*, who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy. * * *" The exclusion of persons rendering service from the benefits of the act must be considered in the light of subdivision (b) of said section 8, which provides:

> "Any person rendering service for another, other than as an independent contractor, or as *expressly excluded* herein, is *presumed* to be an employee within the meaning of this act." (Italics supplied.)

The service rendered by the deceased by no means excluded him from the definition of the term employee. That he was acting in the course of the business or occupation of the sheriff there is no room for question, and that he was in the service of his employer by appointment by the sheriff, who was the county's legally authorized officer or agent in such cases, is beyond cavil.

[3, 4] We are next confronted with the proposition that, because "all elected and appointed paid public officers" are expressly mentioned as being within the benefits of the act, it must follow that all other persons in the service of a public officer under *any* appointment not of hire are excluded from its compensatory provisions even though said appointees do not come within the class of those persons who are *expressly* excluded by the act. We are not convinced that the act intended to exclude from its benefits *all* persons in the service of a public officer by *any* appointment, and that "any appointment," means that such persons must, in order to come within the provisions, be in service under an appointment "of hire." The class of servants upon which the benefits of the act are expressly conferred includes "persons in service under any appointment, or contract of hire, or apprenticeship." Three distinct relationships are thus specified, and, in view of the liberality of construction that must be indulged in favor of the award and the positiveness of the language required to justify exclusion from the benefits of the act, it cannot be said that it was the clear intent of the act that there be read into it, following the words "any appointment," the qualifying words "of hire," as such words appear after the word "contract."

[5, 6] Section 8 (a) ex industria provides that "all elected and appointed paid public officers" are employees within the meaning and purposes of the act and only such persons as hold by appointment, as "deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy," are excluded from the benefits of the act. It is fair to conclude from the foregoing language that a deputy officer, such as a deputy sheriff, who is not appointed for *his own convenience* (and we will take judicial notice that many such are appointed at their own request to serve their personal interests), is entitled to the benefits of the compensatory provisions of the act. There is much reason to sustain the construction which we are required to place upon the section, not alone by reason of the peculiar phraseology of said section, but also in view of the history of the legal controversy which arose out of the circum-

stances of the slaying of the sheriff of Mono county, as set out in the case of Mono County v. Industrial Accident Commission, 175 Cal. 752, 167 P. 377. The Legislature, with the purpose of saving such cases from the peril of annulment, extended the term "employee" to include *elected heads* of public offices and inserted in the amendment of 1917 the italicized words "*all elected and appointed paid public officers,*" words not in the acts of 1911 and 1913. The slaying of the sheriff of Mono county occurred in 1915, and the court held that, inasmuch as the law as it then stood (Stats. 1913, p. 279) did not make provision for the compensation of "elected" officials, and the office of sheriff not being one filled by appointment, the death of said sheriff was not compensable. Mono County v. Industrial Accident Commission, supra. The sheriff in that case was killed while engaged in an attempt to apprehend offenders against the law in July, 1915. A writ of certiorari was issued out of this court in October, 1916, and an opinion was filed August 27, 1917, annulling the award.

There can be no doubt but that the legal and public controversies that grew out of the uncertain situation as to whether the sheriff (an elected officer) was entitled to compensation, under the wording of the statute as it then stood, furnished the reason for the amendment of 1917. There is no room to doubt that the Legislature had in mind but one particular class of officers, to wit, *elected* officials, whose right to enjoy the benefit of the act was under attack in that case, and not deputies, whose right to compensation was not at issue. As to the latter, the act provides that "any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable" who receives no compensation from the county or municipal corporation, nor from the citizens thereof for services rendered as such deputy is excluded from the act, only in case such deputy is appointed for his own convenience. The decedent did not fall within the foregoing or any other clause of exclusion. He was a deputy sheriff designated by his principal to perform an official act, and necessarily clothed with all the executive power in the premises that any commission could have conferred upon him.

[7] By the amendment of section 8 (a), supra, which was made for the purpose of including within the benefits of the statute "elected officers," the Legislature also added "appointed paid public officers." We are of the opinion, as expressed above, that the Legislature by the amendment had in mind the principals or heads of the various departments of government considered with respect to two classes of public officials, to wit, those who receive no compensation for their services but are allowed their expenses, or a stated fixed per diem deemed sufficient to cover actual expenses while engaged in occasional service, and those who receive a fixed salary for the performance of continuous duties. But the inclusion by amendment of "appointed paid public officers," which we think was intended to apply to the heads of departments, does not vitiate or annul the subsequent provisions of the act which relate specifically to deputy clerks, deputy sheriffs, and deputy constables—officers not within the express exclusion provisions of the act.

Village of West Salem v. Industrial Commission, 162 Wis. 57, 155 N. W. 929, L. R. A. 1918C, 1077, is direct authority for the commission's award in the instant case. Voeck, a private citizen, was called upon by the city marshal of the village of West Salem to assist in arresting a person who was resisting legal process. In attempting to execute the command of the marshal, Voeck was killed by the person resisting arrest. Section 1, Compensation Act of Wisconsin (St. 1913, § 2394—7) corresponding with section 8 (a) of our act, provides that the term "employee" as used in the act shall be construed to mean:

> "(1) Every person in the service of the state, or of any county, city, town, village, or school district therein under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein."

The court, in applying the law, as declared by said section, to the facts of the case, said:

> "By command of the village marshal Voeck was required to perform duties of the same kind as those of the marshal, namely, police duties to suppress a breach of the peace and to enforce the criminal law. The transaction in fact conferred on Voeck the powers and duties of a police officer for the purposes and the exigencies of the occasion. From this it logically follows that Voeck was engaged with the marshal in performing police duties in the village at the marshal's command. The duties and powers thus imposed on him under authority of the village marshal, by force of the statutes, constituted an appointment of Voeck to perform police service for the village. State ex rel. Brown v. Appleby, 139 Wis. 195, 120 N. W. 861; McCumber v. Waukesha Co., 91 Wis. 442, 65 N. W. 51; 3 Cyc. 877; 2 Ruling Case Law, p. 491, section 52. The result is that Voeck acquired the status of a police officer of the village and was engaged in the execution of the criminal law at the time of his death. * * *
>
> "It is considered that Voeck, as we have shown, was in fact rendering services under an authorized appointment of the village within the power conferred by statute upon the marshal; that he acted in the capacity of a temporary policeman for the village by authority of law; and that the deceased was performing policeman's service within the contemplation of the Workmen's Compensation Act. * * *"

[8] The court held in the foregoing case that the award should be based on the earnings of one doing police service in the village

of West Salem at the time Voeck was killed. In the instant case, under the rules above announced, compensation would be fixed, as computed by the commission, upon the average annual earnings of a deputy sheriff of the county of Monterey. This basis of computation is also approved in Millard County v. Industrial Commission, 62 Utah, 46, 217 P. 974. The facts of that case are quite similar to the facts of the instant case, and the Workmen's Compensation Act of Utah does not differ from our act in material respects. Upon principle it is an authority supporting the commission's award.

[9] Petitioners assert with much emphasis the claim that the status of N. H. Rader was that of a member of a posse comitatus, and that neither under the common law nor the statutes of this state could he be regarded as an officer or as a person serving by appointment. The right of the respondent to receive compensation is derived by virtue of the provisions of the Workmen's Compensation, Insurance and Safety Act, and this right is not affected by statutes passed many years prior to the adoption of said act, and which merely confer authority upon the sheriff to organize a *posse* as public necessity may require. Those statutes have to do with the public peace and safety of the state, and do not purport to give the slighest consideration to the objects or purposes made paramount by recent legislation, which makes compensable injuries received by persons while engaged in both private and public service.

The decedent in the instant case was compelled by the sheriff of the county of Monterey to perform the service of a deputy sheriff of that county (Pen. Code, § 150), and was charged with the performance of the same duty that would have rested upon a regularly appointed deputy sheriff under like circumstances, and, while so acting, he was killed. Under such circumstances he will be held to be within the protection of the law in assuming the risks incident to his office. We feel satisfied that, when killed, he was performing the service of a deputy sheriff, within the contemplation of the Workmen's Compensation, Insurance and Safety Act, of this state.

The award is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

---

199 Cal. 243

MANOS v. CODINA. (Sac. 3675.)

(Supreme Court of California. Aug. 17, 1926.)

Appeal and error ⚷781(7).

Appeal by defendant from order appointing receiver for defendant's business *held* to present only moot question after judgment allowing defendant benefits of such order, which he accepted and satisfied judgment, and defendant will be held to have abandoned appeal.

In Bank.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Pedro Manos against Alfonso Codina. From an order appointing a receiver to take charge of defendant's business on the ex parte application of W. A. Simms, defendant appealed. Appeal dismissed.

C. I. Baker, of Orland, and Arthur Brand and Russell P. Tyler, both of San Francisco, for appellant.

Geo. R. Freeman, of Willows, for respondent.

RICHARDS, J. This appeal is from an order made by the superior court of the state of California, in and for the county of Glenn, appointing a receiver to take charge of the business of defendant and appellant upon the ex parte application of one W. A. Simms, who was not a party to the action, but who procured the ex parte order upon the filing of an affidavit setting forth a certain interest which he claimed in the personal property affected by said action. It appears from the record that the receiver, when thus appointed, qualified and took possession of the property in dispute, and proceeded to administer and dispose of the same in accordance with the terms of the order appointing him such receiver. Thereafter the defendant and appellant duly filed his notice of appeal from the order appointing such receiver, and also his notice in due time and form for the preparation of the transcript upon appeal, which transcript was duly prepared and filed. Appellant also in due time filed his opening brief herein, to which the respondent presented and filed no reply brief, whereupon, the time having expired for the filing of such respondent's brief, the appellant presented to this court a petition for an order submitting said appeal for decision.

Thereupon the respondent appeared and presented an answer to appellant's petition to have said appeal submitted for decision, setting forth in substance that the above-entitled action had, since the taking of said appeal, been finally and fully settled by the parties thereto after a trial of said cause upon the merits and the entry of a judgment therein. In connection with the respondent's answer and in support thereof, he presented the certificate of the clerk of the county of Glenn, in which said action had been pending, and wherein said clerk certified that said action had been brought to trial and tried on the 29th, 30th, and 31st days of January, 1925; that judgment had been entered therein on February 27, 1925; that, by said judgment, it was determined that of the sum of $3,786.46 which had been received by the said receiver

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

from the sale of the nursery stock in question, which had come into his hands as such receiver by virtue of the order herein appealed from, there should be paid to the plaintiff the sum of $897.15, and to the defendant the sum of $2,889.31; that no appeal was taken from said judgment by either of the parties thereto and that said judgment had become final; that on April 24, 1925, the clerk of said court had received from the receiver the entire sum of $3,786.46, and had paid the same to the respective parties in the proportions fixed by the judgment of the court; and that the judgment had been satisfied by the respective parties by satisfactions duly filed with said clerk. When the matter came on for hearing and consideration by this court, it appeared that no response or denial of any kind had been made by the defendant and appellant to the showing thus made by the respondent, whereupon the whole matter was submitted to this court for decision.

In the foregoing state of the record we must accept the certificate of the clerk of the trial court as correctly stating the status of the case in that court and hence, that the matters presented upon this appeal have become moot. The appellant, by accepting and receiving the full benefit resulting from the order appointing the receiver, and having thereupon satisfied the judgment of the trial court awarding him such benefit, and having allowed such judgment to become final, must be held to have abandoned this appeal.

It is, therefore, ordered that the appeal be and the same is hereby dismissed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; FINCH, Justice pro tem.

199 Cal. 270

UHL v. BADARACCO et al. (S. F. 12161.)

(Supreme Court of California. Aug. 27, 1926. Rehearing Denied Sept. 7, 1926.)

1. Municipal corporations 🔑887—Relative to disposition of revenues, San Francisco, hydroelectric power plant held not independent utility, but element of water project (San Francisco City Charter, art. 12, §§ 1, 3–5, 7, 10).

Under San Francisco City Charter, art. 12, §§ 1, 3–5, 7, 10, it can acquire a public utility only by funds from taxes or bonds levied or issued therefor, so hydroelectric power plant built in connection with water supply works from proceeds of bonds voted for single public utility; "water supply and works" is not an independent utility, but an element of the water project only, relative to disposition of revenues therefrom, even if conditions imposed by Congress for use of public lands for water storage works made imperative its construction.

2. Municipal corporations 🔑887 — Surplus earnings of public utility of San Francisco may not be used for extensions and improvements till after satisfying interest and sinking fund requirements; "may" (San Francisco City Charter, art. 3, c. 1, § 12, and article 12, §§ 12, 16).

Under San Francisco City Charter, art. 3, c. 1, § 10, providing that earnings of public utility may be applied for interest and sinking fund requirements, article 12, § 12, declaring that when interest and sinking fund payments for any year on the bonds issued for a public utility can be made out of its surplus earnings, no tax shall be levied therefor, and article 12, § 16, providing that the supervisors "may" make appropriations from the receipts for enumerated purposes, they must appropriate the receipts for such purposes in the order named, so that none thereof can be employed for extensions and improvements till after the interest and sinking fund requirements have been provided for; and this though the utility has not been completed, and its earnings are insufficient for such interest and sinking fund requirements.

3. Municipal corporations 🔑58.

Sections of a charter all passed at the same time, being in pari materia, should be construed as one statute.

4. Municipal corporations 🔑58.

Language of charter defining powers granted city is to be strictly construed, and any fair reasonable doubt resolved against it.

5. Statutes 🔑245.

Laws pertaining to tax proceedings are to be strictly construed in favor of taxpayer and against taxing power.

6. Statutes 🔑227.

Where persons or the public are interested in having act done by public body, or a public duty is involved, provision of statute that it "may" do it means must.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May (In Statutes as Permissive or Mandatory).]

7. Statutes 🔑181(2).

Statute susceptible thereof will be given construction rendering it reasonable, fair, and harmonious with its manifest purpose, rather than one productive of absurd consequences.

In Bank.

Original mandamus proceeding by Adolph Uhl against John B. Badaracco and others, as Board of Supervisors of City and County of San Francisco, and another. Peremptory writ granted.

Maurice T. Dooling and F. A. Devlin, both of San Francisco, for petitioner.

John J. O'Toole, City Atty., and John J. Dailey, Asst. City Atty., both of San Francisco, for respondents.

PER CURIAM. The following opinion, prepared by Mr. Presiding Justice TYLER, when sitting pro tempore for Mr. Justice LENNON, is adopted as the opinion and decision of the court:

Petition for mandate to compel the respondents to appropriate and use certain receipts obtained from the operation of the hydroelectric power plants of the Hetch Hetchy project to meet the interest and sinking fund payments on the outstanding bonds of such project and to compel respondents in levying and fixing the tax rate for 1926–27 to include a tax therein of such amount only as represents the difference between such receipts and the necessary amount required to meet such obligations. Petitioner institutes the proceeding as a citizen, resident, and taxpayer, and also as a bondholder of the Hetch Hetchy water bond issue of 1910.

For a proper discussion of the case, a brief history of the acquisition and purposes of the public utility in question becomes necessary. In the year 1901, the city and county of San Francisco, through its then mayor, initiated certain proceedings having for their object the acquisition of a water supply for such city. Thereafter application was made to the Secretary of the Interior of the United States for permission to enter upon the lands within the boundaries of the Yosemite National Park and the Tuolumne Forest Reserve to construct the necessary works for storing and conveying waters beyond the boundaries of said park and reserve lands, and ultimately to San Francisco and the bay region for use by the city and county. On the 11th day of May, 1908, Hon. James R. Garfield, then Secretary of the Interior of the United States, rendered his decision granting to the city and county certain rights to develop the storage of the waters from Lake Eleanor and Cherry creek sections, together with rights to thereafter develop the Hetch Hetchy sources of water supply.

Under the terms of the said permit so granted, the city and county were obligated within two years to submit the question of said water supply to a vote of its citizens. In conformity with this requirement and in the year 1909, the board of supervisors duly enacted an ordinance calling for a special election to be held for the purpose of submitting to the electors two propositions, the first of which was one to incur a bonded debt of $45,000,000 for the acquisition, construction, and completion of a water supply and works to be owned and controlled by the city of sufficient capacity for all purposes, the source of such supply to be Lake Eleanor, the waters of the Tuolumne river and its tributaries, in Tuolumne county. The other proposition had to do with the acquisition of the Spring Valley Water Company, an existing public utility. On January 14, 1910, the voters of San Francisco adopted the first proposition and rejected the second. Thereafter bonds in the sum of $45,000,000 were issued by the city, which were sold and the proceeds thereof were placed in the treasury of said city. Subsequently, the Secretary of the Interior caused to be served a notice upon the city to show cause why the right granted to the city should not be revoked. It was later decided that the Secretary of the Interior had no authority in the premises, and that it was necessary to secure a grant from Congress to permit the city to enter upon the forest reserve and park lands for the development of the water resources in question. Such a bill was introduced in Congress commonly known as the Raker Act (U. S. Comp. St. §§ 4748a–4748c), which was finally passed and it provided for the necessary authorization. It was only upon the final passage of this act that the city's rights in the Hetch Hetchy region were made permanent.

Under the terms of the Raker Act, certain conditions were imposed upon the city in the development of the water rights and privileges granted to it by the act. Many of these conditions, so it is alleged, were more onerous than those contained in the original permit, as they required the development of water and hydroelectric power not contemplated under the original grant. Thereafter, and by reason of these alleged newly imposed conditions, the city made radical changes in its plans. It was decided that the main storage should be located in Hetch Hetchy valley. It was also decided to build one large power plant at Moccasin creek instead of the many smaller ones originally contemplated. With the proceeds of the sale of the bonds, construction of the work was then commenced and proceeded with. A structure known as O'Shaughnessy Dam was erected at the end of Hetch Hetchy valley to impound the waters of the Tuolumne river, and a system of aqueducts and tunnels was built to convey the water to the power plant. There was also erected two hydroelectric generating plants, known as the Early Intake and Moccasin creek power plants, to be used to generate hydroelectric power by use of the water developed in the construction of the water system, and a transmission line was also constructed from the Moccasin creek plant to the town of Newark. All the expenditures necessary for these improvements were made out of the 1910 bond proceeds. At this stage of the development of the works the funds became exhausted, and, during the year 1924, an additional $10,000,000 was authorized for the work by the electors of the city. These bonds are being sold and the proceeds thereof are to be expended in the development of the enterprise, but they are not here involved. The water system at present is still far from complete and it is admitted that it will require an additional sum in an amount estimated at about $24,000,000 to complete the same to a point where it will be possible to deliver water to the boundaries of the city and approximately another $40,000,000 to acquire or construct a distributing system before avail of the water can be made by the consumers of the city. On

July 1, 1925, the power plant was ready to function and generate hydroelectric energy, and on said day the board of public works of the city of San Francisco, pursuant to authorization, entered into a contract with the Pacific Gas & Electric Company for the temporary distribution of the hydroelectric energy to be generated at the Moccasin creek power plant as transmitted to Newark over the constructed transmission lines.

The petition alleges that, under and by virtue of this contract, the Pacific Gas & Electric Company has paid to the city for electric energy the total sum of $2,017,130.49, and of this sum, after deducting operating expenses, there remains a balance of not less than $1,752,769.63. The outstanding water bonds of 1910 amount to $38,000,000, and they are being redeemed at the rate of $1,000,000 a year. The interest and sinking fund requirements on these bonds for the fiscal year 1926–27 amount to the sum of $2,830,685.35. It is charged in the petition that respondents have taken proceedings by ordinance to create a special fund, designated as the Hetch Hetchy Power Operative Fund, and have provided that all moneys received from the power plants on the Hetch Hetchy project shall be deposited to the credit of such fund. Ordinance No. 6980, N. S. Under this ordinance the sum of $166,666 was appropriated during the fiscal year 1926 for operating expenses, the further sum of $83,333 as a depreciation reserve fund, and a sum for the payment of interest on and redemption of $9,000,000 only of the water bonds of the issue of 1910. The ordinance provides that at the beginning of the fiscal year, July 1, 1926, the balance remaining in such fund shall be held for and applied exclusively towards the acquisition or construction of a transmission line and step-down station for carrying the electric energy generated at the Moccasin plant from Newark to San Francisco. It is further charged that, in pursuance of the design to wrongfully divert and use the earnings of these plants, respondents intend to make interest and sinking fund payments on $9,000,000 only of the water bonds of 1910, and to divert the balance to the construction of a transmission line from Newark to San Francisco, and the step-down station, and to this end the board of supervisors adopted a resolution (No. 25364, N. S.) by which they purported to appropriate $20,000 from the Hetch Hetchy fund as created by them for the expense of preparing plans, specifications, and estimates for the completion of the transmission line and station referred to. The estimated cost of these improvements will be approximately $1,800,000, and it is alleged that this amount is to be expended without first appropriating and setting aside from the receipts the amount necessary to take care of the total interest and sinking requirements of the outstanding bonds authorized by the electors of the city, except only an amount sufficient to meet such requirement on $9,000,000 thereof. In the estimate transmitted to the board of supervisors by the auditor of the probable expenditures of the city for the fiscal year 1926–27, pursuant to section 2, c. 1, art. 3 of the charter, it is calculated that the total amount required for bond interest and redemption on the water bonds of 1910 is the sum of $2,830,685.35, and that the portion of that amount to be paid on $9,000,000 of said bonds from the Hetch Hetchy Power Operation Fund is the sum of $530,188.16. In making up the budget for the fiscal year 1926–27 the board of supervisors accepted these figures and intend and threaten, so it is alleged, to use only this sum of $530,188.16 from said fund for meeting interest and sinking fund payments on the water bonds of 1910, and to raise the balance necessary for that purpose by taxation. This will leave a balance in the fund of not less than $1,222,581.47 which the respondents intend and threaten to use for the construction of the stated improvements mentioned. If this latter sum is used to meet the interest and sinking fund payments on the bonds, the amount necessary to be raised by taxation for that purpose will be reduced, so it is alleged, to the sum of $1,077,915.72, which will mean a saving to the taxpayers of $1,222,581.47, or approximately 20 cents on the tax rate of each $100 assessed valuation.

Respondents do not deny that they intend to use the earnings of the hydroelectric plant as alleged in the petition, but they claim that before the board can determine how much to include in the tax levy to cover interest on and redemption of outstanding bonds, it will be necessary for the board to take proper official action in the matter of determining the proportion of the 1910 bond issue used in the construction of the power system and the proportion thereof which was used in the construction of the water supply and works. They claim that in making this allocation, it will be entirely proper for the board to apportion to the power development a fair proportion of cost of conduits, lands, dams, and water supply system as recited in the Raker Act, and it is admitted that action has been taken by the board looking to this end in the passage of a resolution. The exact amount will not be determined until the allocation of expenditure from the 1910 bond funds is made officially by the board. It is petitioner's contention that, under the charter of the city, the entire surplus earnings must all be devoted to meet the interest and sinking fund payments on all the outstanding bonds of the entire water bond issue of 1910, and that such surplus earnings consist of the amount remaining after deducting only the operating expenses and costs of repair. Respondents, on the other hand, contend that it is their right under the charter provisions governing the operation of public utilities, and providing for the distribution of the revenues derived therefrom, to use the moneys which have arisen and will arise from the operation of the hydroelectric plant operated by the city, for the purposes which petitioner alleges they are threatening to do, if in their judgment it will be for the best interests of the city that it should be done. The solution of the question depends upon the proper construction to be given to the charter provisions relating to the acquisition and maintenance of public utilities by the city and the disposition of the earnings of such utilities. A review and analysis of the charter provisions therefore becomes necessary for a proper discussion of the case.

Under article 12 of the charter of the city, a complete scheme is provided for the acquisition of public utilities and the disposition of the receipts therefrom. Sections 1 and 3 of such article provide, in substance, that when the board of supervisors shall by ordinance declare that the public interest demands the acquisition, construction or completion of any public utility or utilities, or when the electors shall petition the board of supervisors in the manner provided by the charter, the board of supervisors must procure from the board of public works, through the city engineer, plans and estimates of the cost of original construction and completion by the city of such public utility or utilities.

Sections 4, 5, and 7 of the same article provide that each proposition for the acquisition of such public utility or utilities shall specify the amount of the bonded indebtedness necessary therefor, and the rate of interest thereon, and the board of supervisors shall submit to the electors at a special election the question whether such bonded indebtedness shall be incurred. A two-thirds vote is necessary to secure the acquisition of such public utility or utilities. Section 10 provides for the issuance and sale of the bonds and declares that, when issued and sold, the proceeds shall be placed in the treasury to the credit of the proper fund and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished.

The charter further provides that at the time of levying the municipal tax and in making the apportionment the supervisors shall take into account and apportion to the several funds the income and revenue estimated to arise during the fiscal year from licenses, fees, and other sources, but the income to pay the interest on the bonded indebtedness and to provide for the sinking funds shall always be provided for out of the tax on property: Provided, that whenever any bonded indebtedness shall have been incurred for the acquisition of any of the public utilities named in article 12 of the charter, the surplus earnings of any such utility for the fiscal year may be applied upon the interest and sinking fund of the bonded indebtedness of such utility for the succeeding fiscal year. Article 3, c. 1, § 10.

Article 12, so far as it deals with this subject, provides that at the time of levying the municipal tax and in the manner provided for such tax levy, the supervisors shall levy and collect annually a tax sufficient to pay the annual interest on such bonds, and also such part of the bonded municipal indebtedness as will fall due within the succeeding fiscal year: Provided, that when the interest and sinking fund payments for any fiscal year on the bonds issued for any public utility can be met out of the surplus earnings of such public utility for the preceding fiscal year, no tax shall be levied for such purpose. Such taxes shall be in addition to all other taxes levied for municipal purposes and shall be collected at the same time and in the same manner as other municipal taxes are collected. Article 12, § 12.

With reference to the disposition of receipts from public utilities, it is provided that whenever any public utility shall be operated by the city, the receipts from such utility shall be paid daily into the city treasury and maintained in a special fund set aside for such utility and that the supervisors may, from time to time, make appropriations from such funds in the following manner: (a) For the payment of the operating expenses of such utility; (b) for repairs and reconstruction; (c) for payment of interest and sinking fund on the bonds issued for the acquisition or construction of such utility; (d) for extensions and improvements; (e) for a reserve fund. Article 12, § 16.

Provision is also made for this reserve fund, it being provided that whenever such fund shall exceed one-half of the payment for operating expenses in the preceding fiscal year, the supervisors shall have the power to appropriate such excess to the general fund.

It is apparent that the present controversy has its genesis in the changed conditions presented by the provisions in the Raker Act. Preliminarily it may be said that it is by no means certain that the conditions imposed upon the city by the government made imperative the construction of the extensive power plant that has been installed. While there is no question that the plan as originally submitted to the taxpayers contemplated the construction and operation of a power system for the generation of power to convey the waters from their source to the boundaries of San Francisco, it is by no means certain that the extensive improvements erected were included under the authorization of the bond issue. However this may be, we are not here concerned with the question as to whether or not the proceeds of the bonds were rightfully used or wrongfully converted in the construction of the power system, as no such question is here presented. The main point that we are called to pass upon is whether or not the entire surplus revenue remaining in the fund created by the board as alleged in the petition and admitted in the answer, must, as a matter of law, be applied toward the payment of interest on and the redemption of the entire outstanding bonds of the 1910 issue. Respondents in support of their proposed action, claim that they are now operating a public utility and receiving revenue therefrom; that they are not operating a water system; and that approximately $34,000,000 must yet be spent before the Hetch Hetchy water is brought to the city limits, and many millions more before a water distribution system can be acquired or constructed. In other words, if we correctly understand the argument of counsel for the city, the claim is made that the power plant is a separate utility, one that is distinct and apart from the water system, made so by the act of Congress in imposing additional conditions.

[1] The answer to this contention is twofold. Congress has no power to create or force a public utility upon the city, and, under the organic law of the city, a public utility can be acquired only in one of two ways: First, from funds derived from taxes levied for that purpose; second, from funds derived from the sale of bonds issued for such purpose. The water bonds of 1910 were voted for a single public utility, namely, a "water supply and works." No proposition was ever submitted to the taxpayer for a distinct power system except in so far as such a system might be included under the term "works." The power plant, therefore, is not an independent utility, but is an element of the water project only. If, as claimed, the changed conditions rendered imperative the full development of a power plant, the matter could and probably should have been submitted to the taxpayers. But this course, as we have seen, was not adopted. Assuming then the power plant to be included in the acquisition of the water utility, and it is only by doing so that there is any justification for any expenditure of the bond issue for its construction, the proceeds of the utility must be used in the manner pointed out by the charter, as they are earnings of the utility voted for.

[2-7] Respondents present the further contention that, even conceding this to be true, article 12, § 12, of the charter providing for the purposes for which the surplus earnings of the utility are to be used is applicable only where all of the interest and sinking fund requirements of the bonds issued for a public utility can be made out of the surplus earnings and is inapplicable when such earnings are sufficient to pay a part only of the sum required for such purpose. In other words, that a well-defined line can be drawn between a public utility which has been completed and one which is still under construction. In support of this contention it is claimed that under article 12, § 16, a discretion is given to the supervisors as to whether or not the earnings shall be so used, as is indicated by article 3, c. 1, § 12, which provides that whenever any bonded indebtedness shall have been incurred for the acquisition of any of the public utilities named in article 12, the surplus earnings of any such utility for the fiscal year *may* be applied upon the interest and sinking fund requirements. The charter makes no express distinction between the earnings derived from the utility whether completed or not, and we do not think that any implication in this particular can be drawn from the provision invoked. Such construction would be unreasonable and nullify the plain intent of the statute. See San Joaquin Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924.

The claim, however, that article 12, § 16, by use of the word "may" gives the supervisors a discretion in the application of the use of the surplus funds, presents the real important question in the case. If the supervisors are given a discretion as to the use which may be made of the earnings, they are acting within their rights. It will be noticed from the charter provisions hereinabove set forth, that there are three separate sections which deal with the question as to the use that is to be made of the receipts of a public utility for interest and sinking fund requirements. To recapitulate, article 3, c. 1, § 12, provides in part that such earnings *may* be applied for such purpose. Article 12, § 12, declares that when the interest and sinking fund payments for any fiscal year on the bonds issued for a public utility can be made out of the surplus earnings, no tax shall be levied for such purpose. Article 3, § 16, provides that the supervisors *may* make appropriations from the receipts for the following purposes: (a) For operating expenses; (b) repairs and construction; (c) interest and sinking fund requirements; (d) extensions and improvements; (e) reserve fund. These sections were all passed at the same time, are in pari materia, and should therefore be construed as one statute. Banks v. Yolo County, 104 Cal. 258, 37 P. 900; Hayne v. San Francisco, 174 Cal. 185, 162 P. 625. In so construing them certain statutory rules of construction should be observed to ascertain their proper meaning.

Language defining the powers of municipal corporations and grants thereto are to be strictly construed, and any fair reasonable doubt concerning the existence of a power is to be resolved against the corporation. Then again, as tax proceedings are in invitum, laws pertaining thereto are to be strictly construed in favor of the taxpayer and against the taxing power. East Bay Mun. Utility Dist. v. Garrison, 191 Cal. 680, 218 P. 43; Estate of Potter, 188 Cal. 55, 204 P. 826; San Christina Inv. Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L. R. A. (N. S.) 676. So, also, where persons or the public have an interest in having an act done by a public body "*may*" in a statute means "*must*." Hayes v. Los Angeles County, 99 Cal. 74, 33 P. 766. Words permissive in form, when a public duty is involved, are considered as mandatory. Kennedy v. City of Sacramento (C. C.) 19 F. 580.

Guided by these rules, it seems clear to us that there is no question but that the word "may" when used in the provisions dealing with this subject does not confer or repose any discretionary powers in the supervisors, but must be construed as meaning *must*. If this were not so, the express mandatory provision contained in article 12, § 12, to the effect that no tax shall be levied for interest and sinking requirements, when they can be met out of the earnings of the utility, would be meaningless. We are likewise of the opinion that the use of the word "may" in article 12, § 16, does not give the supervisors a discretion over the order in which the appropriations therein authorized may be made. Any other construction would render meaningless and nugatory the other provisions of the charter and destroy all the safeguards that these provisions were designed to create. See City of Cincinnati v. Roettinger, 105 Ohio St. 145, 137 N. E. 6.

This construction is compelled for other reasons. The charter does not contemplate the construction or extension of a public utility except in the manner hereinabove pointed out. To use the earnings of a public utility for this purpose would be to nullify the express provisions relating to the manner in which such utilities may be acquired, and thus destroy the limitation in this regard which circumscribes the power of the board. Under the construction contended for by respondents, there could be no limit to the cost of the utility where receipts accrued therefrom, and this regardless of the express mandatory provisions declaring that cost and estimates must be submitted before the bond election is had, so that the taxpayer may know the extent of the obligation he is called upon to assume or reject. Then again, if the order of appropriations be construed as wholly discretionary, respondents could provide for the first four enumerated purposes wholly by taxation. They then could transfer to the general fund all of the reserve fund in excess of one-half of the operating expenses for the fiscal year (article 12, sub. 8, § 16) and use such funds for any municipal purpose whatsoever, thus impressing on the city the burden of a large tax rate for the purpose of meeting these obligations. Counsel for the city concedes that this condition could be brought about if the officers abused the discretion which he claims is vested in them under the provision in question. To adopt the construction contended for by the city would be contrary to common sense and the general policy of the law. Where the language of a statute is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. Goldsmith v. Bd. of Education, 66 Cal. App. 157, 225 P. 783. We must decline to give a construction that leads to a result so at variance with the general scheme of the charter provisions dealing with the acquisition of public utilities and the disposition of the revenue derived therefrom and with the general law upon the subject. It is the policy of the law in the absence of a clearly negatived intention to have the funds authorized for a particular purpose expended for such purpose. Edwards v. City of Helena, 58 Mont. 292, 191 P. 387; 15 Corp. Jur. p. 584. And bonds issued must correspond and be used for the purpose for which they were issued. 5 McQuillin on Mun. Corp. § 2203; O'Farrell v. County of Sonoma, 189 Cal. 343, 208 P. 117.

These principles are reflected in the charter provisions, and in fact a special direction to this effect is contained in article 12, § 10. From what we have said, it follows that it was never intended by the charter that the surplus earnings of a public utility could be diverted from the payment of the interest, and sinking fund requirements of all the bonds issued for the acquisition of such utility, and that such earnings should be applied to the purposes recited in article 12, § 16, in the order in which they appear, so far as they are sufficient for such purposes before any extensions or improvements of the utility can be made with such funds. This conclusion is in accord with an express provision of the charter to the effect that the proceeds of any sale of bonds shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished. Article 12, § 10. To the suggestion of respondents that it is extremely important in the operation of a municipal project that the surplus revenue be used at times to make ordinary extensions and improvements to the system, to keep pace with the growing demand, it is sufficient to say that the extensions here contemplated are not ordinary, involving as they do the alleged expenditure of nearly $2,000,000. The charter provides in what manner such extensions may properly be made. It is for the voters to say whether they are ready at this time to assume the costs of such extension. As stated by petitioner it would seem to be a useless expenditure of funds in the absence of a distributing plant, the acquisition or construction of which, considering its enormous cost, might possibly never be sanctioned by the taxpayer. However this may be, the power plant being but an incident of the water project, its extension under the circumstances must be provided for by a bond issue with the approval of the taxpayer, there being insufficient surplus earnings after satisfying the charter requirements to pay for such extensions. Any other conclusion would circumvent the express mandatory requirements of the organic law of the city. This being so, there is no authority in respondents to make the contemplated expenditure at this time, as surplus earnings of a public utility cannot be employed to make extensions and improvements until after the interest and sinking fund requirements have been provided for.

This conclusion renders unnecessary a discussion of the question raised by the petitioner concerning the rights of the bondholders. From what we have said, it follows that petitioner is entitled to the relief prayed for.

It is accordingly ordered that a peremptory writ of mandate issue in accordance with the prayer of the petition.

---

199 Cal. 246

GORMAN et al. v. CALIFORNIA TRANSIT CO. (Sac. 3729).

(Supreme Court of California. Aug. 17, 1926.)

1. Judgment 🔑138(3)—Default judgment against corporation held properly vacated for inadvertent failure to call president's attention to summons and complaint served on secretary.

Where defendant corporation's secretary immediately delivered summons and complaint served on him to head of department concerned, with direction to deliver them to president on latter's return to city, and they were inadvertently taken from department head's desk by employee, with result that matter was not called to president's attention, court properly vacated default judgment.

2. Appeal and error 🔑957(1)—Judgment 🔑139—Relief from default judgment is for sound discretion of trial court, whose action will not be set aside, unless discretion was clearly abused (Code Civ. Proc. § 473).

Application, under Code Civ. Proc. § 473, for relief from default and judgment thereon, is addressed to sound discretion of trial court whose action will not be set aside on appeal, unless abuse of discretion clearly appears.

3. Appeal and error 🔑957(1).

Doubt as to whether court abused discretion in setting aside default judgment should be resolved in favor of application.

4. Judgment 🔑143(3)—Inadvertence or neglect must be based on more than mere forgetfulness to excuse failure to respond to process in due time and authorize vacation of default judgment.

Trial court's discretion to set aside default judgment is not capricious or arbitrary, but impartial one, guided by fixed legal principles, and inadvertence or neglect must be based on more than mere forgetfulness to excuse failure to respond to process in due time.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Delbert Gorman and another against the California Transit Company. From an order granting defendant's motion to set aside and vacate a default judgment, plaintiffs appeal. Affirmed.

Egerton D. Lakin, of Palo Alto, for appellants.

Sullivan & Sullivan & Theo J. Roche, of San Francisco, for respondent.

RICHARDS, J. This appeal is from an order granting the defendant's motion to set aside and vacate a judgment taken against it by default, upon the ground that such default and judgment were the result of the excusable inadvertence and neglect of the defendant. The facts preceding and attending the making and entry of such default and judgment, as set forth in the affidavits filed in support of said motion and against the truth of which the appellants made no counter showing at the hearing thereon, are as follows:

On January 4, 1924, the plaintiffs commenced this action in Alameda county against the defendant, a common carrier corporation operating automobile stages, to recover damages alleged to have arisen out of the happening of an accident upon one of its stage lines. On January 14, 1924, the summons and complaint in said action were served upon the secretary of said corporation at its office in the city of Oakland, who at once delivered the same to one G. W. Tatterson, who was in charge of the traffic department of the defendant, with the direction that said summons and complaint, together with the file relating to the accident, be delivered to W. E. Travis, the president of the corporation, immediately upon his return from Los Angeles, where he then was and from which he was expected to return within a few days. Said file was placed upon the desk of Mr. Tatterson to await the president's return, but prior thereto was inadvertently taken by one of the employees of the corporation—probably a stenographer in the traffic department—from the desk of Mr. Tatterson, and returned to the compartment in which such files were ordinarily kept, and as a result thereof the attention of Mr. Tatterson, who was daily occupied with many details in connection with his immediate department, was withdrawn from said file, with the result that the matter was not called to the attention of the president upon his return, nor in fact until some days after the default of the corporation had been taken and judgment thereon entered against it for the full sum sought by the plaintiffs in the action. On March 17, 1924, several days after the entry of such judgment, Mr. Travis received a communication from the attorney for plaintiffs informing him of the entry of the judgment and demanding immediate payment of the whole amount thereof, with interest and costs. He immediately took steps to ascertain the facts relating to the commencement of said action, the service of the papers therein, and the reasons why the matter had not theretofore been brought to his attention, of which facts he was up to that time entirely unfamiliar, and, upon learning the same, he presented the matter to the counsel of the defendant for appropriate action, which action in the form of said motion to set aside said default and judgment promptly followed.

[1] The trial court, upon the hearing of the motion and presentation of the foregoing facts, made and entered its order vacating and setting aside the default and judgment, from which order this appeal has been taken. We are of the opinion that the trial court was not in error in so doing.

[2, 3] The application to be relieved from this default and judgment was made under section 473 of the Code of Civil Procedure, and was one addressed to the sound discretion of the trial court. It is a well-settled rule of this court that the action of the trial court in the exercise of such discretion will not be set aside upon appeal, unless an abuse of discretion clearly appears, and that any doubt that may exist in that regard should be resolved in favor of the application, to the end that a trial of the cause upon the merits may be had. Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Nicoll v. Weldon, 130 Cal. 667, 63 P. 63.

[4] It is true that the discretion thus to be exercised by the trial court is not capricious or arbitrary, but is an impartial discretion which must be guided and controlled in its exercise by fixed legal principles, and it should, therefore, appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect in question was not the result of mere forgetfulness on the part of the person or official charged with the duty of responding to the legal process in due time, but that such inadvertence or neglect was based upon other circumstances which would suffice to render the same excusable. Therein lies the distinction, we think, between the cases relied upon by the appellant in support of this appeal and the instant case, and particularly between the case of Slater v. Selover, 25 Cal. App. 525, 144 P. 298, and the case at bar. In the instant case, the inadvertence and forgetfulness of the secretary of the corporation was due to the fact that he had delivered said summons and complaint to the manager of the traffic department of said corporation with instruction to deliver the same to the president thereof immediately upon his return. The inadvertence of the manager of the traffic department in failing to carry out such instruction was attributable to the fact that the file containing said papers had been mistakenly removed from his desk by another employee of the defendant, and that his attention amid the engrossing details of his department was thus withdrawn from the same and from his duty to present the papers to the president of the corporation upon his return. It seems to us that these intervening facts furnish a sufficient basis to justify the conclusion of the trial court that the inadvertence of the officials of the defendant corporation was excusable, and justified the order from which this appeal has been taken.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; FINCH, Justice pro tem.

79 Cal. App. 27

PEOPLE v. WHITACRE. (Cr. 1282.)*

(District Court of Appeal, Second District, Division 2, California. July 26, 1926.)

1. Criminal law 🔑358.

Materiality of testimony offered by defendant, charged with robbery, as to whereabouts on any given date, depends on whether it rebuts evidence of prosecution thereon.

2. Indictment and information 🔑176.

People are permitted considerable latitude in proof as to when alleged offense of robbery was committed.

3. Criminal law 🔑358.

Where none of the people's witnesses fixed the date of alleged robberies other than January 17th or 18th, defendant's whereabouts on January 12th, or before the preceding Christmas, was immaterial.

4. Criminal law 🔑387.

Where the people's witnesses testified that the alleged robbery was committed in one city on a certain date, evidence that defendant was not in another city on that date was immaterial.

5. Criminal law 🔑772(4).

Unless two or more offenses be shown, on either of which jury might convict, it is proper to instruct that the date of the act is immaterial, if it occurred within three years before the filing of the information.

6. Criminal law 🔑706.

District attorney *held* not guilty of misconduct in momentarily showing photograph of defendant's alleged accomplice to witnesses, where it was not shown to jury, and was excluded as an exhibit when offered.

7. Witnesses 🔑246(1).

That the trial court occasionally asked two or three questions of witness to elucidate obscure points, previously the subject of testimony, was not ground for reversal.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Randall Whitacre was convicted of grand larceny and robbery, and he appeals. Affirmed.

Mulligan & Ryzek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied August 23, 1926.

CRAIG, J. The grand jury of Los Angeles county indicted the appellant and one Vincent Marsiglia, charging them jointly with having committed grand larceny and robbery in said county, on or about January 18, 1924. Appellant was tried alone upon two counts of the indictment and was convicted. A motion for new trial was thereafter presented, which was denied, and this is an appeal from the judgment and ruling upon said motion.

There is no dispute as to the robberies having been committed, as alleged and as shown by the evidence, appellant's sole defense being that he was not in Los Angeles county at the time of their perpetration. It appears from the testimony of the people's witnesses, H. C. Smith and George L. Smith, that while they were driving into the city of Inglewood, on or about the above-mentioned date, they were stopped by a Japanese, who was soon joined by the defendant Marsiglia, and were conducted to the rear room of a building occupied by said Japanese and his family. Both of the Smiths testified that as soon as they entered the building this appellant threatened them with a revolver, commanded, "Stick up your hands!" and held them at bay while Marsiglia searched them; that about $40 was taken from the person of H. C. Smith, and about $15 and other personal property from George L. Smith. The Smiths were then driven into an adjoining room, and one of them testified that appellant told them that if they attempted to leave the room within five minutes they would have their heads blown off. The witness Mainhardt testified that appellant and Marsiglia held him up and took his automobile from him in the city of Inglewood on the night of January 17, 1924.

Both of the Smiths and Mainhardt recognized appellant and pointed him out among several other men at the county jail two or three weeks before the trial of this case, and at least five witnesses positively identified him in the courtroom while testifying on June 4, 1925, nearly a year and a half after the offense was committed.

Appellant testified that he was not in Los Angeles county on the date of the robbery; that he had been sick and was unable to work, but that one Jack Stender wrote him from San Diego, offering him a job; that he went to San Diego between January 10 and January 18, but did nothing more there than work on Stender's automobile a few days, whereupon he left San Diego for the state of Illinois; that he went as far as Yuma, Ariz., on the Arizona Eastern, and there transferred to the Rock Island lines. His own counsel asked him if he was sure that he transferred to the *Rock Island* at Yuma, to which he answered in the affirmative. Stender testified that he was a marble setter, and that he employed appellant to help in setting stone, but that the material failed to arrive as expected, and that appellant worked on his automobile a few days and departed. This witness at first asserted quite positively that appellant was in San Diego on January 18, 1924, but finally admitted that he kept no records, and his memory being remarkably deficient as to other dates and events, at last said that he had not thought about the 18th of January being later than the second week of said month, and that he had not had time to look it up.

Two sisters and the mother of appellant testified for him, but the latter said that she did not know where he was on the date of the robbery. His counsel asked each of the sisters where he was just prior to Christmas, 1923, to which objections were sustained; one of them testified that she saw him in San Diego very nearly the 18th of January, 1924, that she bought his ticket and saw him board the train, she presumed for the east, but that she did not know where he went, and that she did not see him on the 18th. The other sister swore that she did not know whether he was at San Diego or Los Angeles on that date, but that she knew he could reach Los Angeles from the southern city within three or four hours.

It is urgently insisted from the foregoing facts that inasmuch as appellant's employer was the only witness who knew of his whereabouts on the date of the offense, and that he testified "positively that the defendant was on the 18th day of January, 1924, employed by him" in the city of San Diego, and one of his sisters purchased his ticket and saw him board the train at San Diego—although she did not know where he went—that the trial court erred in that it denied him a reasonable amount of latitude in examining the witnesses. Appellant testified that at the time in question he was "pretty positive" that he was on the train, going east. Five witnesses positively placed him at the city of Inglewood, committing robbery with a deadly weapon; and his sisters testified that they could not swear that he was not at Inglewood at that time. The jury doubtless viewed the testimony of Stender as being extremely uncertain in the face of voluminous positive testimony to the contrary. Had appellant in fact been at work in the city of San Diego on January 18th, it would not have been impossible for him to have left the train, if he had boarded one that day, and to have arrived at Inglewood within a few hours by automobile. But there is no definite proof that he boarded the train on the 18th, though there is evidence that he was in Inglewood on the night of Thursday, following the 15th of January, 1924, in a Hudson super-six automobile. It was admitted that Thursday following January 15, 1924, was January 17th, and it appears that the robbery was committed on the 18th day of January of that year. Appellant's witnesses were asked if they knew where appellant was before Christmas, 1923, or on

January 12, 1924, and having shown on voir dire that they could not answer the questions, they were asked whether or not appellant was in the city of Los Angeles on the 18th of January, 1924, to which the district attorney objected that the evidence sought was "incompetent, irrelevant, and immaterial, and no proper foundation laid."

[1-4] The objections were sustained, and properly so, if for no other reason than because the presence or absence of appellant in Los Angeles was not in issue. The people's witnesses had testified to the commission of the robbery in Inglewood and not in Los Angeles. The materiality of the testimony offered by the defendant as to his whereabouts on any given date is wholly dependent upon the question as to whether or not it rebuts evidence produced by the prosecution on the same subject. While the people are permitted considerable latitude in their proof as to when the offense charged was committed, this in no way varies the rules of evidence concerning the materiality or competency of rebuttal testimony. In the instant case none of the people's witnesses fixed the date of the alleged robberies as not other that the 17th or the 18th of January, 1924. Hence the whereabouts of appellant before Christmas, 1923, or even on January 12, 1924, was in no way material. Such proof would clearly have no bearing upon the issues of the alleged crime on either the 17th or the 18th of January. Evidence as to his whereabouts on other dates, or as to the fact that he was not in Los Angeles on the 18th, would be wholly immaterial, and we think, therefore, that the rulings of the trial court in this behalf were clearly proper.

[5] It is next urged that, having fixed upon the date of the offense, the trial court erred in charging the jury that:

> "It is wholly immaterial on what day or night the offenses charged in the indictment were committed, provided you believe from the evidence that they were committed by the defendant and that the same, or either of them, were committed within three years prior to the filing of the indictment in this case."

The appellant stated that he was at Los Angeles on January 10, 1924, and the offense was alleged to have been committed on or about the 18th of the same month. H. C. Smith testified that he was robbed about the latter date, and his brother averred that he was with him at the time. Mainhardt stated that as nearly as he could fix the date that he saw appellant was on Thursday, following the 15th of January. The theory advanced by appellant is that if the jury believed that the complaining witnesses were in fact robbed at Inglewood by the appellant, but were uncertain, or entertained a reasonable doubt as to whether or not he committed the crime on Friday, the 18th day of January, 1924, they should not convict him. But such is not the law. Authorities are cited by appellant to the effect that an instruction which tends to belittle or disparage a defense of this character is prejudicially erroneous. However, it was held in those cases that the jury should not be instructed that an alibi is a "defense" which must be proved by a preponderance of the evidence, and no mention is made of an instruction such as that here presented. The correct rule is that unless two or more similar offenses be shown by the evidence, upon either of which the jury might convict, it is proper to instruct that the date of the "act is immaterial if it occurred at any time within three years before the filing of the information." People v. Reynolds, 48 Cal. App. 688, 192 P. 343; People v. Carmean, 23 Cal. App. 396, 138 P. 117; Hughes, Instruc. to Juries, § 108, p. 99.

[6] Again, it is urged that the district attorney was guilty of misconduct in that the photograph of appellant's alleged confederate, Marsiglia, "was constantly kept before the jury," and "was constantly referred to throughout the entire trial." There was testimony by each of the witnesses that appellant had an accomplice at the time in question, whom they later learned was the Marsiglia who was indicted with him, but was not on trial nor present in court. There is no evidence that any photograph was more than momentarily exhibited, and it is apparent that none was shown to the jury. During the examination of the first witness counsel for the prosecution prematurely exhibited a photograph and asked, "Do you know whom that photograph represents?" to which the witness replied that it was not the defendant on trial, but that it was Marsiglia. Appellant's counsel thereupon interposed objections, substantially as we have related, to which the court promptly replied, "There has not been a word said so far about any crime," and sustained the objections. Thereafter the photograph was shown to other witnesses in a similar manner, was identified as that of Marsiglia, and no objection was made to this or any other testimony of said witnesses during direct or redirect examination. It was offered as an exhibit, but was excluded, and the offer was withdrawn.

[7] Finally it is contended that the rights of the appellant were prejudiced by the trial court in its examination of the defendant and other witnesses. People v. Boggess, 194 Cal. 212, 228 P. 448, is cited in support of this point. It was there held that the trial court, over objection, repeatedly interrupted witnesses and took them out of the hands of the defendant's counsel, cross-examined them, and directly called specific testimony to the attention of the jury. No such conduct was in any manner chargeable to the court below in the instant case. Occasionally the trial court asked two or three questions of a witness for the purpose of elucidating and making clear any points that might otherwise have remained obscure, as was held

to be proper in People v. Reid (Cal. App.) 237 P. 824:

"Manifestly, the purpose in all of the questions was to make more clear matters that had previously been the subject of testimony."

No error appearing, the judgment and order appealed from are affirmed.

FINLAYSON, P. J.; WORKS, J.

---

78 Cal. App. 455

PEOPLE v. HIGBEE. (Cr. 1258.)

(District Court of Appeal, First District, Division 1, California. June 19, 1926.)

1. Burglary 🔑41(1).

Evidence *held* to sustain conviction of burglary in the second degree.

2. Criminal law 🔑204.

Failure to support pleas of former jeopardy and acquittal with evidence *held* waiver.

3. Criminal law 🔑761(10).

In burglary prosecution, charge declaring that evidence tended to prove that a burglary had occurred *held* not error, where record disclosed beyond possible question that statement was true.

4. Criminal law 🔑768(3)—Court's comments to jury that evidence was limited, and that jury would be able to decide case at once, held not exhortation to convict.

Court's comments to jury, "I am glad the gentlemen have so concisely placed the case before you that you will be able to decide it at once; the evidence is not voluminous, and my instructions will be short, and then you can return to your homes," *held* not error, where evidence was limited, not being an exhortation to convict.

5. Criminal law 🔑798½—Refusal to instruct that jury might find special verdict held not error, where facts were simple and their legal effect, if believed, was certain.

Where facts were few and simple, and their legal effect, if believed, was certain, court's refusal to instruct that jury might find special verdict, if doubtful as to their legal effect, *held* not error.

6. Witnesses 🔑350—Where nature of felony of which state's witness had been convicted was shown, refusal to permit accused to further cross-examine concerning felony, to test credibility, held proper.

Where state's witness, in response to question whether he had been convicted of a felony, answered affirmatively, and nature of felony was shown, that accused was not permitted to further cross-examine witness as to what felony or felonies he had been convicted of, to test his credibility, *held* not error.

7. Criminal law 🔑1169(7)—Error in admission of evidence that associate had accused defendant when arrested held not prejudicial, where associate testified to same fact on trial.

Error in burglary prosecution, in permitting officer to testify that defendant, when arrested, was accused by his associate with having been a participant, *held* not prejudicial, where such associate testified to same fact and accused denied participation.

8. Witnesses 🔑288(2)—Refusal to allow defendant to show by witness why stolen property was left in defendant's room held proper, where question was not asked until redirect examination.

Refusal in burglary prosecution to allow defendant to show by witness why stolen property was left in defendant's room *held* not error, where no inquiry was had on the subject either in direct or cross examination of witness, and question was not propounded until redirect examination.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Merritt Higbee was convicted of burglary in the second degree, and he appeals. Affirmed.

See, also, 236 P. 929.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was convicted of the crime of burglary in the second degree and sentenced to the state prison. He had previously been convicted under the same information of burglary in the first degree, but this judgment of conviction was reversed, and a new trial ordered upon the ground that the evidence was insufficient to support the verdict of first degree burglary, for the reason that there was none introduced at the trial tending to show that the store entered was either an inhabited dwelling house or an inhabited building, or that defendant was armed with a deadly weapon, or that any person was assaulted during the commission of the burglary. People v. Higbee, 70 Cal. App. 788, 233 P. 79.

Several grounds are here urged for a reversal of the present judgment, among which is a claim of the insufficiency of the evidence to warrant the conviction. There is evidence to show that one Forsythe, the prosecuting witness, owned a haberdasher's store in the city of Burlingame, county of San Mateo. Forsythe had left his store on the evening of January 28, 1924, about 6:30 o'clock, and upon his arrival next morning he discovered that a rear door had been broken open, and a lot of merchandise, including clothing, shirts, socks, and other articles had been taken therefrom. In the evening of January 28th, defendant, accompanied by others named Clin-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ton, Dawson, Allen, and O'Connor, had driven to the city of Burlingame in an automobile. The machine was noticed by a police officer, parked in the vicinity of the store. It was occupied by two persons. Upon being interrogated concerning their business, the driver informed the officer his name was Clintel and that he resided in San Jose. At this time Dawson approached the machine and was also interrogated. The officer was evidently satisfied with the statements made to him, for, after noting the number of the machine and the address given, the parties were not detained. The next morning, upon discovering that a robbery had been committed, the chief of police of Burlingame checked up the statements of the occupants of the machine, but failed to locate the given residence. He then telephoned to the San Francisco police, giving the number of the machine. It was located, and O'Connor and Clinton were taken into custody. They confessed to their participation in the crime and informed the police of their place of residence. The police repaired to the address given and there arrested defendant, and some of the stolen articles were found in his room. O'Connor testified at the trial and admitted that he had accompanied Dawson, Allen, and Clinton, and defendant Higbee on an automobile trip to Burlingame on the night of January 28, 1924, and had driven the machine to the vicinity where the crime was committed, at which time Dawson, Allen, and Higbee left the same and returned about an hour and a half afterwards with a lot of suitcases which were taken back to San Francisco; that the party then proceeded to the room in a hotel occupied by Higbee, where the stolen property was distributed.

[1, 2] We are of the opinion that this evidence is amply sufficient to support the verdict. Defendant at the trial pleaded once in jeopardy and former acquittal, and asked that these special pleas be declared to the jury. The trial court disregarded the request and the jury did not find upon them. This act of the court is assigned as error. There is no merit in the contention. Defendant introduced no evidence in support of the pleas. The burden of establishing them was upon him. It was just as necessary to support the pleas as to interpose them. His failure to do so must be deemed a waiver thereof. People v. Newell, 192 Cal. 659, 667, 221 P. 622.

[3, 4] Appellant next complains of the giving of an instruction reading as follows:

> "The evidence in this case tends to show that on the night of January 28th, last year, the prosecuting witness was in the possession of a certain store here in Burlingame, and therein he had merchandise belonging to him, and that during the evening or night, the store was entered by some person, and certain articles of merchandise were stolen and carried away."

It is claimed that this instruction virtually states to the jury that a burglary had been committed; that it occurred at night and that a larceny was also committed. We do not think there is any merit in this contention. There was no claim made that a burglary had not been committed. On the contrary, it was conclusively shown that there had been one. There can be no substantial objection to a charge declaring that evidence has been offered tending to prove a certain fact, when it is disclosed by the record that the statement is true beyond any possible question. It necessarily follows that the instruction attacked did not constitute error. People v. Flannelly, 128 Cal. 83, 88, 60 P. 670. The trial court addressed the jury as follows:

> "Members of the jury, we ought all of us be happy today, and none of us have a grouch, considering the bounteous rain we are having, and I am glad the gentlemen have so concisely placed the case before you that you will be able now to decide it at once. The evidence is not voluminous, and my instructions will be short, and then you can return to your homes."

It is claimed that these remarks can be construed to be nothing more than an exhortation to the jury to convict the defendant, and to do so quickly. We do not so construe them. The evidence was in fact limited, and did not therefore require extensive consideration. Whatever result it may have produced on the minds of the jurors, whether favorable or unfavorable to the defendant, could in no manner be affected by the remarks complained of, as they in no manner indicated in what light the judge may have viewed the evidence. They could not be taken as an indication or expression of opinion of the court upon the facts or the weight of the evidence one way or the other.

[5] Further complaint is made of the action of the court in refusing to instruct the jury that, if they were in doubt as to the legal effects of the facts, they might find a special verdict. There was not error in the refusal to give this instruction, as the facts were few and simple, and the legal effect of the same, if believed, admitted of no doubt.

[6, 7] O'Connor, one of the participants in the robbery, testified on behalf of the people. He was asked whether or not he had ever been convicted of a felony, and he answered that he had. Appellant claims that he should have been permitted to further cross-examine the witness as to what felony or felonies he had been convicted of, in order to test his credibility. The nature of the particular felony he had been convicted of was fully shown, and the trial court did not limit the examination in this particular. There is no merit in this contention. Defendant, at the time of his arrest, was accused by O'Connor and Clinton in the presence of a police officer with having been a participant in the robbery. He denied the accusation. The officer was permitted to testify to this fact, and a motion was made on behalf of defendant to strike out this testimony. The motion was denied.

While it should have been granted, as it was not competent evidence of his guilt, the error was not prejudicial to defendant's rights for the reason that O'Connor testified to this same fact at the trial, and defendant took the stand in his own behalf and denied that he had participated in the robbery. Under these circumstances the error was cured. Appellant next claims that the court erroneously refused to strike out certain hearsay evidence of a police officer to the effect that the owner of the store had previously identified certain of the stolen property at a previous trial. The record shows that the trial court interrupted the examination at this point and no answer was given to the question, and no further inquiry was had upon the uncompleted objection.

[8] The further claim is made that the court erred in refusing to allow defendant to show by Dawson why the stolen property was left in his room. No inquiry was had upon the subject either in the direct or cross examination of this witness. The question was propounded upon the redirect examination, and the court did not abuse its discretion in sustaining an objection to the same. No other questions are presented.

The judgment and order denying a new trial are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

78 Cal. App. 451

PEOPLE v. CLINTON et al. (Cr. 1247.)

(District Court of Appeal, First District, Division 1, California. June 19, 1926.)

1. Criminal law 🔑304(16).

Court may take judicial knowledge, on appeal from second conviction, that it reversed former conviction and directed a retrial.

2. Criminal law 🔑193.

Reversal of conviction on appeal, with direction for retrial, does not constitute former acquittal or once in jeopardy.

3. Criminal law 🔑199.

Conviction of burglary in first degree does not operate as an acquittal of burglary in the second degree.

4. Burglary 🔑37—Evidence that defendant had sledge hammer and jimmy, when arrested for burglary, held admissible.

Evidence that defendant had sledge hammer and jimmy upon his person, when arrested soon after burglary was committed, *held* admissible in burglary prosecution, in view of testimony that rear door of burglarized store had been hammered and forced down.

5. Witnesses 🔑277(2)—Where defendant testified he and codefendants drove to place of burglary, it was proper to ask him purpose of trip.

Where in burglary prosecution defendant testified he and codefendants drove to town where burglary occurred, and that one of their companions had since pleaded guilty to crime of burglary, that he was asked on cross-examination the purpose of the trip, and answered that he went there to and did burglarize, *held* proper.

6. Criminal law 🔑1169(12).

Admission of confession *held* not prejudicial, notwithstanding it was obtained under duress, where defendant testified to same facts upon the trial.

7. Criminal law 🔑1182.

Appellate court need not discuss alleged errors urged on behalf of defendant, where he has escaped and is fugitive from justice.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

James Clinton, George Dawson, and Maurice C. Allen were convicted of burglary in the second degree, and they appealed. Judgment affirmed.

See, also, 236 P. 929.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendants were charged with the crime of burglary. They were jointly tried and convicted of burglary in the second degree, and sentenced to the state prison. All three of the defendants were formerly tried upon the same charge and were convicted of the crime of burglary in the first degree. They appealed to this court, and the judgment was reversed upon the ground that there was not sufficient evidence to warrant a verdict of burglary in the first degree, and the judgment was accordingly reversed and the case remanded for retrial. See People v. Clinton et al., 70 Cal. App. 262, 233 P. 78. The facts, briefly stated, show that appellants, together with others, burglarized a haberdasher's store at Burlingame and stole merchandise therefrom, which was subsequently recovered from them in San Francisco.

Several grounds are urged for a reversal of the instant judgment. It is first claimed that the jury should have found for appellants on their special pleas of once in jeopardy and former acquittal, that the trial court erred in the admission of certain testimony, and also in its instructions to the jury. Alleged misconduct of the district attorney is assigned as error, and it is further claimed that the evidence is insufficient to support the conviction.

[1-3] With reference to their first contention, it appears that appellants in support of their special pleas of once in jeopardy and former acquittal introduced in evidence the information charging them with the commission of the crime of burglary, it being the

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

same instrument upon which they were tried upon on the former occasion and upon which their second trial was based. They also introduced in evidence certain minutes of the former trial, together with certified copies of the judgment commitments as to each of them. No proof was introduced on the part of the prosecution to show that the convictions were reversed. Notwithstanding this fact, the jury found for the people on both special pleas. While, under these circumstances the verdict on these special pleas was erroneous, it does not constitute reversible error. The former conviction relied on was, as a matter of fact, reversed by this very division of the appellate court. It is an established principle that courts may take judicial knowledge of their own proceedings in the same case. Hollenbach v. Schnabel, 101 Cal. 312, 35 P. 872, 40 Am. St. Rep. 57; Sewell v. Price, 164 Cal. 265, 128 P. 407. Upon the setting aside of the former conviction, a retrial was ordered. A judgment, reversed upon appeal with such direction, does not constitute former acquittal or once in jeopardy. People v. Webb, 38 Cal. 467; People v. Tucker, 117 Cal. 231, 49 P. 134. Nor does a conviction of burglary in the first degree operate, as claimed, as an acquittal of burglary in the second degree. Appellants next complain of the refusal of the trial court to instruct the jury that they might find a special verdict. This objection is considered in the companion case of People v. Higbee, 248 P. 927, this day decided, as is also the further objection that the court erred in instructing the jury that the evidence tended to show that a burglary had been committed. As pointed out in the Higbee Case, there is no merit in either contention.

[4, 5] The trial court permitted the prosecution to show that appellant Dawson was searched at the time of his arrest, and that a sledge hammer and jimmy were found upon his person. It is claimed that this evidence was inadmissible, without preliminary proof that the implements were used in the commission of the crime. There was testimony to show that the rear door of the store burglarized had been hammered and forced open and the lock twisted by means of some instrument. Evidence to show that, at or about the time the crime was committed, the accused had in his possession certain tools, with which it was or might have been committed, is relevant. 16 Corp. Jur. 546; People v. Hope, 62 Cal. 291; Fairall on Criminal Laws, p. 156. Appellant Dawson testified on his direct examination that he, Allen, Clinton, and O'Connor drove in a Stutz automobile to Burlingame; that he, Dawson, made the arrangements for the trip; and that O'Connor has since pleaded guilty to the crime of burglary. On cross-examination this witness was asked the purpose of his trip, and he answered that he went there to and did burglarize the store in question. We are of the opinion that this was proper cross-examination. People v. Maughs, 8 Cal. App. 107, 96 P. 407.

[6] At the time of his arrest Dawson made and signed a confession of his guilt, and the trial court permitted its introduction in evidence. It was objected to on the ground that it was obtained by force and violence. There was testimony to show that Dawson had been slapped by a police officer about an hour before the confession was made. Assuming that the confession was obtained under duress and was not voluntary, still we fail to see how the substantial rights of this appellant were affected thereby, as he testified to the same facts upon the trial.

[7] And finally, several objections are urged on behalf of defendant Allen. We need not be at pains to discuss these alleged errors, as it appears by affidavit of the sheriff of San Mateo county, on file herein, that Allen has escaped from custody and is now a fugitive from justice. It may be said, however, that we have considered these objections and find no merit therein.

The judgment as to all of the defendants is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

78 Cal. App. 526

MARSTON v. PICKWICK STAGES, Inc., et al. (Civ. 4473.)

(District Court of Appeal, Second District, Division 2, California. June 24, 1926. Hearing Denied by Supreme Court Aug. 23, 1926.)

1. Appeal and error 🔑110.

No appeal lies from order denying new trial, in view of Code Civ. Proc. § 963.

2. Automobiles 🔑244(10).

Evidence *held* to sustain finding of negligence in operating autostage colliding with automobile.

3. Appeal and error 🔑1001(1).

Appellate court will not disturb a verdict if it is supported by some substantial evidence.

4. Evidence 🔑588.

The most positive testimony may be rejected as inherently improbable when its falsity appears from a consideration of the undisputed circumstances or the laws of nature.

5. Appeal and error 🔑1001(1).

That admitted circumstances make witness' story seem improbable will not justify a reversal on the ground that the verdict is contrary to the evidence.

6. Trial 🔑252(8).

In action for damages resulting from collision between plaintiff's automobile and defendants' autostage in a cloud of smoke covering highway, refusing to instruct that plaintiff was guilty of contributory negligence *held* not error.

7. Appeal and error 🔑1066.

In automobile collision action, instructing that no vehicle must attempt to pass vehicles passing in opposite directions, as stated in Motor Vehicle Act 1915, § 20, as amended by St. 1919, p. 215, § 12, *held* not reversible error, where there was no evidence of such attempt.

8. Appeal and error 🔑1066.

In automobile collision action, instructing that it was unlawful to drive over 30 miles an hour if driver did not have clear view, as stated in Motor Vehicle Act 1915, § 22, as amended by St. 1919, p. 220, § 13, *held* not reversible error, where there was no evidence of speed in excess of 30 miles per hour.

9. Appeal and error 🔑1066.

Though the court should not instruct upon abstract questions of law not applicable to the circumstances of the case, such action will not warrant reversal where it is apparent that no injury could have resulted.

10. Trial 🔑295(10).

Instruction criticized as assuming negligence of driver of stage which collided with plaintiff's automobile *held* not reversible error, when charge was considered as a whole.

11. Automobiles 🔑246(23) — Instruction to find for plaintiff if automobile collision was proximately caused by "negligence" of driver and plaintiff was without "fault" held not erroneous.

Instruction to find for plaintiff if automobile collision was proximately caused by negligence of other driver and plaintiff was without fault was not erroneous as not instructing on contributory negligence, where court elsewhere fully instructed thereon; "fault" being equivalent to "negligence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fault; Negligence.]

12. Automobiles 🔑245(39).

Whether failure to sound horn, as required by Motor Vehicle Act 1915, § 12, was negligence, *held* for jury.

13. Negligence 🔑136(9).

Negligence is for jury if reasonable minds can rationally draw different conclusions, though circumstances are undisputed.

14. Automobiles 🔑246(23) — Instruction on contributory negligence in automobile collision held properly refused as confusing.

In automobile collision action, instruction that plaintiff could not recover if he was negligent and his negligence contributed proximately and directly to the cause of the accident was properly refused as confusing.

15. Trial 🔑260(1).

Refusing instruction, substantially incorporated in those given, which were sufficiently complete, *held* not error.

Appeal from Superior Court; San Diego County; W. P. Cary, Judge.

Action for personal injuries by George O. Marston against the Pickwick Stages, Inc., and another. Judgment for plaintiff, and defendants appeal from the judgment and from an order denying a new trial. Appeal from order dismissed, and judgment affirmed.

Warren E. Libby, of Los Angeles, E. L. Seavey, of San Diego, and B. P. Gibbs, of Los Angeles, for appellants.

Charles C. Crouch, Glen H. Munkelt, and Frank A. Gazlay, all of San Diego, for respondent.

FINLAYSON, P. J. [1] This is an action to recover damages for personal injuries arising out of a collision between an automobile driven by plaintiff and an autostage operated in the business of the defendant Pickwick Stages, Inc., and driven by its employee, the defendant Vallad. The answer of each defendant, in addition to denying the allegations of the complaint, pleads contributory negligence as an affirmative defense. The verdict was for plaintiff. Defendants appeal from the judgment and from an order denying their motion for a new trial. The latter appeal must be dismissed. No appeal lies from an order denying a new trial. Code Civ. Proc. § 963. As grounds for reversal appellants urge that the evidence is insufficient to justify the verdict, that the court erred in giving certain instructions, and that it further erred in refusing certain requested instructions.

[2] The accident in which plaintiff received his injuries occurred during the daytime, on the state highway, within the limits of the city of San Diego. The highway at the place where the collision occurred is 20 feet wide and paved. Plaintiff, driving a Ford automobile, was traveling in a northerly direction. The autostage was proceeding in the opposite direction. A cloud of smoke, caused by the burning of grass or brush along the railroad tracks to the west, swept across the highway and obscured the view of the respective drivers as they were about to pass each other. Each driver claims that the other was on the wrong side of the road. Without doubt the presence of one or the other of the vehicles on the left or wrong side of the road was the proximate cause of the accident. By its verdict the jury impliedly found that plaintiff's car was on the right side and that the autostage was on the wrong side of the highway.

Plaintiff testified that the cloud of smoke was from 75 to 100 feet wide; that he first observed it when he was about half a mile away; that he was then traveling at a speed of about 25 miles an hour; that as he approached the smoke he decreased the speed of his car until it was proceeding at about 15 miles an hour; that as he was about to enter the pall of smoke, and when about a rod away from it, he saw the autostage 50 feet ahead, coming diagonally towards him, his car being at the time on the right side of the pavement; that as soon as he saw the autostage he made an effort to turn his car still further toward the right, but that before he could leave the paved highway the autostage struck his vehicle with terrific force, wrecking it and causing the personal injuries of which he complains.

The driver of the autostage, whose testimony was corroborated by that of some of his passengers, testified that as his vehicle entered the cloud of smoke it was on the right or west side of the paved highway, proceeding at a speed of about 20 miles an hour; that after getting into the smoke he decreased the speed of the autostage, so that when the collision occurred it was traveling at about 8 or 10 miles an hour; that the wheels on the right side of the stage were without 6 or 8 inches of the edge of the pavement, on the westerly side of the highway; that he did not change his course from the time he entered the smoke screen up to the instant of the collision; that as he entered the thick smoke he saw plaintiff's car for the first time, the distance separating the two vehicles being then about half the length of the autostage, which is 15 feet long; that instantly the impact came; and that he had no time to do anything; that the front left wheel of the autostage was broken by the collision and the drag link was bent—the latter piece of mechanism being a rod running from the steering gear to the spindle pin and controlling the front wheels; that by reason of the nature of these injuries he was unable to steer the stage after the impact; and that the vehicle dropped down on the spindle pin, dragged for a few feet, and then turned toward the left, proceeding thus for about 39 feet, when it came to a stop. There was some evidence to warrant the inference that neither driver sounded his horn before the collision.

There was observed after the accident a curved mark, graved in the pavement of the highway by the spindle pin of the autostage. The northerly end of this mark, i. e., the place where it commenced, was about 6 feet 2 inches east of the westerly edge of the pavement. One witness testified that the mark, from the point of its beginning, "starts a little bit, pointing in toward the east"; that it then straightens out and continues thus for about 6 feet, when it disappears for a space and then reappears as a diagonal mark across the pavement from the west side to the place where the stage came to a stop on the east side.

A witness for the plaintiff, who was driving an automobile in the same direction that plaintiff was traveling and who was about 250 feet to the rear of plaintiff's car when the collision occurred, testified that he saw the accident and that after hitting the Ford the autostage traveled 5 or 6 yards before its left front wheel came off.

The foregoing résumé discloses a sharp conflict in the evidence upon the vital question in the case, namely, the question as to which vehicle was on the wrong side of the highway.

[3-5] We think the evidence was sufficient to justify the conclusion of the jury. An appellate court will never disturb a verdict where there is some substantial evidence to support it. But appellants claim that respondent's testimony is conclusively demonstrated to be false and impossible by the marks which were made upon the pavement by the spindle pin of the autostage. This mute testimony, say appellants, shows "unmistakably and conclusively that the stage was upon the west side of the road at the time of the collision," and that respondent's testimony is impossible "in the face of these telltale marks." There would be much force in this contention if a witness for respondent had not testified that the autostage traveled some five or six yards before its wheel came off; for the most positive testimony may be rejected as inherently improbable when its falsity appears from a consideration of the undisputed circumstances or from the laws of nature. But until the wheel came off the axle, thus permitting the left front end of the stage to drop, the spindle pin did not touch the pavement. Until then no mark was made to tell the course of the stage whilst traversing the five or six yards. It is quite possible that while the stage was covering this space of 15 or 18 feet it swerved over to the right side of the highway immediately after hitting the Ford and while it was still traveling on all of its four wheels. This possibility affords a conceivable explanation for the fact that the commencement of the mark made by the spindle pin was found to be on the right or west side of the highway. If this is what happened, and it is not impossible, then there is no necessary inconsistency between the mark as it appeared on the pavement and respondent's testimony that when he saw the autostage an instant before the collision it was coming diagonally toward his vehicle on the east side of the highway. What was said by this court in Austin v. Newton, 46 Cal. App. 498, 189 P. 473, is pertinent:

> "Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence. Stokes v. Metropolitan Street Ry. Co., 173 Mo. App. 676, 160 S. W. 46."

[6] What we have said disposes of appellants' next contention, which is that the court erred in refusing to instruct the jury that respondent was guilty of contributory negligence.

[7-9] The court gave an instruction practically in the language of section 20 of the Motor Vehicle Act (Stats. 1919, p. 215). The instruction reads, in part, as follows:

> "The court instructs you that the driver or operator of any vehicle in or upon any public highway must drive or operate such vehicle in a careful manner with due regard for the safety and convenience of all other vehicles upon such highway, and wherever practicable shall travel on the right hand side of such highway. Two vehicles while passing each other in opposite directions have the right of way, *and no other vehicle to the rear of either of such vehicles must pass or attempt to pass such vehicles.*"

We have italicized that part of the instruction to which appellants object. The court also gave another instruction substantially in the language of section 22 of the same act, which told the jury that:

> "It is unlawful to operate or drive an automobile on a public highway in excess of 30 miles an hour when the operator or driver does not have a clear and uninterrupted view of the highway on which he is traveling in the direction toward which he is traveling for at least 400 feet ahead of such operator or driver."

Appellants do not question the correctness of either of these instructions as statements of abstract propositions of law, but claim that both of them were improper for the reason that they refer to facts of which there was no evidence. It is claimed that it was error to give the first of these instructions because there was no evidence that either the stage or the Ford was attempting to pass any vehicle just before the collision, and that it was error to give the other instruction because there is no evidence that the stage was traveling in excess of 30 miles an hour. If it be conceded that it was improper to give these instructions for the reasons assigned by appellants, nevertheless the giving of them is not reversible error. While it unquestionably is true that the court should not instruct the jury upon abstract questions of law not applicable to the circumstances of the case, nevertheless such action on the part of the trial court will not warrant a reversal where it is apparent that no injury could have resulted. Bosqui v. Sutro R. Co., 131 Cal. 390, 401, 63 P. 682, 685; People v. Romero, 143 Cal. 458, 77 P. 163; Hardy v. Schirmer, 163 Cal. 272, 124 P. 993; George v. Los Angeles Railway Co., 126 Cal. 357, 58 P. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184; Estate of Clark, 180 Cal. 395, 181 P. 639. We are unable to see how either of the instructions now under consideration could have prejudiced appellants' cause. In Bosqui v. Sutro R. Co., supra, the court, speaking of an instruction which referred to facts not shown by the evidence, said:

> "In People v. Cochran, 61 Cal. 548, it was said: 'If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifested that the jury was misled by it to the prejudice of the defendant. Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant.' If this latter statement be true, surely a correct proposition of law under like circumstances would not necessarily mislead the jury. In the present case, there was not the slightest evidence or suspicion pointing to the defendant as having placed the obstruction on the rails, and we do not think the instruction assumes that any such evidence existed. We do not believe that the reference made to defendant in that connection could, in view of the evidence in the case, have made the slightest impression on the jury to defendant's prejudice."

[10] An excerpt from another of the court's instructions is made the subject of attack by appellants upon the ground that it assumes negligence on the part of the driver of the stage. When the whole charge is read and considered in its entirety, as it should be, the objection now made to the isolated passage selected by appellants for their criticism is found to be baseless.

[11] The court instructed the jury to find for the plaintiff if the accident was proximately caused by negligence on the part of the driver of the stage and if "plaintiff was without fault." It is objected that the words "without fault" are not equivalent to an instruction upon the issue of contributory negligence. In other parts of its charge the court fully and correctly instructed the jury upon the question of contributory negligence. Moreover, in the literature of the law, the word "fault" is the equivalent of "negligence." Louisville, etc., R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714; Central R. & Banking Co. v. Lanier, 83 Ga. 587, 10 S. E. 279; 25 C. J. 676. The objection is hypercritical and without merit.

[12, 13] Complaint is made of the court's refusal to give a requested instruction which, in part, is as follows:

> "* * * Every motor vehicle shall be equipped with a bell, gong, horn, whistle, or other device in good working order capable of emitting an abrupt sound adequate in quality and volume to give warning of the approach of such vehicle to pedestrians and other riders or drivers of other vehicles on the highway. Every person operating a motor vehicle shall sound said bell, gong, horn or whistle or other device whenever necessary as a warning of danger. Therefore, in this case, if you find from the evidence that there was a cloud of smoke covering the highway on which the plaintiff was driving at the time and place of the collision making it impossible for the plaintiff then and there to see any object on the highway ahead of his machine for a distance of 400 feet, or in any manner whatever interfering with the vision of the plaintiff so that he did not have a clear and unobstructed view of the highway ahead of him in the direction in which he was traveling, and if you further find that the plaintiff at the time and place where this cloud of smoke was over-

hanging the highway failed to sound any bell, gong or horn, to warn others using the highway of the approach of his car, then I charge you that under the circumstances and conditions then and there existing the plaintiff was guilty of negligence. * * *"

The first part of the above-quoted portion of this instruction is a correct statement of the law. It is substantially in the language of section 12 of the Motor Vehicle Act as it read at the time of the accident. Stats. 1915, p. 405. That section of the act provides that every person operating a motor vehicle shall sound his bell, horn, gong, or other device "whenever necessary as a warning of danger." But though it would have been proper to give this part of the instruction, it would have been error to give the instruction with its concluding sentence. Had the instruction been given, the last part of it would have erroneously charged the jury, as a matter of law, that under the circumstances referred to by the court it was necessary to sound the horn as a warning of danger, and that a failure to do so constituted negligence per se. In other words, the concluding part of the instruction purports to settle the conditions which create the necessity for the sounding of the horn, instead of leaving it to the jury to determine whether, under the circumstances referred to, the sounding of the horn was or was not necessary as a warning of danger. We think that in all such cases it is for the jury, and not for the court, to say whether, under a given set of circumstances, a necessity exists for this precautionary act. The circumstances which will make it necessary to sound the horn "as a warning of danger" cannot be defined and measured by any precise standard. As in all cases where the question of negligence is presented, the existence of a necessity for sounding the warning horn is always relative to the particular facts and circumstances of which the necessity is sought to be predicated. For this reason it is a question of fact for the jury, even where the circumstances are undisputed, if reasonable minds can rationally draw different conclusions from the conceded facts. In Rush v. Lagomarsino, 237 P. 1066, the Supreme Court, speaking of an instruction which was properly drawn—for there the instruction left it to the jury to determine whether the blowing of the horn was necessary—said:

> "* * * It was certainly a matter for the jury to determine whether or not, under all the circumstances, it was necessary for the defendant to sound his horn as a warning of danger, and the failure to submit that question to the jury as requested was error which doubtless redounded to the prejudice of the plaintiff."

In the instant case the court, had the instruction been given, would have undertaken to determine the question of necessity for the jury. The instruction was properly refused.

[14] Appellants complain of the court's refusal to give an instruction requested by them which, if given, would have told the jury that if plaintiff was negligent, and if his negligence contributed proximately and directly "to the *cause* of the accident," he cannot recover. Negligence, of one party or the other, was the proximate cause of the accident. Therefore the instruction, had it been given, would have charged the jury, in substance and effect, that if plaintiff was negligent, and if his negligence proximately contributed to his negligence, he could not recover. This manifestly is absurd, and the learned trial judge clearly was warranted in refusing to give an instruction so incorrectly phrased. It was calculated to make "confusion worse confounded."

[15] Complaint is made of the refusal to give other instructions requested by appellants. An inspection of the record discloses that the subject-matter of these instructions is substantially incorporated in those which were given, and that the jury was fully instructed as to all matters of law necessary for their enlightenment in determining the rights of the parties.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

78 Cal. App. 751

MILLER v. MURPHY et al. (Civ. 5483.)

(District Court of Appeal, First District, Division 1, California. July 21, 1926.)

1. Records ⚷1.

That a document is in a public office or in custody of a public officer does not make it a public record.

2. Evidence ⚷338—Map of subdivisions of land, prepared, acknowledged, and filed according to statute, constitutes a public writing, and a copy thereof is admissible with effect of original (St. 1893, p. 96; County Government Act 1897, § 131, re-enacted by St. 1907, p. 395, now Pol. Code, § 4142; Code Civ. Proc. § 1888, subd. 2, and sections 1892, 1893).

Since it relates to matters in which the public at large or the community may have an interest and for whose protection the law requires it to be filed, a map of subdivisions of land, prepared, acknowledged, and filed according to St. 1893, p. 96, and County Government Act 1897, § 131, re-enacted by St. 1907, p. 395, now Pol. Code, § 4142, constitutes a public writing within Code Civ. Proc. § 1888, subd. 2, and hence a copy thereof is admissible with effect of original under sections 1892, 1893.

3. Evidence ⚷333(4).

Records and tax receipts, offered to prove payment of taxes assessed against lots 17 and 19, block 15, which described the lots as lots 17 and 19, block 15/2196, *held* admissible, where figures 2196 referred to assessor's block book.

4. Evidence 🔑317(4)—Testimony as to what tenant stated as reason for refusal to pay rent held properly excluded as hearsay.

In administratrix's action to foreclose lien of contract for repayment of money advanced for taxes with counterclaim for rents received by plaintiff, testimony as to what tenant stated as reason for refusal to pay rent *held* properly excluded as hearsay, in absence of proof that statements were made in presence of deceased or administratrix.

5. Executors and administrators 🔑434(1)—Counterclaim for rents held properly disallowed, in absence of proof of receipt thereof by administratrix, deceased, or assignee.

In administratrix's action to foreclose lien of contract for repayment of money advanced for taxes, counterclaim for rents from the property was properly disallowed, in absence of evidence of receipt of rents by administratrix, deceased, or his assignee.

6. Assumpsit, action of 🔑1.

To recover in assumpsit against a tortfeasor, it must appear that he received a benefit from the wrongful act which was taken from plaintiff.

7. Appeal and error 🔑1201(3).

Where more than two years elapsed after remand before a second trial, denying motion during trial for leave to file a supplemental answer and to plead as a set-off a judgment for costs entered before remand *held* not an abuse of discretion.

8. Appeal and error 🔑959(1).

Denial of motion to file supplemental answer and to plead as a set-off a judgment for costs will not be disturbed, in absence of abuse of discretion.

9. Executors and administrators 🔑96.

Assignment of cause of action by administratrix, in absence of evidence of her authority to execute it, did not transfer the estate's interest in the cause of action.

10. Attorney and client 🔑70.

Duly licensed attorney is presumed in absence of contrary evidence to have had authority to appear for person for whom he professes to act, including an administratrix, though he was subsequently disbarred.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by William Miller, by Mary Miller, as administratrix of the estate of William Miller, deceased against Herman Murphy and others to foreclose a lien created by a contract for repayment of money advanced for payment of taxes. Judgment foreclosing lien, and defendants appeal. Affirmed.

Welles Whitmore and Hayes, Oliphant & Dukette, all of Oakland, for appellants.

John C. Quinlan, of San Francisco, for respondent.

CASHIN, J. An appeal from a judgment foreclosing a lien created by a contract providing for the repayment to William Miller, respondent's intestate, of sums to be advanced by him for the payment of taxes upon two parcels of land, the title to which was in litigation, it being agreed that such repayment should be made by appellants in the event the latter should be adjudged the owners thereof. The litigation having resulted in favor of appellants, this action was brought to establish the amounts paid and to foreclose the lien upon the two parcels mentioned. The appeal is presented on the judgment roll with a bill of exceptions.

A previous trial of the action resulted in a judgment which was reversed on appeal, in the case of Miller v. Murphy et al., 186 Cal. 344, 199 P. 525. The contract, which was dated July 5, 1917, recited that the property thereinafter described had been sold on July 5, 1912, for delinquent taxes of the city of Berkeley in the county of Alameda for the fiscal year 1911–1912, and that all subsequent city taxes levied thereon were unpaid and had become delinquent, the property referred to being therein described as:

> "Those lots of land situate in the city of Berkeley, county of Alameda, state of California, described as follows, to wit, lots 17 and 19 in block No. 15 as said lots and block are delineated and so designated upon that certain map entitled 'Daley's Scenic Park, Berkeley, Cal.,' filed August 26, 1889, in the office of the county recorder of said county of Alameda, and lots 25 and 26 as said lots are delineated and so designated upon that certain map entitled 'La Loma Park, Berkeley, Alameda county, Cal.,' filed November 12, 1900, in the office of the county recorder of said county of Alameda."

It was found by the trial court that the intestate paid to the city treasurer and tax collector of the city of Berkeley the sum of $996.87 for the redemption of the identical property described in the contract, that the property was thereby redeemed, and that the contract was fully performed. From this sum were deducted the amounts of two of the three counterclaims pleaded by appellants, and judgment for the difference with interest was entered in the sum of $1,345.21.

Appellants specify as error the admission over objection of certain tax receipts as evidence that the payments made by deceased applied to the taxes assessed against the property described, and the admission of other evidence, oral and documentary, for the same purpose, the refusal of the court at the trial to permit appellants by amendment to their answer to plead and prove as a fourth counterclaim a judgment for costs entered in another action subsequent to the filing of the complaint and answer in the instant case, and the conclusion of the court that an attorney who participated in the proceedings at the trial was authorized to appear and act for respondent.

The fact that the deceased made the payments to the city treasurer and tax collector of the city of Berkeley in the amount found by the court is fully supported by his testimony given on the first trial of the action, which testimony was read at the subsequent hearing. One of the grounds upon which the original judgment was reversed on appeal was the fact that it appeared from the tax receipt, offered in evidence to prove that lots 25 and 26 of La Loma Park had been redeemed from the tax sale referred to in the contract, that the property therein mentioned was described as lots 25 and 26 of block 2242 of La Loma Park, and, no other evidence having been offered at the first trial of the identity of the latter parcels with those described in the contract, it was held that the evidence was insufficient to support the burden which rested upon plaintiff of showing that the tax receipt referred to the property in controversy. At the second trial plaintiff undertook to establish the fact by testimony of public officers in connection with certain public records. A map, certified by the county recorder of the county of Alameda to be a full, true, and correct copy of the original map of "La Loma Park, Berkeley, Alameda county, California," on file in his office, was admitted in evidence over the objection of appellants that the copy was not the best evidence. This document, a photographic copy of which is attached to the transcript, shows that the original map, as recited in the contract, was filed in that office on November 12, 1900, and conformed to the requirements of the Act of 1893 (Stats. 1893, p. 96), providing for the filing in the office of the county recorder of the county in which the subdivision is situated of all maps of subdivisions of land into lots for purposes of sale. Section 131 of the County Government Act of 1897 (Stats. 1897, p. 452), which applied to the office mentioned at the time the map was filed, provided that:

> "All books of record, maps, charts, surveys, and other papers on file in the recorder's office, must, during office hours, be open for inspection by any person, without charge; and the recorder must arrange the books of record and indices in his office in such suitable places as to facilitate their inspection."

This section was re-enacted in 1907 (Stats. 1907, p. 395), as section 4142 of the Political Code.

[1, 2] While the mere fact that a document is in a public office or in the custody of a public officer does not make it a public record, where, as here, the document relates to matters in which the public at large or the community may have an interest, and for whose protection the law requires it to be filed, a map prepared, acknowledged, and filed in accordance with the act mentioned may reasonably be held to constitute a public writing within the meaning of subdivision 2 of section 1888 of the Code of Civil Procedure (Colton L. & W. Co. v. Swartz, 99 Cal. 278, 285, 33 P. 878), which every citizen has a right to inspect (Pol. Code, § 4142; Code Civ. Proc. § 1892), and of which a copy certified by the county recorder is admissible with like effect as the original (Code Civ. Proc. § 1893). It appears from this map that La Loma Park is not divided into blocks, but consists of certain lots designated thereon by number from 1 to 27, inclusive, and that the number 2242 appearing in the tax receipt mentioned as a block number is not shown thereon. The meaning and purpose of this number in the tax receipt was clearly shown by the testimony of the city assessor of the city of Berkeley, who produced what is known as the block book used by that officer in making assessments upon land within the municipality, upon a page of which appeared a copy or tracing of a portion of the map of La Loma Park mentioned above, the lots here in question being shown thereon. Upon the margin of the copy or tracing mentioned appeared the figures 2242, which, as testified by the officer, was a number used to locate the map in the book mentioned, the block designated by that number in the tax receipt referring to the assessor's block book, and not to a block so numbered on the map of La Loma Park.

[3] It was further shown by the testimony of the city treasurer of the city of Berkeley and from the original records of that office, which were produced and read at the trial, that the amounts assessed against the lots last mentioned, and two lots numbered 17 and 19 of Daley's Scenic Park, from the year 1911 to 1915, inclusive, with the accrued penalties, had been paid; in addition to which testimony tax receipts of the municipality for the year 1916, acknowledging payment of taxes upon the same parcels, were introduced in evidence. The description of the lots in the latter tract contained in the public record and tax receipts mentioned was as follows: "Description of real estate. Lots 17 and 19, block 15/2196." It is urged in this connection by appellants that the record and receipts referred to a block numbered "15/2196," and should be so construed, that this evidence was irrelevant and insufficient to prove the payment of taxes assessed against lots in block 15, and that an objection to its admission should have been sustained.

While the map of the latter tract was not introduced and no direct evidence on the point was offered, the evidence adduced for the purpose of showing payment of the taxes assessed against the La Loma Park property sufficiently shows that for the more convenient conduct of the offices concerned with the assessment and collection of taxes a block number was inserted in the records of assessments and tax receipts corresponding to the map number in the block book of the assessor, which had no reference to the map of the tract assessed on file in the office of the county recorder. This evidence, taken in connection with the form in which the description quoted appears, fairly supports the conclusion that the figures 2196 refer to the block book and not to the original map, and sustains the construction placed thereon by the trial court.

[4-6] By their third counterclaim appellants sought to recover the sum of $419.30 upon the following facts: While title to the property described was in litigation a portion thereof was occupied by a tenant holding under appellant Ella M. Murphy at a monthly rental of $40. Deceased, who asserted title thereto, assigned his claim to the rent to one Kelly, who brought suit therefor against the tenant and recovered judgment in the sum of $400 with costs. It was alleged that the judgment had been paid to deceased, and appellant thereby deprived of the rents in the amount so recovered. The judgment roll in that action having been admitted in evidence, appellant Herman Murphy testified that neither he nor his wife had received the rents mentioned; and the witness was then asked whether the tenant had stated any reason for his refusal to pay. The court sustained an objection to the question, and its ruling is assigned as error. The court in passing upon the sufficiency of this counterclaim in Miller v. Murphy, supra, said:

> "The third item of counterclaim is ambiguously pleaded and it is difficult to determine whether defendant seeks to recover for a tort, or on an implied contract for money belonging to the defendants, which plaintiff had and received to his own use. Treating defendants' pleading as a waiver of the tort and a claim on the implied contract to a refund of the money so received, we are of the opinion that the set-off may be allowed if the evidence supports it."

The purpose of the question was to prove statements from the tenant from which the conclusion might be drawn that the rents or the amount of the judgment therefor had been received by the deceased or his assignee. In the absence of proof or an offer to prove that such statements were made in the presence of the deceased or his representative, the testimony sought to be elicited from the witness was hearsay, and the objection on the ground of its incompetency was properly sustained. It not being contended that appellants' rights against the tenant were concluded by the judgment obtained by Kelly, and no competent evidence having been adduced of the receipt by the intestate, his representative, or his assignee of any part of the rents mentioned, the finding against the allegations of the counterclaim was proper. To recover in assumpsit against a tort-feasor it must appear that he has received a benefit from the wrongful act (Minor v. Baldridge, 123 Cal. 187, 55 P. 783), and that such benefit was taken from the plaintiff (Woodward, Quasi Contracts, §§ 272, 274).

[7, 8] During the course of the trial appellants moved for leave to file a supplemental answer and plead as a set-off a certain judgment for costs entered in the superior court of the city and county of San Francisco on April 18, 1919, in favor of appellants and against the deceased, which motion was denied. More than two years appear to have elapsed between the determination of the appeal mentioned and the second trial of the action, which afforded ample opportunity for such amendments as were made proper by existing facts; and where, as here, the discretion of the court is not shown to have been abused, its action in denying the motion will not be disturbed. Trower v. City and County of San Francisco, 157 Cal. 762, 109 P. 617; Maltby v. Conklin, 50 Cal. App. 201, 208, 195 P. 280; Slankard v. Wagnon, 181 Cal. 135, 183 P. 562.

[9] Some months before the second trial an instrument was executed by Anna M. O'Connell, a daughter of the intestate, and by Mary Miller, his administratrix, the latter having theretofore been substituted as plaintiff in the action, purporting to assign all their right, title, and interest in the cause of action to Daniel O'Connell, the attorney of record in the case. This instrument was filed therein by the latter, with a written notice of his election to prosecute the action in the name of the plaintiffs, and appointing William F. Cleary, Esq., as his attorney. Subsequently notices of motion to set the cause for trial and of the date fixed therefor were served upon appellants by the attorney last named, the notices being signed by him as "attorney for the plaintiffs and assignee." While the purported assignment was admitted in evidence without objection, no evidence of the authority of the administratrix to execute the instrument having been offered, the court properly held it to be insufficient to transfer to O'Connell the interest of the estate in the cause of action, that the administratrix was the real party in interest, and its judgment was entered accordingly.

[10] It is admitted that the attorney named as assignee and who represented the original plaintiff at the first trial of the action was subsequently disbarred, and it was urged by appellants that the administratrix had not authorized the further prosecution of the action, or attorney Cleary to represent her. No evidence on this question was presented by appellants, and no direct evidence of authority to represent the administratrix appears from the record. It is not contended, however, that Mr. Cleary was not a duly licensed attorney, and therefore presumed, in the absence of evidence to the contrary, to have authority to appear for any person for whom he professed to act. Turner v. Caruthers, 17 Cal. 431; People v. Mariposa Co., 39 Cal. 683. This presumption is sufficient to support the conclusion of the trial court shown by its decision and judgment

that the administratrix was represented by this attorney in the proceedings.

Other rulings assigned as error have been considered, none of which, if erroneous, can reasonably be held to have been prejudicial; and, it appearing that the findings are fully sustained by the evidence, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

78 Cal. App. 584

SOUTHERN CALIFORNIA EDISON CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5324.)

(District Court of Appeal, Second District, Division 2, California. July 6, 1926. Rehearing Denied Aug. 2, 1926. Hearing Denied by Supreme Court Sept. 2, 1926.)

1. Master and servant 🔑416.

Petition for rehearing, on ground that award was "incorrect on facts of case," *held* sufficient under Workmen's Compensation, Insurance, and Safety Act 1917, § 65, subd. (a), cl. 3.

2. Pleading 🔑63.

In civil actions pleadings need not be couched in exact language of statute provided facts are shown bringing them within its plain intent.

3. Master and servant 🔑405(6) — Evidence held to support increased award of compensation as for temporary total disability instead of temporary partial disability (Workmen's Compensation, Insurance, and Safety Act 1917, § 20, subd. [d]).

Evidence on rehearing affecting the then condition of employee and unsuccessful attempts to work, and failure of employer to furnish treatment required by prior award, *held* sufficient under Workmen's Compensation, Insurance, and Safety Act 1917, § 20, subd. (d) (St. 1917, p. 850), to support an award for increased compensation as for temporary total disability instead of temporary partial disability.

4. Master and servant 🔑416.

Industrial Accident Commission, having reopened case on petition for rehearing, has jurisdiction to take further testimony and make such disposition as is warranted by facts.

5. Master and servant 🔑417(5).

Courts are not concerned with process of reasoning of Industrial Accident Commission, but must affirm reasonable award made within commission's jurisdiction.

6. Master and servant 🔑416—Award requiring "further medical treatment necessary to cure and relieve" employee, as indicated by testimony, held not unenforceable for uncertainty.

Award of compensation requiring employer to furnish employee "further medical treatment necessary to cure and relieve him of the conditions from which he is now suffering, as indicated in the testimony of Dr. H. H. M.—— at hearing on July 29, 1924," *held* not so uncertain as to be unenforceable, in view of doctor's testimony.

7. Master and servant 🔑405(6).

Evidence *held* to support finding that in view of open labor market conditions, employee's injury had caused temporary total disability.

8. Master and servant 🔑416.

Finding of temporary total disability on rehearing, based on facts then developed, *held* not inconsistent with prior finding of temporary partial disability, nor objectionable as attempt to correct error.

9. Master and servant 🔑416.

Supplemental award may not be used to correct errors in original award.

Supplemental proceedings under Workmen's Compensation, Insurance, and Safety Act 1917, by Nick Spanovich, claimant, opposed by the Southern California Edison Company, employer. To review and annul an order of the Industrial Accident Commission allowing compensation subsequent to an order terminating payments under previous findings and award, the employer brings certiorari. Writ discharged, and award affirmed.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CRAIG, J. The petitioner seeks by certiorari to review supplemental proceedings of the Industrial Accident Commission and to annul the resultant order allowing compensation subsequently to an order terminating payments under previous findings and award.

The respondent Spanovich was injured on March 28, 1922, while in the employ of the petitioner herein. On August 28, 1924, after various hearings, he was awarded by the respondent commission compensation in the sum of $227.24, payable forthwith, and weekly payments of $8.65. The award also directed "that defendant (petitioner here) furnish to applicant the further medical treatment necessary to cure and relieve him of the conditions from which he is now suffering, as indicated in the testimony of Dr. H. H. Markel at the hearing on July 29, 1924." The employer thereafter sought a rehearing upon the award so granted, and, a rehearing having been denied, proceeded to make payments in accordance with the original order.

From oral testimony and written reports of physicians and surgeons it appears that the award of August 28, 1924, was based upon evidence tending to show that the employee was so seriously injured that, although he repeatedly sought light work, it was impossible for him to continue more than a few days at a time on account of severe pains caused by the injuries. A brief history of the case seems requisite to a clear understanding of the findings and orders of the Industrial Accident Commission which are here presented for consideration. We recite the facts concisely as summarized by Dr. John D. Gillis, who, it may be noted, reported adversely to the applicant's petition for award. After three months no improvement; using various medicines internally and externally; lost his job; sent to doctor at Fresno, then to San Francisco; body cast applied and retained for 16 days; sent to hospital, and under anesthetic another cast applied; no improvement after 30 days; procured light work; pain persisted; again tried light work, but unable to continue; reported to free clinic for two months, procured light work, but finally reported back for treatment; provided with back brace, but could not work with brace on, could not work without it; came to Los Angeles in December; "there is no appreciable change in his condition." Numerous examinations by X-ray and otherwise were made by doctors at various places, from all of which it appeared that there was no focal infection or cause for arthritis; "no arthritis."

Thereafter, and on May 20, 1925, the respondent commission called a supplemental hearing, pursuant to the oral request of petitioner herein, but without a petition in writing therefor, notifying the parties that it would be held on June 2, 1925. On the latter date the applicant appeared in person, without a representative, and the official report recites, "Defendant represented by its C. H. Chandler, Esq." The referee held a brief informal conversation with Spanovich concerning the experiment of removing his tonsils, but the latter stated that he had been advised by a physician that this should not be done. No testimony was taken, nor was the subject of work mentioned. A report of Dr. Gillis was filed wherein the doctor related in detail all of the facts heretofore mentioned, and in addition thereto stated:

> "There is no appreciable change in his condition during the last three years; he still has almost continuous pain in the lower left back, which is markedly aggravated when he bends forward, or when he stands erect for any length of time; he has been examined by various doctors throughout the state. He believes at this time he could do light work if procurable."

Dr. Gillis recommended that the employee's teeth be examined, "since they are probably acting as a foci infection. There may be other foci, but I have been unable to locate them. He should continue doing work within his limits since by so doing he will have less time to think about his continuous ache in the lower left back." Upon the foregoing statement Dr. H. E. Southworth reported in writing: It is evident from the doctor's report that he is of the opinion that this applicant is suffering from chronic arthritis involving the left sacro-iliac and lumbo-sacral joints. The doctor is of the opinion that recovery from injury of March 28, 1922, is complete at the present time, and that present disability is the direct result of a metastic infection depending upon a focus in a distant part of the body." Spanovich remarked: "As far as the operation goes, I wouldn't care, if I could get cured."

No evidence was offered at the supplemental hearing in behalf of the employee, nor was the record of previous hearings upon which the award was based before the commission. The matter was submitted for decision, and on July 15, 1925, an order was filed, reciting that, "Good cause appearing therefor, it is ordered that payments under findings and award be terminated as of June 15, 1925."

On August 13, 1925, the respondent employee filed a petition for rehearing, alleging that:

> "The order terminating payments under findings and award is incorrect on the facts of the case; that the medical reports, as he is informed and believes, show that while there is an arthritis of the hip joint, that that arthritis was not an infectious arthritis, but was an arthritis caused, exacerbated, and increased by reason of his injury. And in support of his condition your petitioner is filing report of Dr. H. H. Markel, who treated your petitioner long prior to the examination made by Dr. Gillis of Los Angeles, and has since made examination and report."

The accompanying report of Dr. Markel stated in part:

> "In my opinion Mr. Spanovich is still suffering from the effects of the injury which he originally sustained in 1922. At that time he tore loose the left sacro-iliac joint, which has, in my opinion, never been properly treated."

A rehearing was granted, and on December 8, 1925, and January 14, 1926, oral and documentary evidence, including the testimony of Spanovich, was received. The commission thereupon prepared and filed findings which recited that the period of temporary partial disability as found in the prior decision continued up to and including the 8th day of August, 1924; "that the injury, the subject-matter of the proceeding, also caused temporary total disability, in view of the conditions of the open labor market, continuing from August 28, 1924, indefinitely entitling the employee to $17.29 a week during said time. Amount accrued to January 14, 1926 (72 weeks) is $1,244.88. On account thereof defendant has paid weekly indemnity at the rate of $8.65 a week up to and including June 15, 1925 (41⅓ weeks), amounting to $359.59, balance due as of said date, January 14, 1926,

$885.29." A supplemental award was accordingly made in the sum of $885.29, payable forthwith, and "the further sum of $17.29 a week beginning with the 15th day of January, 1926, and continuing thereafter until the termination of the disability or the further order of this commission."

[1] The petitioner contends that the commission was without jurisdiction to grant the rehearing for the reason that the petition therefor did not specify, as required by section 65 (a) of the Industrial Accident, Insurance, and Safety Act (St. 1917, p. 875), either "(3) that the evidence does not justify the findings of fact"; "(4) that the applicant has discovered new evidence, material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing;" or "(5) that the findings of fact do not support the order, decision, or award."

It should be noted at the outset that the employee did not petition for rehearing upon the ground of newly discovered evidence. He demanded such rehearing upon the ground that "the order terminating payments under findings and award is incorrect on the facts of the case," and this we think was amply sufficient to state the sole ground upon which a rehearing could be asked, for the reason that no findings of fact were filed and the order was obviously contrary to the uncontradicted evidence contained in the record.

[2] It is unnecessary to cite authorities for the rule that pleadings in civil actions need not be couched in the exact language of the statute provided sufficient facts be shown to bring them within its plain intent. The petition for rehearing specifically alleged, further, "that the medical reports, as he is informed and believes, show that while there is an arthritis of the hip joint, that that arthritis was not an infectious arthritis but was an arthritis caused, exacerbated, and increased by reason of his injury." In granting the rehearing by order dated September 3, 1925, the commission accepted the petition therefor as a sufficient compliance with the third clause of subdivision (a) of section 65, above quoted, recited the fact that an operation had previously been ordered, including the treatment suggested by Dr. Markel, and directed, "the defendant having neglected to furnish said medical and surgical care, that applicant is entitled to secure said medical and surgical care from any competent physician and surgeon of his own selection, and that defendant will be liable for the reasonable value of said medical care, together with full compensation for the period of total disability caused by said medical care." The defendant, petitioner herein, sought a rehearing upon this latter order, which was denied. In view of the fact that the petitioner failed to obey the order of the commission in the first instance, and no findings were filed with the order terminating payments, we think the petition for rehearing was sufficient, and that the commission acted within its jurisdiction in granting it.

[3, 4] The second point presented by petitioner is that the commission acted in excess of its jurisdiction in awarding upon rehearing an "increased compensation" over that originally fixed, without evidence tending to show any increase of disability as required by section 20 (d) of the act in question. We think that under the circumstances presented an increase of the award was authorized. The finding supporting the first order was that the employee had sustained a permanent partial disability, and for this he was awarded $8.65 per week, and the employer was required to furnish treatments and care of a physician, including a necessary operation. The finding upon which the supplemental order was based, and which finding resulted from the taking of additional evidence concerning the then condition of the employee, the unsuccessful attempts to work since the making of the first order, and the failure of the employer to furnish the treatment as required, was that the employee was then under a temporary total disability. With this change in the condition of the employee it was entirely proper and obviously necessary that the commission should allow a greater compensation than before, and the amount was therefore increased to $17.29 per week. It is quite possible that the failure of the employer to supply the treatments at first required was in part or wholly responsible for the change in the condition of the employee for the worse. But without regard to the cause of the change, it is enough that conditions were so altered as to justify, in the opinion of the commission, the increased compensation. As was said in National Engineering Corp. v. Industrial Accident Comm., 193 Cal. 422, 427, 225 P. 2, 4, having reopened the case, the commission had jurisdiction "to take further testimony and make such disposition of the matter as should be warranted by the facts developed on such re-examination."

[5] The court is not concerned with the process of reasoning whereby the Industrial Accident Commission may arrive at its conclusions. So long as it shall act within its jurisdiction, and its award is not unreasonable, it must be affirmed.

> "The underlying principle upon which the Workmen's Compensation Act rests is, as its title indicates, the providing of compensation to an employee for injuries resulting from his employment. It emanates from the economic thought that personal injury losses incident to an industry are a part of the costs of production to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398." Union Iron Works v. Industrial Accident Comm., 190 Cal. 33, 39, 210 P. 410, 413.

The losses incident to the industry in the instant case consisted of the expenses of sustenance of the injured employee, and of medical and surgical treatment. We cannot say that the method of compensation or the amount as determined by the commission was in excess of its jurisdiction.

[6] The petitioner asserts that the original award was so uncertain as to the amount of allowance for the operation, the services to be performed, and to whom it should be paid, that it was unenforceable. Dr. Markel testified that he would favor an operation; "immobilization, putting a bone graft across the sacro-iliac joint, known as the Smith-Peterson operation"; "it takes a good many months after such an operation, but it ought to give him a cure. If, however, the sacralized transverse processes were found to be absolutely at fault, they could be cut off." The original award directed that petitioner furnish the applicant with further treatment "as indicated in the testimony of Dr. H. H. Markel." The expenses of such on operation could not, perhaps, be determined in advance, but the procedure in such cases was outlined in Grand Union Hotel v. Industrial Accident Comm., 67 Cal. App. 123, 125, 226 P. 948. In that case the operation had not been performed at the time of the hearing, but it was stipulated that the employer would defray the expense if finally determined to be liable therefor. The employee was compelled to enter a hospital on his own account, and though the operation bills for medical services were submitted to the employer, who declined to pay them. A hearing was thereupon called, evidence introduced, and an order allowing supplemental medical expenses was made, which was affirmed. The reasonable cost of the operation need not, in the instant case, have been fixed in advance, nor was it necessary that the name of the hospital be determined at the time of the first hearing, as a condition precedent to the making of an award. The award was not therefore functus officio because this was not done.

[7] It is further contended that the decision of the commission was void because there was no evidence tending to support the finding that in view of the conditions of the open labor market the employee's injury caused temporary total disability continuing from August 28, 1924, indefinitely. As we have seen, even granting petitioner the most favorable view of the question by accepting the report of Dr. Gillis, who intimated in substance that, although the employee was incapacitated, some sort of employment might enable him to forget his distress, it appears therefrom that Spanovich was utterly unable to compete in the open labor market for any kind of means of livelihood. The inevitable conclusion is that he was, at least temporarily, totally disabled.

[8, 9] Another contention advanced by petitioner is that the finding of temporary total disability from August 28, 1924, indefinitely, is inconsistent with the original finding of temporary partial disability from September 30, 1923, indefinitely. This argument furnishes its own answer, since admittedly the commission decided that the temporary disability was indefinite. At the time of the first award it appeared that the employee was temporarily partially disabled, but such finding was, of necessity, based upon the showing as of that date, in anticipation of an operation. Upon rehearing it appeared without conflict that no operation had been performed, that the employee had been unable to do any remunerative work, and was therefore totally disabled from August 28, 1924—a year later than the showing of partial disability. We think the question is appropriately met by the language used in Grand Union Hotel v. Industrial Accident Comm., 67 Cal. App. 123, 128, 226 P. 948, 949:

> "It is true, of course, that supplemental awards may not be used for the purpose of correcting errors in the original award (Georgia Casualty Co. v. Industrial Accident Comm. [177 Cal. 289, 170 P. 625] supra; McBride v. Industrial Accident Comm. [182 Cal. 407, 187 P. 1050] supra), and if the expenses in dispute here had been incurred prior to the submission of the case to the Industrial Accident Commission, but, nevertheless, through error, said commission had failed to make an allowance therefor, or if applicant had neglected to prove such expenses before the commission, although they had occurred prior to the date of the hearing, no supplemental award could have accomplished the purpose of correcting the error. But in the present case, the decision having reference only to the facts as they existed at the date of the submission of the case to the Industrial Accident Commission, the expenses incurred later and the conditions which occurred later making such expenses necessary constituted such a change in the situation of the injured man as to empower the commission to do justice by him under the provisions of section 20 (d) of the act. Any other construction of the act would be contrary to its spirit and would result in hardship and injustice to an applicant without fault on his part."

Petitioner incidentally asserts that past errors were attempted to be corrected in the instant case, but there is no evidence of the commission having committed, or attempted to correct, error. Admitting for the sake of argument that the order terminating payments was erroneous because the whole record was not considered, yet the award under consideration was not made to rectify error, but was granted pursuant to rehearing. It was not supplemental to the order terminating payments. The order itself was subject to a petition for rehearing during the period of 20 days.

The writ is discharged and the award affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

FRATERS GLASS & PAINT CO. et al. v. SOUTHWESTERN CONST. CO. et al. (Civ. 5307.)

(District Court of Appeal, First District, Division 1, California. June 25, 1926.)[1]

1. Contracts 🔑147(1).

The true interpretation of every instrument is that making it speak the intention of the party when it was made.

2. Evidence 🔑455—Conversations during negotiations may be shown in construing contract, in case of doubt as to meaning of words (Code Civ. Proc. §§ 1860, 1861).

In case of doubt as to meaning of words in contract, circumstances when made, what parties intended, and hence conversations and declarations during negotiations, may be shown, in view of Code Civ. Proc. §§ 1860, 1861.

3. Evidence 🔑455—Extrinsic evidence held admissible in construing ambiguous waiver of lien rights.

Where ambiguity arose in agreement between materialmen and sureties of contractor that materialmen would wait a specified time for payment, "Waiving our lien rights" as to waiver of recourse against sureties, extrinsic evidence was admissible to show circumstances, and to apply words according to parties' intent.

4. Appeal and error 🔑1010(1)—To set aside finding of waiver of lien, appellant must show that finding is not supported.

To authorize setting aside finding that materialman, by agreement with contractor's sureties on bond given under Code Civ. Proc. § 1183, intended to waive rights against them, appellant must show that the finding is not supported by evidence by the record.

5. Appeal and error 🔑907(3).

In absence of transcript of evidence or bill of exceptions, it will be presumed that the evidence was competent, material, received without objection, and sufficient to sustain the findings.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action to foreclose mechanics' liens by the Fraters Glass & Paint Company and others against the Southwestern Construction Company and others. Judgment in favor of defendants Patten against the named plaintiff, and it appeals. Affirmed.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Jones & Weller, of Los Angeles, for respondents.

KNIGHT, J. Appellant, Fraters Glass & Paint Company, a corporation, and others brought this action to foreclose certain mechanics' liens filed by them to secure payment of claims for labor and materials furnished in the construction of a building in the city of Los Angeles, the complaint containing several counts. Although the contractor and the owner were joined as parties defendant with respondents Henry S. and F. W. Patten, who were the sureties on the materialmen's bond given pursuant to section 1183 of the Code of Civil Procedure, liability for the payment of appellant's claim, which alone constitutes the subject of this appeal, was urged solely against respondents, and judgment was awarded in their favor.

The bond provided in part that:

> "* * * All such persons (for whose benefit the same was given) shall have and are given a right of action to recover upon this bond against the said principal and sureties, or either of them, in any suit brought to foreclose mechanics' liens, which may be filed by such persons, or any of them, upon the property mentioned in said contract, or in a separate suit brought upon this bond, and may recover in such action or actions the value of such labor done or materials furnished, or both. * * *"

The total amount for which appellant sued, including a small item of cost incurred in filing the lien, was $5,142. Respondents denied liability to the extent of $4,000, upon the ground that they were induced to become sureties on said bond under an agreement with appellant to the effect that the latter would waive recourse against them for the payment of the sum last mentioned. Upon the issues of fact raised by this defense the trial court found in respondents' favor as follows:

> "That as a part of the consideration for their entering into the undertaking mentioned in paragraph V of said plaintiff's complaint, and as an inducement to said defendants Henry S. Patten and F. W. Patten to execute said undertaking, said plaintiff Fraters Glass & Paint Company did on the 26th day of April, 1921, and prior to the signing of said undertaking by said defendants, execute and deliver to said defendants an agreement in the words and figures following, to wit: 'April 26, 1921. Mr. Henry Patten, Patten & Davies Lumber Co., Los Angeles, California—Dear Sir: In connection with the contract between the Southwestern Construction Company and E. B. Rivers, for a building at Seventh and Central, we agree to furnish glass as arranged with Harry E. Martin, to cost approximately $4,000, and to wait 35 days after the completion of said building for payment of same, waiving our lien rights. We are doing this, of course, to help Mr. Martin in this deal and are confident that it will be carried to a successful completion. Very truly yours, Fraters Glass & Paint Co., by J. A. Fraters, Pres.,' and that defendants relied thereon in executing said undertaking. That it was the intent and purpose of the said plaintiff, by the execution of said writing, to relieve said defendants of the burden of the said undertaking to the extent of the said sum of $4,000 therein mentioned, and that it did thereby waive recourse on said defendants to the extent of said sum of $4,000, the balance due said plaintiff from the Southwestern Construction Company."

---

[1] Superseded by opinion of Supreme Court, see 254 P. 1097.

From the facts thus found the court held that appellant was not entitled to any lien or to recover from these respondents any sum of money whatever, and judgment was entered accordingly.

The sole question presented by the appeal is, as appellant states it, whether, by the execution of the agreement set forth in the findings, "appellant intended to and did waive, not only its right to file and foreclose a mechanics' lien, but also its right to recover from the sureties on the contractor's bond," appellant claiming in this respect that notwithstanding that it may have waived its right to file and foreclose a lien, it retained a right of recovery against the sureties under the provisions of the bond (General Electric Co. v. American Bonding Co., 180 Cal. 675, 182 P. 444); and that such was the intent and effect of its agreement.

[1, 2] The case of Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876, quotes approvingly the following language from a case decided in another jurisdiction:

> "The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself,"

—following which our Supreme Court said:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. Code Civ. Proc. §§ 1860, 1861; (City of) Atlanta v. Schmeltzer, 83 Ga. 609 (10 S. E. 543); Keller v. Webb, 125 Mass. 88, 28 Am. Rep. 209; Long v. Long, 44 Mo. App. 141; Swett v. Shumway, 102 Mass. 365, 3 Am. Rep. 471."

[3] In view of the ambiguity arising from the agreement involved in the instant case by reason of the use therein of the words "waiving our lien rights," it was necessary and proper for the trial court, under the rules above mentioned, to receive extrinsic evidence for the purpose of showing the circumstances under which the language of said agreement was used, and applying it according to the intentions of the parties. It appears that such evidence was adduced, from which, as well as from the terms of the agreement itself, the court determined as a fact that:

> "It was the intent and purpose of the said plaintiff, by the execution of said writing, to relieve said defendants of the burden of said undertaking to the extent of the sum of $4,000. * * *"

This finding, which is evidently the controlling one in the case, is binding on appeal, unless appellant has shown by the record that the same is not supported by the evidence. This the appellant has failed to do.

[4, 5] The record upon which the appeal is taken does not purport to contain any of the evidence. It consists merely of a "stipulation of facts" setting forth the execution and the copies of the bonds upon which appellant is seeking to recover, together with a statement of the manner in which the money received by the contractor for the performance of the work was deposited and disbursed, and concludes:

> "It is further stipulated that the foregoing matter be settled as a bill of exceptions."

The trial court attached thereto the following certificate:

> "The foregoing stipulation of facts is hereby settled and allowed as a bill of exceptions and the clerk is hereby instructed to file the same, provided, however, that *it is to be noted that the foregoing are not all of the materials, facts,* (doubtless meaning material facts) *or evidence in the case.* [Signed] Elliot Craig, Judge. Dated May 3, 1923." (Italics ours.)

As above indicated said stipulation contained none of the extrinsic evidence above alluded to nor any specification of insufficiency thereof. In that state of the record it is beyond the power of this court to interfere with the trial court's findings. To charge in the brief merely, as appellant has done, that respondents have "failed to sustain the burden resting upon them, of showing that it was the intention of the parties that plaintiff should waive all rights of recovery except as against the contractor," and also that surrounding circumstances as shown by the record do not tend to support the theory that appellant intended to waive all rights and claims against the sureties, is not enough. Appellant is required to point out in the record evidence or lack of evidence showing that the finding assailed is not supported by evidence (Robben v. Benson, 43 Cal. App. 204, 185 P. 200); and in the absence of any transcript of the evidence or bill of exceptions containing the same, or specifying the insufficiency thereof, it will be presumed that the evidence adduced was competent and material to the issues, was received without objection, and was sufficient to sustain the facts found (2 Cal. Jur. 877; Cooney v. Gray, 49 Cal. App. 664, 194 P. 61, citing cases; Shuken v. Cohen, 179 Cal. 279, 176 P. 447).

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

ALLYNE et al. v. MURASKY, Judge, et al. (Civ. 5430.)

(District Court of Appeal, First District, Division 1, California. June 17, 1926.)[1]

1. Dismissal and nonsuit 🔑60(1)—Statute providing for dismissal of action, unless brought to trial within five years, should be construed so as to bring within its scope every case within its spirit and policy (Code Civ. Proc. § 583).

Code Civ. Proc. § 583, providing that action shall be dismissed, unless brought to trial within five years after answer is filed, except where parties have stipulated that time may be extended, is remedial, and should be construed with reference to its object, to cover entire subject and to prevent unreasonable delay, and so as to bring within its scope every case within its spirit and policy.

2. Statutes 🔑185.

Whatever is necessarily implied in a statute is as much a part of it as that which is expressed.

3. Statutes 🔑183.

When intention of statute is plainly discernible in its provisions, that intention is as obligatory as letter of statute, and will even prevail over its strict letter.

4. Dismissal and nonsuit 🔑60(1).

Code Civ. Proc. § 583, providing that action not brought to trial within five years shall be dismissed, in absence of stipulation extending time, applies where delay follows granting of new trial, is mandatory, and applies without regard to merits of cause.

5. Mandamus 🔑182.

The rule requiring peremptory writ of mandate to conform to the alternative writ is to be applied with fairness and justice.

6. Mandamus 🔑180.

Where all defendants moved for dismissal, because action was not brought to trial within five years, but administrator of one did not join petition for writ of mandate to require dismissal, that alternative writ required dismissal of action does not preclude peremptory writ as to petitioners.

Application by Lucy H. Allyne and others for writ of mandate, to be directed to Frank J. Murasky, Judge of the Superior Court of the State of California in and for the City and County of San Francisco, and another, directing the dismissal of an action pending in said court. Peremptory writ granted.

Leicester & Leicester, of San Francisco, for petitioners.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for respondents.

CASHIN, J. A petition for a peremptory writ of mandate, directing the superior court in and for the city and county of San Francisco to dismiss an action therein pending, in which petitioners and another not a party to this proceeding are defendants. According to the averments of the petition—which are not denied—the action was commenced on December 31, 1910, against all persons claiming an interest in or lien upon several pieces of real property therein described, including a lot or parcel known as Emmet place. The answers of defendants were filed on March 11, 1911, admitting plaintiff's claim of ownership and his right to the possession of the land described other than Emmet place, which was alleged to be an open public highway or street, over which defendants claimed rights of way to and from adjoining lots owned by them.

The cause was tried on July 17, 1913, and a decree entered on November 29, 1913, adjudging the plaintiff to be the owner of all the lands described in the complaint, with the exception of Emmet place, and as to the latter that he was the owner of the westerly 39 feet thereof, but that the whole thereof was subject to rights of way thereover in all the defendants mentioned, and further adjudging this parcel to be a public street or alley. Thereafter, upon motion by plaintiff, a new trial of the action was granted, and the order therefor entered on October 18, 1916. No further action was taken therein by any of the parties until September 24, 1925, when a notice of motion to dismiss, upon the ground that plaintiff had failed for more than five years to prosecute the action or bring the same to trial, was served and filed by defendants. On September 28, 1925, plaintiff filed his motion to set the cause for trial, following which the motion to dismiss was denied, and that by plaintiff granted.

In addition to the usual prayer for relief, the petition contains the further prayer that "petitioners have such further or different relief as, the premises being considered, shall to the court seem meet and proper." It appears that between the date of the entry of the order granting a new trial and the filing of the motion to dismiss approximately nine years elapsed, during which no trial of the action was had or stipulation made extending the time therefor.

In opposition to the motion to dismiss an affidavit by plaintiff was filed, alleging that since the construction of what is known as the Stockton street tunnel Emmet place is several feet above the level of Stockton street, to which it formerly gave access, and can now serve no public purpose or convenience; that Mary J. Kelly, one of the original defendants, and who owned one of the lots abutting on Emmet place, for the benefit of which a right of way thereover is claimed, died on March 18, 1916, and that her estate is in course of administration; that plaintiff had from time to time negotiated with her administrator for the purchase of the lot last mentioned, such negotiations having as yet

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Superseded by opinion of Supreme Court, see 254 P. 564.

been unsuccessful, with the intention upon its purchase to apply to the city and county of San Francisco for the relinquishment of its claimed right over Emmet place and the abandonment of the latter as a public street or alley.

It is not claimed that the negotiations mentioned led plaintiff to believe that defendants, or any of them, consented to an extension of the time for trial, or thereby or otherwise waived any right given by statute to move for a dismissal. It is contended by respondent that, the action having been once tried within five years after the filing of the answers, the mandatory provisions of section 583 of the Code of Civil Procedure had no application; that the granting or denial of the motion was therefore within the sound discretion of the court; that, the action being one to quiet the title to lands in which the defendants claimed no interest other than as to the one parcel mentioned, the motion was properly denied; and that, the alternative writ having required a dismissal of "the action," a peremptory writ directing a dismissal as to such parcel or of the action as to petitioners—the administrator mentioned not having joined in this proceeding—cannot be granted.

[1-3] In City of Los Angeles v. Superior Court, 185 Cal. 405, 197 P. 79, a proceeding in mandamus to compel the dismissal of an action, five years having elapsed since the filing of the answer, it was contended by the respondent that, it appearing that the period had been extended by stipulation, which extension had also expired, the effect of the stipulation was to render the mandatory provisions of the section no longer applicable. In granting the writ the court held that the mandatory force of the statute was not destroyed by such extension, nor the right of a defendant to a dismissal after the extended period thereby affected. While the provisions of the section do not literally apply to the facts of the instant case, the statute is remedial in character, and should receive a construction, due regard being had to the language in which it is expressed, which will bring within its scope every case within its spirit and policy. As was said in Johnston v. Baker, 167 Cal. 260, 139 P. 86, the statute must be construed with reference to the object to be accomplished by it, and in City of Los Angeles v. Superior Court, supra, where, as here, the respondent urged that a literal and restrictive interpretation be given to the section, whatever is necessarily implied in a statute is as much a part of it as that which is expressed, and the statute must be construed with reference to the purpose to be served by it, and, when the intention of a statute is plainly discernible from its provisions that intention is as obligatory as the letter of the statute, and will even prevail over its strict letter.

It was the intention of the Legislature to cover by this section the entire subject of dismissals for failure to bring an action to trial after answer filed (Romero v. Snyder, 167 Cal. 216, 138 P. 1002), the purpose of the statute being to prevent unreasonable delay in the determination of causes at issue both as a matter of public policy and of private concern to the litigants (City of Los Angeles v. Superior Court, supra; Bell v. Solomons, 162 Cal. 105, 109, 121 P. 377).

[4] The failure to bring an action to trial within the maximum period fixed by the provisions of the section, whether such period follows the filing of an answer or the entry of an order granting a new trial, results in either event in a delay in the determination of the cause which it was the purpose of the statute to prevent. In view of this purpose, and the aim of the Legislature to make full provision therein for the dismissal of causes at issue wherein such delays occur, the intention that its mandatory provisions should, in the absence of an extension by stipulation, apply to cases where the delay follows the granting of a new trial is clearly implied therefrom.

That defendants claim no interest in the land described in the complaint, other than to the one parcel mentioned, though a fact to be considered in a case involving the discretionary power of the court (Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 P. 344; Ferris v. Wood, 144 Cal. 426, 77 P. 1037; Merced Bank et al. v. Price, 145 Cal. 436, 78 P. 949), where the case is one within the mandatory provisions of the statute a dismissal for lack of prosecution is without regard to the merits of the cause (Bell v. Solomons, 162 Cal. 105, 109, 121 P. 377; City of Los Angeles v. Superior Court, supra); and where, as here, according to the construction given the section, its mandatory provisions apply the court was without discretion to refuse an order of dismissal (Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670; Andersen v. Superior Court, 187 Cal. 95, 200 P. 963; City of Los Angeles v. Superior Court, supra; Ravn v. Planz, 37 Cal. App. 735, 174 P. 690).

[5, 6] That the administrator of the estate of the deceased defendant did not join in this proceeding does not affect the right of petitioners to relief. It is shown by the petition and the exhibits attached thereto that a dismissal was moved by all the defendants; and while the alternative writ required a dismissal of "the action," which here the administrator has not sought, as was said in Larkin v. Superior Court, supra, the rule requiring a peremptory writ to conform to the alternative writ (Gay v. Torrance, 145 Cal. 144, 78 P. 540) "is not an iron-bound one, to be enforced by a court regardless of circumstances, but is one to be applied in consonance with principles of fairness and justice."

It appearing that the motion as to all the defendants should have been granted, and that the trial court would be compelled to dismiss the action as to petitioners, either of its own motion or on their motion hereafter made, and that the proceeding may be regarded as one wherein relief to the extent that petitioners are beneficially interested is sought, the fact that the alternative writ required a dismissal of "the action" does not preclude the court from granting the relief to which petitioners are entitled. Larkin v. Superior Court, supra; State ex rel. Babcock v. Chisago County, 115 Minn. 6, 131 N. W. 792, Ann. Cas. 1912D, 669; People ex rel. Keene v. Queens County, 142 N. Y. 271, 36 N. E. 1062.

A peremptory writ of mandate, requiring the superior court in and for the city and county of San Francisco to enter an order dismissing said action as to petitioners, is granted.

We concur: TYLER, P. J.; KNIGHT, J.

78 Cal. App. 503

PEOPLE v. WAGNER. (Cr. 893.)

(District Court of Appeal, Third District, California. June 22, 1926.)

1. Burglary ⚷41(1).

Evidence *held* to sustain conviction for burglary in the second degree.

2. Criminal law ⚷1202(1)—Indictment and Information ⚷114.

To sustain a judgment as habitual criminal under Pen. Code, § 644, indictment or information must charge it and defendant be given opportunity to plead or make defense thereto.

3. Criminal law ⚷1202(7).

Where on conviction of burglary in second degree defendant was erroneously adjudged habitual criminal, judgment will be modified by striking therefrom erroneous portion.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

George Wagner was convicted of burglary in the second degree, and he appeals. Modified, and, as modified, affirmed.

Donald McKisick and J. S. Daly, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the crime of burglary in the second degree upon an information charging as follows:

> "The said George Wagner on or about the 1st day of April, A. D. 1925, in the said county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, feloniously and burglariously enter the building used as a restaurant by one P. Koris at 1418 J. street, in the city of Sacramento, in said county of Sacramento, with the felonious intent then and there to commit the crime of larceny, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

From the testimony of the defendant during the course of the trial it developed that the defendant had suffered two previous convictions, and the court in pronouncing sentence adjudged the defendant an habitual criminal under the terms and provisions of section 644 of the Penal Code. From the judgment of the court, the defendant appeals and assigns two grounds of error: (1) That the evidence is insufficient to warrant the conviction of the defendant; and (2) that the judgment adjudging the defendant an habitual criminal is erroneous, in that there was no pleading charging the defendant with prior convictions.

[1] Upon the question as to the sufficiency of the evidence, the only matter called to the attention of the court is the alleged absence of a scar on the defendant's head. The circumstances attending the offense for which the defendant was convicted are set forth as follows: About 10 o'clock at night on April 1, 1925, the defendant and one other person were discovered attempting to break into a restaurant on J. street in the city of Sacramento. An alarm being given, officers arrived and observed a short man standing inside the restaurant near the cash register, but before he could be arrested this man emerged from the front door of the restaurant, crossed the street, and was followed by an officer named Kaminsky. The officer overtook the short man just as he started to climb a fence in an alley between I. and J. streets in said city, and in the scuffle that ensued the officer struck the defendant over the left ear with his revolver. This short man then grappled with Officer Kaminsky, succeeded in taking away the officer's revolver and making his escape. A blood-stained cap was found thereafter near the Western Pacific track. On the back porch of the restaurant was also found a coat with the name of G. Wagner on a label in one of the pockets. The defendant was identified by Kaminsky as the man with whom he had had the struggle in the alley. Upon the trial, the defendant exhibited his head to the jury to show that he had no scar. To rebut this evidence, the prosecution introduced the testimony of Dr. Binkley to the effect that there had been a scar on defendant's head about the middle of May succeeding the date of the offense. As opposed to the testimony of Dr. Binkley, appellant cites Ogstrom Lectures, Med. Jur. 425, Taylor on Medical Jurisprudence, p. 333, and Herold on Manual of Legal Medicine, p. 305, to the effect, "that if, on examining a part, where at some pre-

vious time a stab, cut or burn involving the cutis is alleged to have been inflicted, we find no mark or cicatrix, it is fair to assume that the allegation is false, and that no wound, has been inflicted." Admitting that the authors referred to were eminent physicians and surgeons, it is only necessary to state that their opinions set forth in medical treatises constituted no evidence in this case, and if the jury believed the testimony of the witnesses to which we have referred, the verdict is amply supported.

[2, 3] Section 644, Penal Code, provides:

> "Every person convicted in this state of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of the crime of robbery, burglary, rape with force and violence, arson or any of them, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years."

The information in this case charges no prior convictions. Section 969 of the Penal Code sets forth the procedure which must be followed in charging prior convictions. Section 1025 of the Penal Code sets forth the procedure that shall be had when the defendant is arraigned upon an information charging a prior conviction, and section 1093 of the same Code the procedure to be followed upon such an indictment or information when the trial of the defendant is begun.

In People v. Coleman, 145 Cal. 609, 79 P. 283, it is held that previous conviction is a question of fact, which must be both pleaded and proven, or, which is the same thing, pleaded in the information and admitted by the defendant. To the same effect is the case of People v. King, 64 Cal. 338, 30 P. 1028, People v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389, and 16 C. J. 1342. A number of additional authorities might be cited, but the necessity of such pleading is unquestioned in this state, and the foregoing authorities set forth the rule prevailing in California. Section 644 of the Penal Code was added in 1923 (Stats. 1923, p. 237), and does not appear to have received interpretation by any court of appeal in this state. We think the same rule applies where it is sought to adjudge a defendant an habitual criminal as where additional punishment is sought to be inflicted by charging a prior conviction. In the case of People v. Rosen, 208 N. Y. 169, 101 N. E. 855, the Court of Appeals of the state of New York, in a case which was brought to it from the Supreme Court holding that prior convictions need not be charged in the information in order to support a judgment adjudging a defendant guilty as an habitual criminal, under a statute similar to ours, reversed the Supreme Court as to this holding and modified the judgment of the trial court by eliminating or striking therefrom that portion of the judgment adjudging the defendant guilty as an habitual criminal, and in so holding decided as follows:

> "Under the law providing that a person who, after conviction within this state of a felony, or an attempt to commit a felony, commits any crime within this state [stating the times of conviction necessary] shall be punishable therefor by an added penalty, the prior conviction is such an element of the second offense that, in order to support a sentence for the severer punishment, it must be charged in the indictment; and information thereof developed on the examination of the accused before sentence, * * * is not sufficient."

We think that the reasoning of the Court of Appeals upon a similar statute is applicable here, and that in order to sustain a judgment as an habitual criminal it is necessary that the indictment or information charge the same and the defendant be given an opportunity to plead thereto, or make defense to such charge. We think also that the procedure followed by the Court of Appeals of the state of New York should be followed here, and it is therefore ordered that the judgment be modified by striking therefrom all that portion adjudging the defendant to be an habitual criminal, and, as so modified, the judgment stands affirmed.

We concur: FINCH, P. J.; NEEDHAM, Justice pro tem.

---

78 Cal. App. 362

HIROSHIMA v. BANK OF ITALY.
(Civ. 3026.)

(District Court of Appeal, Third District, California. June 14, 1926. Hearing Denied by Supreme Court Aug. 12, 1926.)

1. Banks and banking 🔑154(5).

In action against bank for paying check on which payment was stopped, allegations showing money on deposit, issuance of check, notice to stop payment thereof, payment of check, demand for the money, and its nonpayment, with prayer for its recovery, stated a cause of action without alleging damage.

2. Pleading 🔑72.

Code Civ. Proc. § 426, stating that, if recovery of money or damages be demanded, the amount thereof must be stated in the complaint, requires a statement of either the sum demanded or the amount of damages, not both.

3. Banks and banking 🔑154(7).

In action against bank for paying check on which payment was stopped, whether there was consideration between drawer of check and payee *held* immaterial.

4. Banks and banking 🔑139.

While relation between bank and depositor is that of creditor and debtor, bank is subject to orders of depositor in relation to payment of his check, whether or not payee is a holder in due course.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Banks and banking 🔑139.

As a general rule, the drawer of an uncertified check can stop payment at any time before the bank's acceptance of the check, and the bank has no right to pay the check after notice thereof.

6. Bills and notes 🔑22.

Stopping payment of a check does not discharge the liability of the drawer to the holder.

7. Banks and banking 🔑154(7).

In action to recover from bank amount of check paid after payment was stopped, evidence that check was given in payment for restaurant, that payee took and retained possession thereof, and that there had been no payment therefor, except by check, was properly excluded.

8. Assignments 🔑49.

Negotiable Instruments Law does not conflict or modify the rule that a check is not an assignment, nor Civ. Code, § 3265e, so declaring.

9. Banks and banking 🔑139.

Lack of consideration for agreement, in notice to stop payment of check, to release bank from all liability for noncompliance with notice, renders such agreement not binding on the maker.

10. Banks and banking 🔑139.

Bank, which paid check after being given notice to stop payment, without exercising ordinary or reasonable care, is liable, though maker agreed to release bank from liability in case of payment.

11. Banks and banking 🔑154(8)—Evidence held to show mistake of fact, rendering agreement of drawer of check to release bank from liability for payment of check on which payment had been stopped not binding (Civ. Code, § 1577).

Testimony that drawer of check was unable to read English, that notice to stop payment thereon was not read to him, and that he was told he must sign to stop payment, *held* to show a mistake of fact, within Civ. Code, § 1577, so that agreement in such notice to release defendant from liability in case of payment was not binding.

12. Banks and banking 🔑139.

Notice to stop payment of check may be verbal, in view of Civ. Code, §§ 1667, 1668, 1670, and hence written notice thereafter is merely additional identification of the check.

13. Banks and banking 🔑139—Provision of notice to stop payment of check that drawer released bank from all liability by reason of compliance or noncompliance therewith held contrary to public policy and void; "public policy."

Provision of notice to stop payment of a check, releasing bank from all liability by reason of compliance or noncompliance therewith, was contrary to public policy and void; "public policy" being the principle that no person can lawfully do what tends to injure the public, or is against the public good, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Policy.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by H. Hiroshima against the Bank of Italy to recover money paid on a check, payment of which had been ordered stopped. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis Ferrari and J. J. Posner, both of San Francisco, and McLaughlin & McLaughlin, of Sacramento, for appellant.

Henry & Bedeau, of Sacramento, for respondent.

PLUMMER, J. Plaintiff had judgment in an action against the defendant for negligently paying the amount of a check upon which payment had been ordered stopped, from which judgment the defendant appeals.

Omitting the formal parts, the complaint contains the following allegations:

"That the plaintiff on the 18th day of November, 1924, had on deposit in said bank operated and conducted in said city of Sacramento by the defendant the sum of $823.31, or thereabouts. On said 18th day of November, 1924, plaintiff drew a check against said account on deposit in said defendant's bank in favor of one M. Yamakita in the sum of $436.50; said check being postdated November 27, 1924. After the drawing and delivery of said check to said M. Yamakita, and before the same was presented to and paid by the defendant, to wit, on November 20, 1924, the plaintiff notified and instructed defendant not to pay said check when presented, and to stop payment on the same, which the defendant then and there agreed to do.

"That the defendant, contrary to said agreement hereinabove set forth, negligently and carelessly, on the 29th day of November, 1924, paid said check in full upon the same being presented by one S. Fujita, sometimes known as S. Yamakita, to whom said check had been indorsed by said M. Yamakita, as plaintiff is informed and believes. That after the payment of said check said defendant deducted and withdrew from the account of this plaintiff said sum of $436.50, and debited his account with that sum. That plaintiff has demanded of the defendant, on numerous occasions prior to the filing of this complaint, the payment and return to him of said sum of $436.50, but the said defendant refused and still refuses to do so. That by reason of the foregoing there is now due, owing, and unpaid from defendant to plaintiff the sum of $436.50.

"Wherefore plaintiff prays judgment against defendant for the sum of $436.50, for interest on said sum as is allowed by law, for his costs of suit herein expended, and for such other, further, and different relief as to the court may seem just."

To this complaint the defendant demurred, setting forth several grounds, of which the following only are urged on appeal: That said complaint does not state facts sufficient to constitute a cause of action; that the complaint is uncertain, in that it does not appear, nor can it be ascertained therefrom, whether Yamakita was or was not a holder in due course, whether or not plaintiff had been damaged by the payment of the check, whether or not plaintiff received full value as a consideration for his delivery of said check to the payee, Yamakita.

The defendant's demurrer being overruled, the answer was filed, pleading the stop notice in hæc verba, to wit:

Branch Stop Payment
Bank of Italy
Head Office: San Francisco
of check drawn by H. Hiroshima
Number 22 dated November 27th
Favor of M. Yamakita
Reason for stopping payment over paid
Date stopped 11-20 Time 3:30
The undersigned makes the foregoing request as an act of courtesy only, and hereby indemnifies you against, and releases you from all liability by reason of compliance or noncompliance therewith.
H. Hiroshima
Address
Ack. paying teller R. M.
F. M. Y.
Bookkeeper Arthur Caton
Statem't Clerk.

And also as a special defense pleaded in its answer as follows:

> "That said plaintiff, on or about the 18th day of November, 1924, purchased from M. Yamakita a restaurant located on K street in the city of Sacramento, state of California, and entered into, and has since remained, in the possession of said restaurant. That the check mentioned and described in paragraph III of the complaint herein was by plaintiff issued and delivered to said M. Yamakita in payment of the purchase price of said restaurant, and was accepted by said M. Yamakita as a full payment of said purchase price. That said M. Yamakita in the regular and due course of business indorsed, signed, and trasferred said check to S. Fujita, who paid to said M. Yamakita the amount of said check, and the payment thereof by defendant to said S. Fujita did not injure or damage the said plaintiff, who, at the time said check was received, and has ever since, and now has and retains the full value and consideration for said check."

In support of its demurrer, the appellant makes the following argument:

> "The most striking omission of the complaint is found in the absence of any allegation that plaintiff was damaged by the defendant's payment of plaintiff's check. The complaint purports to count upon a breach of the agreement not to pay a check, or upon a tort for the negligent or careless payment of said check. In either event the plaintiff should have alleged that he was damaged by the act complained of, or should have set forth how or in what manner he was damaged in the premises."

[1-4] A reference to section 426, Code of Civil Procedure, discloses a complete answer to the appellant's contention as to the sufficiency of the complaint. Here we have a statement of the facts constituting a cause of action in ordinary and concise language, to wit: The money on deposit, the issuance of the check, the giving of the stop notice and the failure of the defendant to observe the same, a demand for the money, a statement that it has not been paid, and the prayer of the complaint for the recovery of the money. The third subdivision of section 426, Code of Civil Procedure, requires a statement of either the sum of money sought to be recovered or the amount of damages, not both. The citation (8 Cal. Jur. 882) upon which the appellant relies to sustain his demurrer does not require anything further than is stated in the plaintiff's complaint. It is there said:

> "A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated. * * * The rule is sustained in many decisions that a complaint which states the facts showing the plaintiff's damage, in a manner sufficient to sustain a judgment, and concludes with a prayer for damages in a named sum, is sufficient, though it fails to contain a formal allegation that plaintiff has been damaged in a stated amount."

Here the complaint alleged that the plaintiff had so much money on deposit in defendant's bank, that the defendant wrongfully paid out a certain sum thereof, and recovery of that sum is demanded. This constitutes all the facts necessary to show that plaintiff's money has been wrongfully paid out by the defendant. Any further allegations would be surplusage. Where the payment of a certain sum of money is alleged to have been wrongfuly made, the amount of damages suffered necessarily appears from the statement of the facts thus set forth. Whether there was or was not any consideration moving between the plaintiff and Yamakita for the issuance of the check is a matter entirely collateral to the issues presented to the trial court in this action, as to whether the defendant did or did not wrongfully pay out the plaintiff's money. While the relation between the bank and a depositor is that of creditor and debtor, yet for the purpose of paying the check it was subject to the orders of the plaintiff in relation to the payment of said check, irrespective of whether Yamakita was or was not a holder in due course.

The appellant further in its argument along this line cites the cases of Unaka National Bank v. Butler, 113 Tenn. 574, 83 S. W. 655, Usher v. Tucker, 217 Mass. 444, 105 N. E. 360, L. R. A. 1917F, 826, and Raesser v. National Exc. Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979. The Unaka and Raesser Cases support the rule that, as against a holder in due course, the drawer of a check has no right to stop payment. The case of Usher v. Tucker, supra, does not support the rule, and has either been erroneously cited or incorrectly applied. In this state, where a check has been held to operate as an assignment of the funds in the bank, the two cases cited by the appellant would be authority; but such is not the case in California. Section 3265e, Civil Code, reads:

> "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

In line with this section we find the Supreme Court, in the case of Sneider v. Bank of Italy, 184 Cal. 595, 598, 194 P. 1021, 1022 (12 A. L. R. 993), thus states the law:

> "In this state a bank check is a direction by a creditor to a debtor for the disposition of funds, and it does not operate as an assignment of the funds themselves unless and until the bank accepts or certifies the check. Civ. Code, § 3265e. Consequently, the vitality of a check, at least where it has not been accepted or certified prior to the knowledge of the death of the depositor, ceases upon receipt of such knowledge by the bank, and a bank which pays such a check after knowledge of the death of the depositor is liable to the estate of the depositor. Pullen v. Placer County Bank, 138 Cal. 169 [94 Am. St. Rep. 19, 66 P. 740, 71 P. 83]; 35 Ann. Cas. 443, note; 7 C. J. 702."

[5, 6] The rule followed in this state and the one followed by the great weight of authority is stated in 7 C. J. 701, as follows:

> "As a general rule, the drawer of an uncertified check can revoke his order for the payment of his funds, or in banking phraseology 'stop payment' at any time before the bank's acceptance of the check, and the bank is bound by such revocation, and has no right to pay the check after notice thereof."

The rule, as stated in Corpus Juris, is supported by authorities too numerous to be set forth herein. That the drawer is liable to the holder of the check for the consequences of his conduct in stopping payment is a different matter. This is the point which was considered in the case of Usher v. Tucker, 217 Mass. 443, 105 N. E. 360, L. R. A. 1916F, 826, erroneously cited by appellant as supporting a different rule. The court there said:

> "It is true that the drawer may stop the payment of the check, and as between him and the bank the latter in such case pays at its peril, but such an order cannot discharge the liability of the drawer to the payee or one holding under him. Where the payment has been stopped, as above stated, the relations between the drawer and the payee become the same as if the check had been dishonored and notice thereof given to the drawer. And hence the effect so far as respects the drawer is to change his conditional liability to one free from this condition, and his situation is like that of the maker of a promissory note."

In other words, in the case at bar, the drawee of the check, Yamakita, would have had the right to sue the plaintiff for any damages suffered by him by reason of the stopping of payment of the check. Stopping payment of a check does not discharge the liability of the maker to the holder, but the holder must look to the maker for his remedy. Edwards v. Guaranty, etc., Bank, 48 Cal. App. 787, 192 P. 324; Sneider v. Bank of Italy, 184 Cal. 599, 194 P. 1021, 12 A. L. R. 993; Pullen v. Placer County Bank, 138 Cal. 169, 66 P. 740, 71 P. 83, 94 Am. St. Rep. 19.

[7, 8] In relation to the special defense set up by the defendant, the record shows the following:

> "Q. Why did you give him the check? What for you give him the check? (Objected to on the ground that it was no concern of the bank. Objection sustained.)
>
> "Mr. McLaughlin: Now, in order to make my point clear, I don't know just what kind of procedure or legal deportment will do—I want to make my record—we offer to prove by this witness now on the stand, and by other witnesses here present, that this check was given by the plaintiff here in payment for a restaurant, and was the purchase price of the restaurant owned by M. Yamakita, and to whom the check was drawn; that Hiroshima entered in possession of the restaurant, and still remains in possession, and there has been no payment other than the check.
>
> "Mr. Henry: We make the same objection to the offer of proof.
>
> "Court: That would involve an independent controversy between these two men.
>
> "Mr. McLaughlin: We simply want to make a record of your honor's ruling on it.
>
> "Court: Very well, I will refuse your permission to make that proof."

In support of this offer the appellant again cites the case of Usher v. Tucker, supra, but, as we have seen, the Usher Case does not support any such rule of evidence as contended for by the appellant. It does support the rule that Yamakita would be entitled to prosecute an action against the plaintiff for the recovery of damages suffered by him. Any other rule would lead to trial of all outside and collateral matters between the plaintiff and Yamakita, as to whether the plaintiff had or had not received full value for his check, whether he had or had not been defrauded in the sale, whether he was induced to purchase the restaurant in question by fraudulent and deceitful practices, and, in fact, all other matters which might be inquired into in an action concerning the sale and purchase of the restaurant referred to, and the legality of such sale, and the liability of the plaintiff to pay therefor, and also the sum of money which he would be liable to pay. A mere statement of these facts is sufficient to show the correctness of the court's ruling. The bank is not interested in the check. It has no interest in the contract between the plaintiff and Yamakita. Its duty is simply to follow the order given by the drawer of the check. It has been held that a bank cannot decline payment of a check by setting up that it was given for an unlawful purpose. McCord v. Cal. Nat. Bank S. D. 96 Cal. 197, 31 P. 51; Morse on Banks and Banking (5th Ed.) §§ 317, 397, and cases there collated. The doctrine that payment cannot be stopped against a holder in due course is only true in those jurisdictions which hold that a check works an assignment of the funds. The cases cited by the appellant so holding are inapplicable here. It may be stated, also, that in the Unaka Case there was no attempt by the drawer to stop payment. In the Raesser Case the rule is followed that a check operates as an assignment of the funds of the depositor. We do not find anything in the Negotiable Instruments Law conflicting with or modifying the decisions of this state that a check is not an assignment, or that in any wise modifies or amends the provisions of section 3265e of the Civil Code heretofore cited.

[9-12] It is further urged by appellant that the words "the undersigned makes the foregoing request as an act of courtesy only, and hereby indemnifies you against, and releases you from all liability by reason of compliance or noncompliance therewith," contained in the stop notice absolutely releases the defendant from all liability. The transcript shows that the plaintiff went to the defendant bank and stated to the defendant that he wanted to stop payment on the check herein referred to. Whereupon the following conversation took place:

> "Q. What did you say? A. I say I want payment stopped.
>
> "Q. What did he say? A. He says, 'All right;' and he say, 'How much amount?'
>
> "Q. How much amount? A. And 'What is name?' I say, 'M. Yamakita; my check.' I give check M. Yamakita, and amount, $436.50, I think, and I want payment stopped. 'All right.' 'I can't write'—
>
> "Q. You can't write? A. No; and he says, 'Sign.'
>
> "Q. He gave you some paper? A. Yes; and he says, 'This paper there to sign name.'
>
> "Q. All right, he write down on some paper? A. Yes.
>
> "Q. And say, 'You must sign;' is that right? A. Yes; I no understand if I sign; I ask; he says, 'If you want payment stopped, you must sign,' and I understand, and I sign, that is all.
>
> 'Q. Can you read the English language? A. No; I can't read.
>
> "Q. You couldn't read, then, the paper that this man in the bank asked you to sign? A. No, sir. * * *
>
> "Mr. McLaughlin: I object, on the ground you can't impeach writing in that way. * * *
>
> "The Court: I will hear the evidence. * * *
>
> "Court: Go ahead; I will hear it.
>
> "Mr. Henry: What was the question?
>
> "Court: You asked if he read the English language, and he said he couldn't.
>
> "Mr. Henry: And that he therefore couldn't read the document that he signed.
>
> "Q. Could you read the paper that you signed? A. No; I can't read. He says, 'Sign;' that is all; I sign.
>
> "Q. Did anybody read it to you? A. No.
>
> "Q. This man in the bank, he no read it to you? A. No; he says, 'Sign.'"

The court found that the assent and signature to the stop notice were given by the plaintiff under the influence of mistake and misapprehension and unconscious ignorance of the fact that said instrument contained a provision relieving defendant of liability in the event that it failed to stop payment of the check. The court also found as a fact, and also drew as a conclusion of law, that the portion of the stop notice which we have quoted was against public policy and void; also that there was no consideration moving from defendant to plaintiff for the execution of said agreement; and also that the defendant, contrary to the notification and instruction of the plaintiff, heedlessly, negligently and carelessly and without exercising ordinary or reasonable care, paid the check upon which the stop notice was given, etc. Any one of these reasons would be sufficient to support the judgment. Wolfsen v. Smyer, 178 Cal. 775, 785, 175 P. 10; Moore v. Copp, 119 Cal. 429–436, 51 P. 630; Brison v. Brison, 90 Cal. 323, 27 P. 186.

The testimony showing the conditions under which the stop notice was signed, the fact that the plaintiff was unable to read the English language, the fact that the stop notice was not read to the plaintiff, and that he was told that, if he wanted payment on the check stopped, "he must sign" the paper presented to him by the defendant, brings the case clearly within the provisions of section 1577, Civil Code. See Moore v. Copp, supra; Los Angeles Co. v. New Liverpool Co., 150 Cal. 21, 87 P. 1029. It may also be stated that there is nothing in the law which requires a stop notice to be in writing, and a verbal or oral notice, given by the plaintiff to the defendant prior to the signing of the stop notice, was sufficient to require the defendant to observe such directions, and the writing only aided in identifying the check upon which the stop notice was given.

[13] As to whether an agreenent is or is not contrary to public policy, we quote from 13 C. J. 424, § 360:

> "If an agreement binds the parties, or either of them, to do, or if the consideration is to do, something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class it will be declared void, although in the particular instance no injury to the public may have result-

ed. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interest of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case."

Section 1668 of the Civil Code reads:

> "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Section 1670, Civil Code, reads:

> "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

The next section refers to cases where liquidated damages may be agreed upon where actual damages would be incapable or difficult of ascertainment.

It is not necessary to state that compliance by the defendant with a direction to stop payment of the check is not in law merely an act of courtesy. It is a bounden duty of a bank, when notified to stop payment, to use all reasonable efforts to comply with the directions so given. Compliance with one's obligations, while possibly courteously performed, is nothing more nor less than doing what one is under obligation to do. In the case at bar, immediately upon receipt of a verbal notice to stop payment of the check by the plaintiff, it became the legal duty of the defendant to comply therewith. The matter of the subsequent writing can at best be held nothing more nor less than additional identification of the check upon which notice to stop payment was given or being given. The wording of the stop notice which the plaintiff was induced to sign in the manner shown by the evidence, releases the defendant from all liability however negligent or otherwise. In other words, it simply purports to eliminate all the provisions of section 1668 of the Civil Code, and leaves the defendant free to follow the directions of the stop notice or not at its pleasure.

That such a writing, purporting to relieve the defendant of all liability or responsibility, is against public policy, scarcely requires argument. Under the provisions of section 1670, Civil Code, if an attempt had been made to limit the liability of the bank by fixing a definite sum of money, it would have been void, because the injury to the plaintiff, by reason of the negligence of the defendant, is readily capable of ascertainment, to wit, the amount of money wrongfully paid out, theretofore deposited by the plaintiff. Thus if the defendant and plaintiff could not under the law execute a valid contract limiting damages on account of negligence of the defendant in a definite sum, we do not very well see how the defendant could secure a valid release from all liability on account of subsequent negligent acts. As stated herein, the court expressly found the defendant careless and negligent in the matter and also that the defendant did not exercise ordinary or reasonable care. The sufficiency of the evidence to support this finding does not appear to be challenged by the appellant. That a verbal notice to stop payment is sufficient, see the case of People's Sav., etc., Trust Co. v. Lacy, 146 Ala. 688, 40 So. 346.[1]

The appellant cites the case of Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N. E. 782, 9 A. L. R. 1067, where a provision in the stop notice read:

> "The undersigned agrees to hold the Tremont Trust Company harmless for said amount and for all expenses and costs incurred by it on account of refusing payment of said check and further agrees not to hold the Tremont Trust Company liable on account of payment contrary to this request if same occur through inadvertence or accident."

The court in the decision of that case stated:

> "It is manifest the quoted words were intended to exonerate the bank from the kind of negligence shown by the record, and we are unable to see anything illegal, or anything opposed to public policy, in a stipulation or agreement which relieves a bank so circumstanced from the results of the mere inattention, carelessness, oversightedness, or mistakes of its employees."

Whether the state of Massachusetts has a Code similar to ours has not been called to our attention; but, aside from that question, it is manifest that, if it be considered to be an agreement exonerating the defendant from all negligence in the observance of the stop notice, as was the attempt made in this case, the Massachusetts decision is not in harmony with our Code provisions, nor with the California cases, where attempts have been made to absolutely relieve the parties for any kind of negligent acts. Nor is the Massachusetts case in harmony with the decisions of other courts, which follow along the line of recent decisions by the courts of this state, when considering attempts to relieve oneself from negligence. In 3 R. C. L. 708, § 340, the rule is thus stated:

> "Notwithstanding a by-law of a savings bank which exempts the institution from liability for payments made to a person other than a depositor when the depositor's book is presented, and the depositor has given the bank no notice of the loss of the book, the bank is nevertheless liable for a payment to the wrong person, if by ordinary diligence it could have discovered the fraud and negligently failed to do so; this is so because public policy will not allow the bank to strip itself of responsibility

---

[1] Reported in full in the Southern Reporter; not reported in full in Alabama Reports.

by contract as to enable it safely to pay, intentionally or heedlessly, to one who has come into the possession of the pass book fraudulently or criminally."

See, also, Hough Ave. Sav. Bank v. Andersson, 78 Ohio St. 341, 85 N. E. 498, 18 L. R. A. (N. S.) 431, 125 Am. St. Rep. 707, 14 Ann. Cas. 479.

In the case of Elder v. Franklin Nat. Bank, 25 Misc. Rep. 716, 55 N. Y. S. 576, a provision in the stop notice in the following words was held void:

> "It is further agreed that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn; that the bank will endeavor to execute such orders, but that no liability shall be created by failure so to do; and that no rule, usage, or custom shall be construed to create such liability."

This case goes on to hold that it is against public policy to permit a bank to relieve itself from the consequences of its negligent acts, and is in harmony with the Code provisions of this state and the decisions of other courts to the effect that it is against public policy to permit agreements exempting one from his own negligence. Section 1667, Civil Code, provides that that is unlawful which is contrary to an express provision of law, contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals. In 13 C. J. 491, § 437, the rule in relation to exempting one self by contract from liability for negligence between the master and his servant is thus stated:

> "While it cannot be said that, without exception all contracts against liability for negligence are against public policy, the general rule is that it is against the policy of the law to permit a master to contract against liability for the negligence of his servants while acting within the scope of their employment. * * * Further, by the weight of authority, a master cannot, by agreement with his servant, exempt himself from liability for injuries to the servant caused by his negligence or by the negligence of those who, though engaged in the same service, are superior in authority and control."

In 6 R. C. L. 427, § 132, the reason why such provisions are against public policy is set forth:

> "Undoubtedly contracts exempting persons from liability for negligence induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from this cause. It has therefore been declared to be good doctrine that no person may contract against his own negligence."

In the case at bar, the banking public, as well as the particular individual who may be concerned in the giving of any stop notice, is interested in seeing that the bank is held accountable for the ordinary and regular performance of its duties, and also in seeing that directions in relation to the disposition of funds deposited in bank are not heedlessly, negligently, and carelessly disobeyed, and money paid out contrary to directions given. The case at bar is not one like that presented in Stephens v. S. P. Co., 109 Cal. 86, 41 P. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17, where one of the contracting parties was at liberty to make a contract or not make it, but, if made, entered into upon such terms and conditions and limitations as it might elect. Here the bank had a definite and legal duty to perform. It does not present a case of election to enter into a contract, but an instance where the duty cannot be declined. It may also be added that the testimony shows the parties in this case were not contracting upon an equal basis. One was desirous of having money in the hands of the other held subject to his order and payment of a certain check stopped, and at the same time not able to read the writing to which his signature was demanded; the other had the funds in its possession, which the law made subject to the order of the depositor, and yet demanding the signature of the depositor to said writing waiving liability before it would undertake to perform its legal duty. In the case of Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 P. 242, the question of escaping liability for one's own negligence by contract is considered at length, and the cases upholding such contracts criticized, and the difficulty of reconciling such cases with the provisions of section 1668, Civil Code, pointed out and also the cases holding that such contracts are against public policy collected.

The judgment of the trial court is affirmed.

We concur: HART, J.; NEEDHAM, Justice pro tem.

78 Cal. App. 685

PEOPLE v. RAMBAUD. (Cr. 895.)

(District Court of Appeal, Third District, California. July 14, 1926. Rehearing Denied Aug. 13, 1926. Hearing Denied by Supreme Court Sept. 7, 1926.)

1. Criminal law 🔑1166½(8)—Prejudice in disallowing challenge for cause of juror subsequently peremptorily challenged held not shown unless objectionable juror sat.

Error, if any, in disallowance of defendant's challenge for cause *held* not prejudicial, notwithstanding he exercised his peremptory challenges and exhausted all of them, where record failed to disclose that defendant had made appropriate objection to any sworn juror.

2. Criminal law 🔑1166½(6)—That prosecution was permitted to exercise peremptory challenges after defendant's had been exhausted held not prejudicial unless objectionable juror sat (Pen. Code, §§ 1088, 1404).

That prosecution was permitted to exercise peremptory challenges upon veniremen who had theretofore been passed for cause, and after the prosecution had declined to exercise, in turn, its peremptory challenges, violative of Pen. Code, § 1088, *held* not prejudicial, in view of section 1404, notwithstanding defendant had exhausted his peremptory challenges, where it did not appear any objectionable juror had been forced upon him.

3. Criminal law 🔑1186(4)—Departure from statutory procedure for selecting juror will not work reversal unless record shows a miscarriage of justice resulted (Pen. Code, § 1088; Const. art. 6, § 4½).

Though procedure set forth in Pen. Code, § 1088, for selecting a juror should be followed, a departure therefrom cannot work a reversal, in view of Const. art. 6, § 4½, unless it appears from the record that it has resulted in a miscarriage of justice.

4. Rape 🔑51(1)—Defendant's statement that he was single and purpose of trip with ravished female was to get married held to show that parties were not married.

Evidence that defendant stated that he was going away with ravished female to get married and that purpose of their trip was to go somewhere to get married *held* sufficient to show she was not his wife.

5. Statutes 🔑118(6).

Act entitled, "An act to amend section 264 of the Penal Code, relating to the punishment of the crime of rape," *held* sufficient, as to title, under Const. art. 4, § 24.

6. Statutes 🔑107(3)—Statute entitled "punishment for rape," providing imprisonment in state prison except under one condition jury shall recommend imprisonment, held not violative of provision that act shall embrace but one subject, expressed in its title (Const. art. 4, § 24; Pen. Code, § 264, as amended by St. 1923, p. 271).

Pen. Code, § 264, as amended by St. 1923, p. 271, providing that rape is punishable in state prison, except when rape is on female under 18 years with her consent, under section 261, subd. 1, jury shall recommend imprisonment in county jail or state prison, provided that when defendant pleads guilty trial court shall fix punishment, *held* to embrace but one subject, pursuant to Const. art. 4, § 24, expressed in title, "punishment of rape."

7. Rape 🔑60—Statute providing for rape on female under 18 years without force jury may fix place of punishment is valid (Pen. Code, § 264, as amended by St. 1923, p. 271).

Legislature had right, when enacting 1923 amendment to Pen. Code, § 264 (St. 1923, p. 271), to eliminate words "over the age of 16 years" from said section, as amended in 1913 (St. 1913, p. 213), providing that when rape was on female "over the age of 16 years and under the age of 18 years" without force jury could fix punishment in county jail or state prison.

8. Statutes 🔑87—Statute fixing punishment for rape in state prison, except when rape is on female under 18 years without force jury shall fix place of imprisonment, held not bad as special legislation (Pen. Code, § 264, as amended by St. 1923, p. 271; Const. art. 4, § 25).

Pen. Code, § 264, as amended by St. 1923, p. 271, providing that rape is punishable in state prison, except when on female under 18 years without force jury shall recommend place of imprisonment, provided that when defendant pleads guilty trial court shall fix punishment, *held* not violative of Const. art. 4, § 25, prohibiting special legislation.

9. Criminal law 🔑1177—Court's refusal to follow jury's recommendation on place of imprisonment where rape was on female under 18 years with her consent held reversible error (Pen. Code, § 264, as amended by St. 1923, p. 271).

Under Pen. Code, § 264, as amended by St. 1923, p. 271, providing that when rape is on female under 18 years with her consent jury shall recommend whether imprisonment shall be in county jail or state prison, provided that when defendant pleads guilty trial court shall fix punishment, Legislature intended trial court to fix punishment only upon plea of guilty, and hence trial court's refusal to follow jury's recommendation, where rape was on female under 18 years with her consent, was reversible error.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Louie Rambaud was convicted of rape, and he appeals. Sentence set aside, and cause remanded, with directions to resentence.

Langdon & Dexter, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was tried and convicted of the crime of rape on an information charging said offense under subdivision 1 of section 261 of the Penal Code, and appeals from the judgment.

Upon this appeal the defendant assigns the following grounds for reversal: (1) That the court erred in refusing to allow the defendant's challenge for cause in two instances; (2) that the court permitted the people to exercise peremptory challenges and excuse two prospective jurors after the defendant had exhausted his peremptory challenges; (3) that there is no evidence showing that Jennie Jackson, the rapee mentioned in the information, was not the wife of the defendant; and (4) that the court erred in refusing to follow the recommendations of the jury that the defendant be punished by confinement in the county jail and in sending the defendant to a state prison, notwithstanding the verdict of the jury.

[1] The record shows that upon voir dire examination two of the veniremen were challenged for cause by the defendant, that these challenges were denied by the court, and that thereafter the defendant excused both of the challenged veniremen by exercising his peremptory challenges. The record further shows that the defendant exhausted all of his peremptory challenges, but the record nowhere shows that any venireman was allowed to remain upon the panel and was sworn as a juror who had been challenged for cause or against whom the defendant had intimated the slightest objection. So far as the record shows, every one of the twelve jurors finally sworn to try the cause against the defendant was wholly and entirely acceptable, free from bias, and properly qualified to try the cause. Our attention has not been called to any objection urged by the defendant, or anything in the record whatever, intimating that the twelve jurors sworn to try the cause were not entirely satisfactory to the defendant. The only statement of counsel for the defendant in this particular is: "Our challenges are exhausted."

This situation does not present any reversible error. Whether the trial court should or should not have allowed the challenges for cause is wholly immaterial. The objectionable jurors were not sworn to try the case, and the defendant had just what he was entitled to, to wit, the judgment of twelve fully qualified jurors. While some of the earlier cases announce the rule that a disallowed challenge for cause will be considered upon appeal, under the circumstances here presented, all the later decisions and the ones which announce the correct rule hold against the appellant's contention. In 8 Cal. Jur. p. 610, we find the following:

> "The rule, as laid down in the later cases, is that an erroneous disallowance of a challenge for cause is not prejudicial, even though the defendant finally exhausted his peremptory challenges, if it does not appear that he had occasion to or desired to use an additional peremptory challenge, or that the jurors finally accepted were not entirely satisfactory to him. In the earlier cases there is authority to the contrary. To warrant a reversal it must appear that an objectionable juror was forced upon the defendant and that he in some appropriate manner expressed his dissatisfaction with the jury as completed."

See other cases there cited.

In People v. Schafer, 161 Cal. 573, 119 P. 920, the Supreme Court, in considering this question, says:

> "It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted, his peremptory challenges; if his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means he has no ground of complaint,"

—and then adds further:

> "But the fact that he does exhaust them does not preclude the application of the rule above quoted."

As was said in many of the cases, the important thing to be considered is whether the objectionable juror was forced upon the defendant and whether he had that to which he was entitled—a fair and impartial jury and not a jury composed of any particular individuals. People v. Johnson, 57 Cal. App. 391, 207 P. 281; People v. Kromphold, 172 Cal. 512, 157 P. 599; People v. Schafer, 161 Cal. 573, 119 P. 920; People v. Troutman, 187 Cal. 313, 201 P. 928. Other cases might be cited to the same effect, but the list would only incumber the record.

[2] After the defendant had exhausted all of his peremptory challenges, the court permitted the prosecution to exercise peremptory challenges upon two veniremen who had theretofore been passed for cause, and after the prosecution had declined to exercise, in turn, its peremptory challenges, as set forth in section 1088 of the Penal Code, which specifies "first the people and then the defendant, may take a peremptory challenge, unless the parties' peremptory challenges are exhausted; and each party shall be entitled to have the panel full before exercising any peremptory challenges." Here again we are confronted with the situation previously considered. It does not appear that any objectionable juror was forced upon the defendant. Not the slightest intimation appears in the record of any dissatisfaction whatever relative to the jurors who were sworn to try the cause in the places of the persons just referred to. Under such circumstances, we think that section 1404 of the Penal Code applies, which reads:

> "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

In People v. Majors, 65 Cal. 138, on pages 148 and 149, 3 P. 597, 605 (52 Am. Rep. 295), we find the following:

> "In the case of People v. McCarty, 48 Cal. 557, it was held 'that if the prosecution in a criminal case pass the jury to the defendant, who declines to make any challenge, the prosecution may then interpose a peremptory challenge to a juror before he is sworn.' It is true the foregoing case differs slightly from this, inasmuch as in that case the defendant did not interpose any challenge, whereas, in this case, he did; but we do not think that the difference between the facts of the two cases in any manner affects the principle applicable to both. It is there said that the prosecution had not accepted the jury by only passing them to the other side. At most, the action of the court was an irregularity, not affecting, so far as we can see, any substantial right of the defendant, and one which does not call for a reversal of the judgment."

In that case a challenge was allowed to be exercised by the prosecution after it had previously passed the jury.

In 15 Cal. Jur. p. 438, § 108, the procedure in exercising challenges is thus set forth:

> "In criminal cases 'if all challenges [for cause] on both sides are disallowed, either party, first the people and then the defendant, may take a peremptory challenge unless the parties' peremptory challenges are exhausted.' Failure to comply with this provision does not invalidate a judgment but at most amounts to a mere irregularity. Thus if after all challenges for cause are disallowed, the prosecution passes the jury or a juror to the defendant, it may then interpose a peremptory challenge to a juror before he is sworn. Even if such procedure is an irregularity cognizable upon appeal, the defendant may not complain unless he exhausts all of his peremptory challenges."

[3] The last sentence of the quotation from California Jurisprudence is not, however, a complete statement of the law. It is true that a defendant is not in a position to complain until he has exhausted all of his peremptory challenges, but it is not true that this alone is a good ground of complaint. Under such circumstances, the defendant is simply in a position where he has a right to complain if any objectionable juror has in this manner been placed upon the panel, and it is incumbent upon the defendant to show that such is the case. The mere fact that some other juror is placed upon the panel by reason of the exercise of a challenge out of order by the prosecution is not, in and of itself, a showing of prejudicial error. For all that appears in this case, the juror placed upon the panel was just as acceptable to the defendant and as free from bias or prejudice as was any juryman so displaced. The order of selecting a juror is a matter of procedure, and section 4½ of article 6 of the state Constitution specifies that no error as to any matter of procedure shall be held sufficient to set aside a verdict or order a new trial, unless it appears from the record that the error complained of has caused a miscarriage of justice. While it may be said that the procedure set forth in section 1088 of the Penal Code should be followed by the trial court, a departure therefrom cannot be held sufficient cause for the reversal of a judgment, unless it appears further that the defendant has suffered the loss of a substantial right, justifying an appellate court under the constitutional provision quoted in holding that such departure has resulted in a miscarriage of justice. The following cases are in line with the holding here had: People v. Troutman, 187 Cal. 313, 201 P. 928; People v. Schafer, 161 Cal. 573, 119 P. 920; People v. Durrant, 116 Cal. 179, 48 P. 75; People v. Kromphold, 172 Cal. 512, 157 P. 599.

[4] In arguing that the record does not show that the girl was not the wife of the defendant, the portion of the transcript wherein the statements made by the defendant admitted in evidence that he was going away with the girl to get married and that the purpose of their trip was to go to some place and get married must not have been fully considered. The statement of the defendant, read into the record, was that he was single and that he intended to marry the girl when he reached Bakersfield, all of which testimony was proper to be considered by the jury in determining the fact of whether the defendant and the girl in question were not husband and wife as fully and completely to all intents and purposes as though the defendant had said the girl was not his wife or the girl had said the defendant was not her husband.

The refusal of the trial court to follow the verdict of the jury presents a question not hitherto directly passed upon. Prior to the amendment, approved May 19, 1913 (St. 1913, p. 213), section 264 of the Penal Code read, simply, that rape was punishable by imprisonment in the state prison for not less than 5 years. By the amendment approved, as above stated, the section was changed to read that rape is punishable by imprisonment in the state prison not more than 50 years, except where the offense is under subdivision 1 of section 261 of the Penal Code and the female is over the age of 16 years and under the age of 18 years, in which case the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years, and in such case the jury shall determine by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison. In 1923, by an act approved on May 8th of that year (St. 1923, p. 271), section 264 of the Penal Code was amended to read as follows:

> "Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision one of section two hundred sixty-one of the Penal

Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty of an offense under subdivision one of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."

In drafting the amendment, approved in 1923, the words, "the jury shall determine by their verdict," as they appeared in the section as amended by the act of 1913, were changed to read, "the jury shall recommend by their verdict." The act of 1913 was silent as to what should be done by the court in prosecutions founded upon subdivision 1 of section 261 of the Penal Code in the event that the defendant pleaded guilty. This apparent omission was supplied by the amendment of the section in 1923, and reads as follows:

> "Provided, that when the defendant pleads guilty of an offense under subdivision one of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."

[5] It is argued by counsel for the people that the act approved by the Legislature in 1923 purporting to amend section 264 of the Penal Code is unconstitutional in that it conflicts with section 24 of article 4 of the Constitution setting forth what shall be embraced in the title of every act and that every act shall embrace but one subject. The title of the act, approved May 8, 1923, is in the following words: "An act to amend section 264 of the Penal Code, relating to the punishment of the crime of rape." A reference to the act approved May 19, 1913, wherein the jury is first given the right to designate the place of punishment where the prosecution is based upon subdivision 1 of section 261 of the Penal Code, discloses a title in identical words. It thus follows that if the amendment of section 264 passed by the Legislature in 1923 is invalid for the reasons argued, then, and in that case, the same section, as amended in 1913, is also invalid. It may first be observed that section 261 of the Penal Code divides the crime of rape into degrees in so far as it may be said that the Codes anywhere designate the different degrees of the crime of rape. In section 261, supra, six different situations or conditions are set forth in defining the offense, only one of which, to wit, the first subdivision, where the female is under 18 years of age and no force is used, presents a possible situation where circumstances may be presented lessening the apparent heinousness of the offense. The Penal Code does not, in terms, anywhere purport to divide the offense of rape into degrees. It simply sets forth, as said, six sets of conditions or circumstances under which the offense may be committed, and then follows with section 264, naming penalties and providing for cases where the act of the defendant may not be so reprehensible as to necessitate or warrant his being confined in the state prison or that the safeguarding of society does not necessitate that form of punishment. The Legislature, by the act of 1913, limited the period when such possible conditions might exist and be considered to instances where the female was over the age of 16 and under the age of 18 years. The amendment to the section of 1923 cuts out the words "sixteen years" and leaves section 264 of the Penal Code operative in all cases where the prosecution is based upon subdivision 1, § 261, supra. For the reasons hereinafter about to be given, we do not think it necessary to review the cases cited by respondent upon the theory that section 264 of the Penal Code, as amended in 1923, is unconstitutional. The cases cited are applicable to particular facts and circumstances there presented. The cases which are controlling here are the ones which relate to the amendments of particular Code sections. The text found in 23 Cal. Jur. 660, sets forth the rule controlling in this state. It is there said:

> "An act to amend a provision of the Codes is sufficient, so far as title is concerned, if it is entitled merely as an act to amend a certain numbered section of a named Code. If such title omits to name the Code, though specifying a section number, it is sufficient, but if it adds further descriptive words, the title is not vitiated thereby unless such further words indicate a subject not related to the matters covered by the body of the bill. The almost universal custom of the Legislature in making amendments to the Codes has been to put into the title of the amendatory act, after the number of the section amended and the name of the Code, additional words expressing the subject of the act; and it is settled that such an amendatory act complies with the constitutional requirements. The title of an act to amend one of the Codes by adding a new section may or may not state the number of the new section, but it must contain words expressing the subject to which the proposed legislation relates. An act entitled an act to add a new section to a named Code, relating to a named subject, is sufficient to embrace all matters relating to such subject. Where a statute is entitled as an act to amend a certain section of a named Code and to provide for a given object, the title expresses a single subject."

As illustrating the rule set forth, we cite the case of Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 98 Am. St. Rep. 73, where the title of an act adding new sections to the Code reading as follows, "Relating to Actions for Divorce," was held sufficient. In People v. Parvin, 74 Cal. 549, 16 P. 490, the title of the act under consideration read, "An act to amend section 3481 of the Political Code." Such title was held sufficient. To the same effect are the cases of Beach v. Von Detten, 139 Cal. 462,[1] and People v. Oates, 142 Cal. 12, 75 P. 337. In the case of Edler v. Edwards, 34 Utah, 13, 95 P. 367, the Supreme Court of Utah, discussing a similar provision in the Constitution of that State, quotes with approval the following language:

> "It is held by the great majority of cases that it is sufficient for the title of an act to amend a Code or Revision to specify the section to be amended, without giving the title of the chapter or division to which it belongs or in any way indicating the subject-matter of the section. Under such a title any legislation is proper which is germane to the section specified."

We do not need to go so far in upholding the title in the case under consideration for the simple reason that the title does indicate the subject-matter being considered as well as the section of the Code to be amended. Other cases might be cited, but what we have said is sufficient to show that the title employed by the Legislature in amending section 264 of the Penal Code in 1923 is amply sufficient.

[6] That section 264 of the Penal Code, as amended in 1913, under a title identical with that employed by the Legislature in the amendment adopted in 1923, is constitutional has been expressly adjudicated by this court in the case of In re Todd, 44 Cal. App. 496, 186 P. 790. This court, after upholding the constitutionality of the section, as it then stood, speaking through Justice Hart, used the following language:

> "It will not, of course, be denied that it is within the power of the Legislature to fix the penalty for a crime according to its inherent nature, or the nature of the circumstances under which it may be committed. 'There can be no doubt,' says Mr. Justice Lennon, in Selowsky v. Superior Court, 180 Cal. 404 [181 P. 652], 'that the Legislature has power to classify with respect to the penalty to be imposed not only upon the basis of the inherent nature of the offense but also upon the basis of the nature of the circumstances attending the commission of the offense considered in their relation to the public welfare' "—citing a number of cases.

Nor do we think that the section is vulnerable on the theory that more than one subject-matter is contained in the section and not expressed in the title. The only subject-matter dealt with is punishment for the crime of rape. It is not even dealing expressly with degrees of crime. When the word "punishment" is used in the title every member of the Legislature has his attention directed to the subject-matter of the punishment to be imposed for the crime of rape, which includes all the elements that may enter into the question of making the punishment fit the offense committed. By way of illustration in showing that the title with respect to section 264, Penal Code, follows the rule heretofore adopted and may be more or less considered as a legislative interpretation of the constitutional provision which we are considering, we may refer to the titles used by the same Legislature in amending other sections of the Penal Code, to wit, page 270, Statutes of 1923, the title of the amending section relating to burglary reads as follows: "An act to amend section four hundred sixty-one of the Penal Code, relating to the penalty for burglary." Three degrees of punishment are set forth in the section under the title which we have quoted. On page 271, Statutes of 1923, in amending section 213, relating to the punishment of robbery, we find the following title: "An act to amend section two hundred and thirteen of the Penal Code, relating to the punishment of robbery." Under this caption or title, a section is added permitting the punishment for robbery for not less than five years to life, and, also, under other circumstances, for not less than one year. Again, section 487 of the Penal Code, Statutes of 1923, section 271 is amended under the following title: "An act to amend section four hundred eighty-seven of the Penal Code, relating to grand larceny." The section then sets forth three sets of conditions or circumstances under which grand larceny may be committed. We think the rule is too well settled, both by the adjudications of our own court and the practice of the Legislature that a title such as was used by the Legislature in 1923 amending section 264 of the Penal Code is sufficient, to permit of any other ruling than we have indicated, whether correct or incorrect in the first instance. Any other ruling would invalidate almost every section of the Penal Code.

[7] In the case of People v. Davis, 67 Cal. App. 210, 227 P. 494, this court in considering incidentally the interpretation of section 264 of the Penal Code, as amended by the Legislature in 1923, said:

> "The evident intention of the Legislature was to correct the omission in the section as it originally stood, to empower the court upon plea of guilty to exercise the discretion which had theretofore been vested in the jury upon trial, when the female outraged was between the ages of sixteen and eighteen years, but, the unhappy wording of the section makes the amendment apply to all cases coming under subdivision 1 of section 261 of the Penal Code, when the female is under the age of eighteen years."

While the use of this language was not absolutely necessary to the decision of the Davis Case, it does indicate our views of what the Legislature intended by the added words incorporated in section 264 by the amendment of 1923. A consideration of these words is absolutely necessary in order to determine what the Legislature intended. Prior to the amendment of 1923 the section simply permitted the fixing of the punishment either in the county jail or a state prison by the jury upon trial. No such discretion was by the wording of the section permitted to be exercised by the court. We know as a matter of fact this authority or discretion was exercised by courts upon the entry of a plea of guilty upon a charge founded on subdivision 1 of section 261 of the Penal Code, but it was not by virtue of any direct provision of the Penal Code, but was only upon the assumed inherent power of the court. To supply this omission or defect in the language of the section, there was added the proviso which we have set forth that when the defendant pleads guilty of an offense under subdivision 1 of section 261 of the Penal Code, the punishment shall be in the discretion of the trial court. It will thus be seen that the Legislature intended the punishment to be in the trial court only in one instance, that is, upon a plea of guilty. In cases where the cause went to trial the place of punishment was designated by the jury, and now when he does not go to trial, but pleads guilty, the discretion as to the place of punishment is centered in the court. When the defendant is sent to the state penitentiary in either case, neither the jury nor the court fix the extent of punishment. If the words, "and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or the state prison," have no mandatory effect, then the proviso that in a certain specified case, and only in a certain specified case, the discretion as to the place of punishment shall be exercised by the court is wholly meaningless. If it was intended by the Legislature that the court should fix the place of punishment in all cases, it would not have so worded the section that the discretion as to the place of punishment should be exercised by the court only when the defendant pleaded guilty. If the section as amended does not vest in the jury power to designate the place of punishment, then the language of the section does not vest such authority anywhere in the event that the defendant goes to trial, and we are forced to the rather anomalous conclusion that the Legislature in giving discretion to the court to fix the place of punishment, when a plea of guilty is entered, has provided that more favorable consideration may be given a defendant even when the lack of a tenable defense induces the entry of such plea. This certainly was not the intention of the Legislature, as common experience teaches that pleas of guilty are not ordinarily entered in cases where defense is humanly possible. When read as a whole, we think the section means just as we have interpreted it. That the Legislature has the power to authorize the jury to fix the place of punishment as well as the court cannot be doubted. Nor is the argument tenable that, because the jury may not fix an adequate punishment, the court is therefore authorized, under the section, to disregard the action of the jury. To hold that the recommendation provided for in the section is of no validity because the jury may make a mistake as to the place where the defendant should be sent would be to hold that the court ought not to be allowed to exercise like authority, because the trial court might also fall into error, might be either too severe or too lenient. That is a matter exclusively for the Legislature. The Legislature has seen fit to eliminate these words, "over the age of sixteen years," allowing the discretion to be exercised where the female has consented, irrespective of age, so long as she is under 18 years.

---

[1] 73 P. 187.

We said in the case of People v. Davis, supra, that this wording was "unhappy." However, the Legislature has the exclusive power over these matters and had a right to eliminate the words which we now find omitted, irrespective of whether courts deem such acts wise or unwise. It is simply a question of power and not of wisdom. Our attention has been called to the cases of Guthrie v. State, 125 Ga. 291, 54 S. E. 180, Mack v. State, 118 Ga. 755, 45 S. E. 603, and Coney v. State, 101 Ga. 582, 28 S. E. 918, where recommendations in the verdict of the jury have been held of no binding force or effect upon the court. A reference to section 1062 (marginal number section 1036, parenthetical number of the Penal Code of Georgia), having to do with the subject of recommendations by a verdict upon which the foregoing cases were founded, contains the following:

> "When such recommendation is approved by the judge presiding on the trial, said crime shall be punished as misdemeanors. If the judge trying the case sees proper, he may in his discretion, reduce such felonies to misdemeanors."

These are the concluding words of the section, and, of course, take away the idea of vesting in the jury authority to designate the place of punishment, or enforce any views which they may express concerning the mitigation thereof. Likewise, the case of State v. Evans, 159 La. 712, 106 So. 123, and Leach v. State, 99 Tenn. 584, 42 S. W. 195, are founded upon statutes which expressly state that the court may or may not adopt the recommendations of the jury. Again, in Lewis v. State, 51 Ala. 1, where the Code of the state provided that any person who is guilty of murder in the second degree must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than ten years, at the discretion of the jury," a verdict which read, "We, the jury, find the defendant guilty of murder in the second degree, and recommend his sentence to the penitentiary for 20 years," sufficiently complied with the statute, as the word "recommend," under such circumstances, was held as sufficiently indicating the exercise of discretion by the jury in fixing the period of imprisonment. That the word "recommend" in its ordinary meaning is not synonymous with the word "determine" may be admitted, but the whole wording of section 264 of the Penal Code, we think, leads unmistakably to the conclusion that the Legislature did not intend to take away from the jury any powers it had heretofore exercised, but only intended to confer upon the court powers which were not expressly included within the language of the section as worded by the amendment of 1913, and that is was intended that the court was to designate the place of punishment only in the instance mentioned and expressly provided for. It is not for us to say that a jury would be less wise in its action than the court. That, again, is exclusively within the province of the Legislature.

[8] The case of In re Todd, 44 Cal. App. 496, 186 P. 790, and the case of Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652, and the cases there cited, sufficiently answer the contention that section 264 of the Penal Code, as amended, is violative of section 25 of article 4 of the Constitution, relating to special legislation. It is there shown that such contention is not tenable.

[9] It necessarily follows from what has been said that the court erred in pronouncing sentence. The verdict was in the following language: "We, the jury in the above-entitled cause, find the defendant, Louie Rambaud, guilty of the crime of rape, as charged, and recommend that he be punished by imprisonment in the county jail"—which authorized the court to sentence the defendant to the designated place. This necessitates, however, only a modification of the judgment. It is therefore ordered that the sentence be set aside and the cause remanded to the trial court, with directions to resentence the defendant to the county jail of San Joaquin county for a period not exceeding that provided in the Code.

We concur: FINCH, P. J.; NEEDHAM, Justice pro tem.

---

78 Cal. App. 702

PEOPLE v. SACHAU. (Cr. 922.)

(District Court of Appeal, Third District, California. July 14, 1926. Rehearing Denied Aug. 13, 1926. Hearing Denied by Supreme Court Sept. 7, 1926.)

1. Rape 🔑60, 1218—Provision that when rape is on female under 18 years without force jury shall recommend place of imprisonment is mandatory and valid (Pen. Code, § 264).

Under Pen. Code, § 264, providing that when rape is on female under 18 years without force jury shall recommend place of imprisonment, jury must fix place, since provision is mandatory and valid.

2. Criminal law 🔑1189—Upon reversal of judgment for defective verdict defendant is not entitled to discharge, and retrial will be ordered.

Where defective verdict is rendered defendant is not entitled to discharge on reversal of judgment, but new trial will be granted, since provision against double jeopardy, under Const. art. 1, § 13, is inapplicable.

3. Criminal law 🔑1031(4).

Plea of former jeopardy must be presented to trial court, and is not available in Court of Appeals upon motion for discharge.

4. Rape 🔑60—Verdict of "guilty of rape, a felony, as charged," held not defective, in that it does not find defendant guilty of crime charged (Pen. Code, §§ 261, 1157).

Verdict finding defendant "guilty of rape, a felony, as charged" *held* not defective, in that it does not find him guilty of crime charged, notwithstanding Pen. Code, § 1157, since, under section 261, rape is not divided into degrees.

5. Criminal law 🔑884—Failure to instruct jury as to power to fix place of punishment in rape case held error (Pen. Code, § 261, subd. 1, and section 264).

Trial court's failure in prosecution for rape on female 15 years old, under Pen. Code, § 261, subd. 1, to instruct jury as to authority vested in it, under section 264, to recommend place of punishment when rape is on female under 18 years, *held* reversible error, since such provision is mandatory.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Joe Sachau was convicted of rape, and he appeals. Judgment reversed, motion to be discharged denied, and retrial ordered.

Foltz, Rendon & Wallace, of Stockton (A. V. Scanlan, of Stockton, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was tried and convicted upon an information charging the defendant with the commission of a felony, to wit, that on or about the 8th day of October, 1925, etc., the defendant did willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon a certain named female of the age of 15 years and not the wife of the defendant, the information being based upon and charging the offense specified in subdivision 1 of section 261 of the Penal Code. The jury returned a verdict in the following words (omitting the title): "We, the jury in the above-entitled cause, find the defendant, Joe A. Sachau, guilty of the crime of rape, a felony, as charged." At the time fixed for pronouncing sentence the defendant moved that he be discharged from custody on the ground that the verdict of the jury was a nullity. This motion was denied and sentence pronounced. From the judgment of the court the defendant appeals and assigns two reasons as to why the judgment should be reversed, to wit, (1) that the court did not fully instruct the jury as to the law applicable to the case; (2) that the jury did not return a verdict fixing the degree of the crime; and, also, insists that he should be discharged on the ground that he had been once in jeopardy.

The court, after having given certain instructions which we need not set forth, instructed the jury as follows:

> "If the jury find to a moral certainty and beyond a reasonable doubt that the defendant, Joe A. Sachau, did, at and in the county of San Joaquin, state of California, and on or about the 8th day of October, 1925, willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon one Suzzanne La Porte, then and there a female under the age of 18 years, to wit, of the age of 15 years, and not then and there the wife of the said Joe A. Sachau, then I charge you it will be your duty to bring in a verdict of guilty of rape, a felony, as charged."

And, further:

> "In this case you may render one of two verdicts, namely: '(1) We, the jury in the above-entitled cause, find the defendant, Joe A. Sachau, guilty of rape, a felony, as charged;' or '(2) We, the jury in the above-entitled cause, find the defendant not guilty.'"

[1] The foregoing constitutes the only instructions given to the jury relative to their powers under section 264 of the Penal Code. It will be observed that the jury was not advised as to the authority vested in it to recommend as to the place of punishment, as specifically provided for in this section. It appears to have been the view of the court that such provisions are merely directory and might be disregarded, notwithstanding the fact that the Code uses the mandatory form of language, to wit, the jury "shall" perform certain functions. Although the same argument is made here as in the case of People v. Rambaud, 248 P. 954, this day filed herein, we need not go into a discussion of the meaning or interpretation of the section, but will simply refer to that case as authority for holding that it is within the province of the jury to fix the place of punishment. We also content ourselves in referring to the Rambaud Case as to all questions concerning the constitutionality of section 264 of the Penal Code.

[2] Passing these questions, the appellant insists that the foregoing verdict is a nullity, and, basing his argument upon the cases of People v. Terrill, 132 Cal. 497, 501, 64 P. 894, People v. Tilley, 135 Cal. 61, 67 P. 42, and People v. Small, 1 Cal. App. 320, 82 P. 87, contends that the judgment should be reversed and the cause remanded, with directions to the trial court to discharge the defendant. While the view contended for by the appellant has been approved by certain decisions of the Supreme Court of this state, it is obvious that consideration has not been given to the case of People v. Tong, 155 Cal. 579, 102 P. 263, 24 L. R. A. (N. S.) 481, 132 Am. St. Rep. 110. In that case the court had before it a question similar to that which is here presented, and in referring to the cases upon which the appellant relies uses the following language:

> "The only question presented for our determination is whether or not the Court of Appeals properly ordered the discharge of the defendant from custody upon the authority of People v. Arnett, 129 Cal. 306 (61 P. 930). In that case the defendant had been charged with the crime of assault with intent to commit murder and had been convicted of assault with a deadly weapon. The verdict was held to be a nullity (People v. Arnett, 126 Cal. 680, 59 P. 204), and on a second appeal (People v. Arnett, 129 Cal. 306, 61 P. 930), it was determined that the defendant had been once in jeopardy, and that he was entitled to his discharge, as it appeared from the minutes of the trial court, which were before the Supreme Court, that he had not consented to the discharge of the jury without verdict. If it be the doctrine of the case of People v. Arnett, 129 Cal. 306 (61 P. 930); People v. Smith, 136 Cal. 207 (68 P. 702); People v. Tilley, 135 Cal. 61 (67 P. 42); and People v. Curtis, 76 Cal. 57 [17 P. 941], that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned and the jury has been discharged without consent, then those cases should be overruled."

This court had before it the subject of defective verdicts in the case of In re Colford, 68 Cal. App. 308, 229 P. 63, where a defendant had been convicted of robbery without designation of the degree, and it is there said:

> "The verdict and judgment being void, the imprisonment of petitioner in the state prison is illegal. He is not, however, entitled to be set at liberty but he must be tried anew. 'Where a verdict is so defective that no judgment can be entered on it, and the defendant fails to have it corrected when rendered, he is considered as consenting to the verdict, and as waiving any objection, including the plea of former jeopardy, to being put again on trial before another jury.' 8 R. C. L. 141. 'Because a defendant waives his right by not objecting when an imperfect verdict is rendered, if it is set aside he shall not be discharged but tried anew.' Bishop's New Criminal Procedure, § 1016. See, also, People v. Tong, 155 Cal. 579 [102 P. 263, 24 L. R. A.

(N. S.) 481, 132 Am. St. Rep. 110]; State v. Rover, 10 Nev. 388 [21 Am. Rep. 745]; Mahany v. People, 31 Colo. 365 [73 P. 26]; Marshall v. State, 73 Tex. Cr. R. 531 [166 S. W. 722, L. R. A. 1915A, 526]; State v. Bates, 22 Utah, 65 [61 P. 905, 83 Am. St. Rep. 768])."

The judgment in that case was that the defendant should be released from the state prison at Folsom and returned to the county of Yuba for trial. Upon a like state of facts, a like conclusion was reached by Division 2 of the First Appellate District in the case of In re Davis, 68 Cal. App. 801, 229 P. 1114.

In 7 Cal. Jur. p. 946, the text citing a number of California cases for authority thus states the rule relating to double jeopardy, where a judgment is reversed:

> "The constitutional provision against double jeopardy was never intended to apply to cases in which a judgment of conviction was reversed in an appellate court and a new trial ordered. Moreover, it is the generally accepted doctrine that a defendant's successful effort to set aside a verdict and judgment by means of a motion for new trial or appeal is a waiver of his constitutional right to object to being placed again in jeopardy. In effect he assents to all the consequences legitimately following such reversal, and consents to be tried anew."

And on page 953 of the same volume, the law is further stated in this language:

> "When a verdict of conviction is illegal or void, the jury should be sent out for further deliberation. But it does not follow that the discharge of the jury upon rendition of such a verdict operates as an acquittal; as it is a mistrial rather than a legal putting in jeopardy. Moreover, the defendant's successful effort to set aside the verdict and judgment is a waiver of his right to object to being placed again in jeopardy. It has been so held where a jury was discharged upon the rendition of a verdict convicting the defendant of an offense not embraced by the accusation."

The text-writer here refers to the case of People v. Tong, in which the cases relied upon by the appellant are, in effect, overruled as to the particular points upon which they are cited as authority. It is true the language of the Supreme Court in the Tong Case, when referring to the cases upon which the appellant relies, used the words, "then these cases should be overruled," instead of explicitly stating that they are overruled. The language used, however, is sufficient to indicate that such cases are not to be considered as authority upon questions such as are presented for our consideration, and we are at liberty to follow the great weight of authority setting forth a contrary, and, what we believe to be, the correct rule. In the case of People v. Travers, 73 Cal. 580, 15 P. 293, where the defendant was prosecuted upon an information charging burglary without setting forth whether the offense was committed in the daytime or the nighttime, and the jury returned a verdict of guilty as charged, upon appeal, the same contention was made as is here presented. The court there held the verdict insufficient on the ground that the jury had not designated the degree of the crime, and in so doing, expressed its views as follows:

> "In People v. Campbell, 40 Cal. 129, the court reversed the judgment because the verdict did not designate the degree of the crime. Under a similar statute the Supreme Court of Alabama held it to be error to pass sentence upon a verdict which did not specify the degree of murder of which the jury found the defendant guilty. The court said that the statute which required the jury to specify the degree was imperative, and that it was the right of the accused to have it complied with [citing a number of cases]. We are unable to find any case in which the contrary has been held. * * * It therefore follows that the judgment must be reversed, and here the question arises, what further order should be made? Appellant's counsel insists that we should order the discharge of the defendant under that clause of the Constitution which declares that 'no person shall be twice put in jeopardy for the same offense.' Const. § 13, art. 1. In none of the cases which we have followed thus far was there an order that the defendant be discharged from custody, but in each of them there was an order that the cause be remanded for a new trial. Since we reverse the judgment on the authority of those cases, we deem it proper to make the same orders which were made in them."

This case came before the court again in Id., 77 Cal. 176, 19 P. 268. The defendant pleaded the former trial and defective verdict as once in jeopardy. The court held the plea untenable, stating its reasons as follows (quoting from the syllabus):

> "When the defendant procures a reversal of a former judgment of conviction upon appeal, though asking for a discharge for insufficiency of the verdict, and not for a new trial, if the prayer for a discharge be denied, and a new trial ordered, the defendant will be regarded as impliedly assenting to all the consequences legitimately following such reversal, and a plea of once in jeopardy by reason of the former trial cannot be sustained upon the new trial."

The Supreme Court again reviewed the cases we are now considering in the case of Lee Yune Chong, 94 Cal. 379, 29 P. 776, and considers the questions urged upon this appeal so fully that we quote therefrom at length:

> "The judgment must be reversed, however, because the verdict failed to find the degree of the crime. It has always been the statutory law that in a murder case the verdict of guilty must designate the degree of the crime of which the defendant is found guilty; and for many years the Penal Code has provided generally that 'whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime.' Pen. Code, § 1157. And it has been held here, in a num-

ber of cases, that when the degree is not found by the verdict (when the crime has degrees), the judgment will be reversed, and a new trial granted. People v. Marquis, 15 Cal. 38; People v. Campbell, 40 Cal. 129; People v. Jefferson, 52 Cal. 452; People v. Travers, 73 Cal. 580 [15 P. 293]; People v. O'Neil, 78 Cal. 388 [20 P. 705].

"Appellant's motion to be discharged was properly denied. While the failure of the jury to find the degree of the crime is an error for which the judgment must be reversed, it no more entitles appellant to a discharge than would any other reversible error committed during the progress of the trial.

"Appellant asks that the judgment be reversed and that he be discharged; and contends that as he did not move for a new trial, no new trial can be ordered. It will be observed that in the cases last above cited—where there was a failure to find the degree of the crime—new trials were ordered, though in most of them a new trial had not been asked by the appellant. Under section 1260 of the Penal Code, the appellate court may reverse, affirm, or modify a judgment appealed from, 'and may, if proper, order a new trial.' It was expressly held in People v. Olwell, 28 Cal. 456, approved in People v. Barric, 49 Cal. 342, and People v. Travers, 77 Cal. 176 [19 P. 268], that—we quote from People v. Travers—'if a defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate court may order a new trial, even though the defendant does not move for such new trial, and denies the power of the court to grant it.' And the case at bar is clearly one in which it is proper that a new trial should be ordered.

"Counsel for appellant argue the question of 'once in jeopardy,' but that question can arise only after an issue has been made by a plea of 'once in jeopardy.' It is not necessary, therefore, to discuss that question here, although it may not be out of place to say that the cases last above cited of People v. Olwell, 28 Cal. 456, People v. Barric, 49 Cal. 342, and People v. Travers, 77 Cal. 176 [19 P. 268], are strong authorities against the position taken by appellant on that question."

[3] The plea of former jeopardy, however, if available, must be presented to the trial court (Rebstock v. Superior Court, 146 Cal. 315, 80 P. 65), and is not available here upon motion for discharge.

[4] In the case at bar the verdict of the jury is not, however, defective, in that it does not find the defendant guilty of the crime charged in the information. The crime of rape is not specifically divided into degrees. People v. Rambaud, supra. The crime of rape may be committed under varying conditions, but it is simply one crime, to wit, rape, not having different degrees set forth in the statute as is done in dividing the crime of robbery. It partakes more of the nature of the crime of grand larceny, which may be committed in various ways, but it is still the crime of grand larceny without degrees, and it has been held that where an information charges the defendant with the crime of grand larceny a verdict of guilty is sufficient. People v. Price, 67 Cal. 350, 7 P. 745; People v. Whitely, 64 Cal. 211, 27 P. 1104; People v. Perez, 87 Cal. 122, 25 P. 262. In the last case, the information was for grand larceny, and a verdict of guilty as charged was held to be a verdict of guilty of grand larceny.

Section 1157 of the Penal Code requires that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." A number of authorities are collated in the annotation to this case in Kerr's Cyc. Codes, holding that verdicts not complying with the section where crimes are divided into degrees are involved insufficient. Even though it might be held that the cases upon which the appellant relies correctly state the law, the defendant would not be entitled to a discharge. In those cases it appears that the defendant was not convicted of any crime expressly charged in the information or indictment, while in the case at bar the defendant is found guilty of the crime of rape, denominated in the information a felony and set forth as a felony in the verdict, and, also, by the use of express words finding the defendant guilty as charged. In the case of People v. Cornell, 29 Cal. App. 430, 155 P. 1026, this court had occasion to review a large number of previous decisions having to do with alleged defective verdicts. This court there quoted with approval from Bishop's Criminal Procedure (2d Ed.) § 1005a, as follows:

> "The language of the verdict, being that of lay people, need not follow the strict rules of pleading or be otherwise technical. Whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it. As in an indictment or a pleading bad grammar or spelling does not vitiate, so, a fortiori, it does not in the verdict unless the meaning becomes inadequate. Surplusage is harmless. The finding must be construed as a whole, not in its separate parts."

This court also in that case called attention to the reasons why the verdict in the Tilley Case was held insufficient, and the distinction between the verdict in the Cornell Case and the Tilley Case is no greater than is the distinction between the verdict in the case at bar and the verdict in the Tilley Case. In the Tilley Case the defendant was not expressly found guilty of the crime charged, while here the defendant is explicitly found guilty of the crime charged. We do not need to review the Cornell Case further than to state that the review of the verdict in that case fully establishes the validity of the verdict in this case, save and except for the reasons hereinafter stated. See, also, In re Flaherty, 64 Cal. App. 210, 221 P. 390. This case refers to and relies upon the authorities which we have cited. Again, if the principle upon which the cases of People v. Welch, 49 Cal. 174, and People v. French, 69 Cal. 169, 10 P. 378, are decided is applicable, then the verdict in this case, if the jury had been properly instructed, might be held to be sufficient to sustain the judgment in that finding the defendant guilty as charged in the information, and its being charged in the information that the defendant had committed a felony, and the verdict finding the defendant guilty of a felony as charged, intended to fix the place of punishment of the defendant in the state prison. Section 17 of the Penal Code defines a felony as an offense punishable by death or by imprisonment in the state prison. Section 264, Penal Code, provides for punishment of the offense of rape in the state prison, and, nothing further appearing, we see no reason why it cannot be held that the jury has with common certainty, in view of the Code, fixed the place of punishment. If this conclusion be correct, then, irrespective of the decisions which we have cited relating to the question of jeopardy and the right of the defendant to be discharged or not discharged, would be of no avail to the defendant, for the simple reason that we are only confronted with the ordinary case of where a defendant is entitled to a reversal on account of erroneous instructions given by the court.

[5] As we have said, the trial court in the case at bar did not instruct the jury as to what it should or should not do under the provisions of section 264 of the Penal Code. That section does not read that the jury may do so and so, but it is mandatory in form and directs that the jury shall make certain recommendations. The defendant was entitled to have the jury correctly instructed as to its powers with relation to the verdict. That it was incumbent upon the jury to make recommendations, that it might recommend either incarceration in the state prison or the county jail, and that this is a substantive right which may not be disregarded, appears to us to be beyond question. These are matters which the Legislature has seen fit to intrust to the determination of the jury, whenever and wherever the female has given actual consent, though denied the power of giving legal consent. As said in many of the cases, the circumstances under which the crime mentioned in subdivision 1 of section 261 of the Penal Code are found such that the ends of justice are subserved by a modified degree of the extent of the punishment.

The defendant requested no instructions relative to the authority and duty of the jury under section 264 of the Penal Code, but the cases denying relief under such circumstances are inapplicable here, for the simple reason that when the trial court undertook either of its own motion or upon the request of the prosecution (the transcript does not disclose which) to instruct the jury in relation thereto, it was incumbent upon the court to observe the terms and provisions of said section and to advise the jury of the duty devolving upon it as well as its authority.

For the reasons which we have stated, the motion of the appellant to be discharged is hereby denied, the judgment reversed, and a retrial ordered.

We concur: FINCH, P. J.; NEEDHAM, Justice pro tem.

---

78 Cal. App. 554

PEOPLE v. JONES. (Cr. 929.)

(District Court of Appeal, Third District, California. June 28, 1926. Hearing Denied by Supreme Court Aug. 26, 1926.)

1. Intoxicating liquors ⚷173.

Though liquor furnished by defendant was all sold and delivered at same time to 3 persons, transaction constituted separate sales as to each of them.

2. Criminal law ⚷369(6)—Sale of liquor, on which prior conviction was had, held properly admitted in support of charge of maintaining nuisance (Pen. Code, §§ 1025, 1093).

In prosecution for selling liquor and maintaining nuisance, where liquor was kept and sold, that clerk read part of information charging previous conviction for sale, contrary to Pen. Code, §§ 1025, 1093, *held* not prejudicial error, evidence of prior sale being properly admitted in support of charge of maintaining a nuisance, which is a continuing offense, notwithstanding sale occurred more than a year prior to filing of information.

3. Witnesses ⚷344(1)—Indian witness for prosecution might not be impeached by showing that he was a ward of the government, as showing discreditable conduct by officers in violating federal statutes governing giving of liquor to Indians (Code Civ. Proc. § 2051).

In liquor prosecution, witness for prosecution, who was an Indian, might not be impeached by showing that he was a ward of the government, as showing discreditable conduct by officers in violating federal statutes governing giving of liquor to Indians, who are wards of the government, in view of Code Civ. Proc. § 2051.

4. Criminal Law ⚷1170½(5)—Denying cross-examination of detectives, employed by district attorney in liquor prosecution, as to amount paid them for their services, held not prejudicial error.

In liquor prosecution, denying cross-examination of witnesses for prosecution, who testified that they were detectives employed by the district attorney and paid for their services, as to how much they expected to be paid, how much had been paid them in other cases, and total amount they had been paid, *held* not prejudicial error.

5. Witnesses 🔑291—Sustaining objection to recross-examination of detective employed by district attorney in liquor prosecution, as to transaction with bootleggers, held proper, as matter was immaterial.

In liquor prosecution, in which detective employed by prosecution testified that he was enabled to secure liquor from defendant by giving him names of bootleggers, sustaining objections to recross-examination of witness relative to his transactions with such bootleggers *held* proper, as matter was immaterial.

6. Intoxicating liquors 🔑139—Possession of intoxicating liquor for beverage purposes is lawful only where obtained before prohibition act went into effect and kept in owner's dwelling for private use.

Instruction that defendant could possess liquor in his private dwelling house for personal consumption of himself and family and any bona fide guests therein *held* properly refused, since such possession is lawful only where liquor was obtained before prohibition act went into effect.

7. Criminal law 🔑809—Instruction permitting finding defendant guilty of either, both, or neither of charges of information, held not misleading as requiring jury to either acquit or convict of both charges.

Instruction that jury might find defendant guilty of either, both, or neither of charges set forth in information, *held* not misleading in that jury must have understood they must either acquit or convict of both charges, since it must be presumed that trial judge so read instruction as to convey to jury correct meaning thereof.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Alonzo Jones was convicted of the unlawful sale of intoxicating liquor, and of maintaining, as a common nuisance, a place where intoxicating liquor was unlawfully kept and sold, and he appeals. Affirmed.

Dowd & Reagh, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein charges two offenses. The first count charges an unlawful sale of intoxicating liquor on the 21st day of September, 1925, and a previous conviction, on the 8th day of May, 1924, of an unlawful sale. The second count charges that the defendant, on or about the 17th day of October, 1925, maintained, as a common nuisance, a place where intoxicating liquor was unlawfully kept and sold. He admitted the prior conviction, but pleaded not guilty to the charges of unlawful sale and maintenance of a nuisance. He was convicted of both offenses, and prosecutes this appeal from the judgment and the order denying a new trial.

[1] The evidence against defendant is strong and convincing. Three witnesses, one a township constable, testified that they went together to defendant's home on the 21st day of September, 1925, and that he there furnished them intoxicating liquor, which they drank on the premises, and also sold them three bottles of liquor. Three other constables testified that they searched the defendant's premises on the 17th day of October, 1925; that they "heard a racket in the house" as they entered the gate; that in the house they "could smell liquor there strong"; that they found where liquor had been recently poured out in the back yard on some papers and leaves and secured a small quantity of the liquor from papers which were "cupped," by squeezing it out of the papers. This small quantity of liquor was produced at the trial. Several other witnesses testified that they had purchased liquor from defendant at his home at different times. While the liquor furnished by the defendant on the 21st day of September was all sold and delivered at the same time, the transaction constituted separate sales to the three witnesses mentioned in connection therewith. At the defendant's request the court required the district attorney to elect the sale upon which he would rely for a conviction, and he selected that made to the constable.

[2] In reading the information to the jury the clerk, doubtless through inadvertence, read that part thereof which charges a previous conviction, contrary to the express provisions of sections 1025 and 1093 of the Penal Code. Appellant contends that this constitutes prejudicial error. It is probable that the clerk's error escaped the attention of the court and the attorneys for both parties, because no reference thereto appears in the record. The sale of the liquor, upon which the prior conviction was had, was properly admitted in evidence in support of the charge of maintaining a nuisance, which is a continuing offense. People v. Frankovich, 64 Cal. App. 184, 190, 221 P. 671; McDonough v. U. S. (C. C. A.) 299 F. 30. It is the previous conviction, not the offense of which a defendant has been previously convicted, which section 1025 provides must not be "alluded to on the trial," in case it is admitted by the defendant. With such proof properly in evidence, the additional fact that he had been convicted of that offense would have little weight with the jury. Relative to such prior sale, a witness for the prosecution, who had testified that he had purchased liquor from defendant prior to September, 1925, was examined as follows:

> "Q. When was it and how much did you buy? A. I can't recollect the date, about two years ago. That case was disposed of and Mr. Jones was fined at that time.
>
> "Mr. Reagh: We will move to strike out the answer on the ground that this is outside of the statutes of limitations, and it is prior to the time of the plea alleged in the information.
>
> "The Court: The motion is denied."

The ruling was correct, because directed to the whole of the answer, and the first part thereof was properly admitted as bearing upon the charge of maintaining a nuisance. While the defendant could not be convicted of making a sale or maintaining a nuisance at a time more than one year prior to the filing of the information, evidence thereof was admissible as a circumstance tending to prove that his possession of liquor at the time charged was for the purpose of unlawful sale. The information herein was filed November 3, 1925. If it had charged that defendant maintained a nuisance on the 5th of November, 1924, it would hardly be contended that a sale, made by him a few days prior to November 3, 1924, could not be shown for the mere reason that the prosecution of defendant for making such sale was barred by the statute of limitations. It is the prosecution of the crime of making such a sale that is barred in one year, not the proof of the sale as tending to establish another crime. The real question is whether the sale given in evidence was so disconnected or remote as to have no logical tendency to prove the crime charged, but the objection did not raise that question. In answer to a question by his own counsel, the defendant stated that "one time I was selling it there." In view of all the foregoing facts and circumstances, it does not appear that the defendant's case was prejudiced by the inadvertent reading of the charge of a previous conviction.

[3] One of the witnesses for the prosecution is an Indian. Counsel for appellant say:

> "On cross-examination the defendant essayed to show that the witness, admittedly an Indian, was a ward of the government. The defendant's avowed purpose was to show discreditable conduct on the part of the officers in willfully and unnecessarily violating the federal statutes governing the giving liquor to Indians who are wards of the government." It is sufficient to say that a witness may not be impeached "by evidence of particular wrongful acts." Code Civ. Proc., § 2051.

[4] Two witnesses for the prosecution testified that they were detectives employed by the district attorney, and were paid for their services, and expected to be paid for their attendance at the trial. They were asked on cross-examination how much they expected to be paid, how much had been paid them in other cases, the total amount they had been paid, and other similar questions, to all of which the court sustained objections made by the district attorney. The rulings were not prejudicially erroneous. People v. Breen, 130 Cal. 72, 62 P. 408; People v. Tomalty, 14 Cal. App. 224, 235, 111 P. 513.

After one of the detectives had left the witness stand, he was immediately recalled by counsel for defendant and asked: "What was the threat you made against me when you passed me going outside of the courtroom?" The witness answered: "You called me a stool pigeon."

The district attorney objected to the question and there followed a colloquy between the court and respective counsel, but no ruling upon the objection appears to have been made. Counsel for defendant stated that he desired to make an offer of proof relating to the alleged threat and was willing to make it outside of the hearing of the jury. The court replied that the matter would be taken up later and directed the witness to remain within call. Nothing further was done in the matter. Appellant's contention that he was not permitted to examine the witness in relation to such threats does not appear to be supported by the record.

[5] One of the detectives testified on cross-examination that he was enabled to secure liquor from defendant by giving him the names of bootleggers in Oroville. On redirect examination the witness, without objection by defendant, gave the names of several persons who, he said, were bootleggers. On recross-examination counsel for defendant examined the witness at some length relative to his transactions with such bootleggers, and finally the district attorney objected to any further examination along that line. The objection was properly sustained, as the whole matter was immaterial. Appellant says that it was "competent for Jones to show that the men named were not bootleggers." The statement contains a sufficient reason for sustaining the objection. It would have been highly improper in the middle of defendant's trial to have tried the question of whether several other persons were guilty of similar offenses.

[6] The court refused to give the following instruction requested by defendant:

> "In connection with the second count in the information, I charge you that the defendant under the law had a right to possess liquor in his private dwelling house for the personal consumption of himself and family, and of any bona fide guest he might entertain therein."

The instruction is too broad and comprehensive. "The only instance in which the possession of intoxicating liquor for beverage purposes is recognized as lawful is where the liquor was obtained before the act went into effect, and is kept in the owner's dwelling for use therein by him, his family, and his bona fide guests." Cunard Steamship Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306.

[7] The court instructed the jury as follows:

> "Under the said information you may find the defendant guilty of either, both, or neither of the charges set forth in said information, accordingly as you are convinced as to the truth of said charges."

Appellant contends that the jury probably understood from this instruction "that they must either acquit of both charges or convict of both charges." There is no merit in the contention. It must be presumed that the trial judge so read the instruction as to convey to the minds of the jurors the correct meaning thereof as indicated by the punctuation.

Appellant complains of statements made by the district attorney in his argument to the jury. No complaint or objections were made at the time, and the defendant did not assign such statements as misconduct, or ask the court to instruct the jury to disregard them. The statements were not of such character as to merit discussion thereof in the absence of any objection thereto at the trial.

The remaining contentions of the appellant are unimportant and wholly without merit.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; NEEDHAM, Justice pro tem.

---

78 Cal. App. 522

CALIFORNIA BEAN GROWERS' ASS'N v. C. H. & O. B. FULLER CO., Inc.

(Civ. 5530.)

(District Court of Appeal, First District, Division 2, California. June 24, 1926.)

1. Corporations 🔑503(3)—To defeat motion to change venue, when corporation defendant's residence is in another county, plaintiff must show contract was made, or was to be performed, or breach occurred, in county where sued on (Const. art. 12, § 16).

Where, on motion to change venue, corporation defendant has shown that its principal place of business is in another county, to defeat motion, plaintiff must, under Const. art. 12, § 16, show that contract sued on was made, or was to be performed, or that the obligation or liability arose, or breach occurred, in county where action was brought.

2. Contracts 🔑145.

Place at which contract bears date is only prima facie place where it was made.

3. Evidence 🔑471(2)—Testimony that contract was made in certain county was mere conclusion, not probative fact, where fact in dispute was place of making.

Where, on motion to change venue, fact in dispute was where contract was made, witness should state probative facts, and witness' statement that it was made in certain county was but his conclusion, without probative value.

4. Corporations 🔑503(2)—Where defendant corporation signed contract in one county, and plaintiff subsequently signed in another county, plaintiff could maintain action in latter, since contract was made there (Const. art. 12, § 16).

Where, notwithstanding contract recited it was signed in certain county, it appeared that defendant corporation signed it as indicated, but plaintiff signed it later in another county, contract was made in latter county, and hence action could be maintained therein on contract, in view of Const. art. 12, § 16, though defendant's principal place of business was in former county.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the California Bean Growers' Association against the C. H. & O. B. Fuller Company, Inc. From an order granting a motion for change of venue, plaintiff appeals. Reversed.

Sapiro & Hayes and Sapiro, Levy & Hayes, all of San Francisco, for appellant.

Wm. A. Freeman, of Los Angeles, for respondent.

STURTEVANT, J. This is an appeal from an order granting the motion of the defendant corporation changing the place of trial from San Francisco to Los Angeles, the city where the principal place of business of the defendant corporation is situated.

[1] The plaintiff is a nonprofit, co-operative association, without capital stock, organized and doing business under the laws of the state of California, and having its principal place of business in San Francisco; it was organized by a large number of growers of beans to enable the growers to market their produce; the defendant and the plaintiff executed a contract, and the principal action was brought to recover damages for an alleged breach of that contract. On the hearing of the motion it transpired and at this time the parties concede that the defendant is a corporation having its principal place of business in the city of Los Angeles. Both parties concede that it is the settled law of this state that, in applying the provisions of section 16 of article 12 of the state Constitution:

> "The rule is that when the corporation has shown that its principal place of business, which is its residence, is in another county, to defeat the motion for a change of venue the burden of proof is upon plaintiff, in an action like this, to show that the contract was made, or was to be performed, or that the obligation or liability arose, or the breach occurred in the county where the action is brought (citing cases)." Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 169, 133 P. 978, 979.

Accordingly, on the hearing of the motion in the trial court and again in presenting the matter in this court, the plaintiff endeavored to show: (1) The contract upon which the action is brought was made in San Francisco; (2) the contract was to be performed in San Francisco; and (3) the breach occurred in San Francisco. If the plaintiff made a showing that was sufficient on any one of the grounds stated, the order should be reversed. The respondent contends that the contract was made in Santa Barbara county. In support of this contention it calls to our attention that the ending of the contract is as follows:

> "Read, considered, and signed at Lompoc, Cal., this 17th day of August, 1921. [Seal] California Bean Growers' Association, by C. L. Danly, Secretary-Treasurer. C. H. and O. B. Fuller Co., by O. B. Fuller, Pres."

In framing its complaint the plaintiff pleaded the contract in haec verba. The complaint was verified by C. L. Danly. The affidavit of C. H. Fuller presented by the defendant on the hearing of the motion, among other things, contained the statement:

> "That said contract was made * * * in the county of Santa Barbara, state of California."

[2] Thereupon the respondent contends that the showing made before the trial court was to the effect that the contract was made in Santa Barbara county. The respondent also argues:

> "The place at which a contract bears date is held to be prima facie the place where the contract was made (citing cases)." Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 170, 133 P. 978, 980.

[3] The appellant replies that it concedes the rule, as last quoted, to be sound in the absence of other evidence, but it claims that there was other evidence before the trial court on the hearing of the motion. Turning to the facts relied on by the respondent, the appellant claims that the statement in Mr. Fuller's affidavit is but the conclusion of the affiant. We think that that contention is correct. On the hearing of the motion to change the place of trial the very fact in dispute was the question as to where the contract was made. When such is the case, the witness should state the probative facts and leave the court or jury to draw its conclusion therefrom. Levins v. Rovegno, 71 Cal. 273, 275, 279, 12 P. 161; Winslow v. Glendale Light & Power Co., 164 Cal. 688, 689, 690, 130 P. 427.

[4] We turn therefore to the additional facts that were before the trial court, and which appear in the bill of exceptions. In resisting the motion to change the place of trial the plaintiff presented the affidavit of C. L. Danly, its secretary-treasurer. Among other things contained in the affidavit are the following:

> "That the above-entitled action is based upon an agreement in writing executed as in said complaint set forth, and a copy of which is attached to said complaint and marked Exhibit A thereto; that said Exhibit A was signed by defendant as indicated thereon, on the 17th day of August, 1921, at Lompoc, county of Santa Barbara, state of California; that on said 17th day of August, 1921, said Exhibit A was not signed and did not bear the signature nor seal of plaintiff; that said Exhibit A on the said 17th day of August, 1921, or shortly thereafter, together with an application for membership in plaintiff association signed by the defendant, was forwarded by mail to the plaintiff at its office and place of business in said city and county of San Francisco; that on or about the 25th day of August, 1921, said Exhibit A and said application of defendant for membership in plaintiff association, and the offer to contract therein contained was delivered to, received by and accepted by plaintiff in the said city and county of San Francisco, and the said application for membership was acted upon, and certificate of membership in plaintiff association issued to defendant in the said city and county of San Francisco, and the contract contained in said Exhibit A was then and there entered into by plaintiff, and plaintiff's signature and seal were thereto affixed at plaintiff's office and principal place of business in the said city and county of San Francisco, by C. L. Danly, the affiant, on plaintiff's behalf, and thereunto was duly authorized, and not elsewhere; and no application for membership in plaintiff association was received nor acted upon, nor membership certificate therein applied for issued, and no signature of plaintiff or affiant, or of any one in plaintiff's behalf was affixed to said bean crop agreement of which Exhibit A is a copy, nor was any seal of plaintiff affixed thereto at any other time or place or in any other manner than as aforesaid. That said contract upon which plaintiff's action is based was made as above set forth in the city and county of San Francisco, state of California, and not elsewhere."

The appellant offered no evidence contradicting the probative facts contained in the affidavit of Mr. Danly. There being no showing to the contrary, we must assume the probative facts to be as stated in that affidavit. The question as to what conclusion should be drawn from such probative facts is not an open one in this state. A similar question arose in the case of Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 P. 180, 61 P. 99. Following the doctrine of that case we must hold that the contract involved in the principal action was made in San Francisco. It is unnecessary therefore to discuss the other contentions made by the appellant.

The order appealed from is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

78 Cal. App. 598

PEOPLE v. HALBERT. (Cr. 1324.)

(District Court of Appeal, Second District, Division 1, California. July 7, 1926. Hearing Denied by Supreme Court Sept. 2, 1926.)

1. Criminal law 🔑409—Defendant's admission held sufficient to establish fact that he was driving automobile at time of collision causing death.

Corpus delicti having been established by evidence apart from any admission or confession by defendant, testimony as to his admission that he was driving car at time of collision causing death was sufficient to establish such facts.

2. Automobiles 🔑355(13).

Evidence *held* sufficient to sustain conviction of manslaughter by automobile, under Pen. Code, § 192.

3. Automobiles 🔑352 — Information charging automobile struck named person and proof that it struck automobile in which he was riding held to present no variance (Vehicle Act 1923, § 141).

That information for violating Vehicle Act (St. 1923, p. 562) § 141, by failure to stop after accident, charged that automobile driven by plaintiff collided with and struck named person, while evidence showed that it struck automobile in which such person was riding, *held* to present no variance.

4. Criminal law 🔑406(6) — Defendant's admission that he was driving automobile at time of collision held admissible in trial for failing to stop and render assistance (Vehicle Act 1923, § 141).

Corpus delicti having been established by competent evidence, exclusive of any confession or admission by defendant, that latter's automobile collided with another car and proceeded without occupant rendering necessary assistance, defendant's admission that he was driving it at time was admissible in trial for violating Vehicle Act (St. 1923, p. 562) § 141.

5. Criminal law 🔑388.

For experimental evidence to be of any value, conditions affecting result must be substantially identical with those existing at time of, and operating to produce, particular effect.

6. Criminal law 🔑388—Jury may allow for minor differences, where principal conditions in experiment are same as those of evidence against which directed.

Where principal conditions in experiment are same as those of evidence against which it is directed, jury may weigh and make allowances for minor differences, which affect weight not competency of evidence.

7. Criminal law 🔑388—Testimony that witness, standing where eyewitnesses of collision stood, could not tell whether car passed to left of center of street, as they testified, held erroneously excluded.

Testimony of witness, standing, about six months after automobile collision, at points where eyewitnesses were at such time, that he could not tell whether car crossing intersection passed to left of center line, as they testified, *held* erroneously excluded.

8. Witnesses 🔑270(2)—Police officer's testimony on cross-examination held properly excluded as immaterial, though his direct testimony was inconsistent with his testimony at preliminary examination.

Police officer's testimony, on cross-examination by defendant, that latter would say nothing when arrested, *held* properly excluded as immaterial, though his testimony at preliminary examination was inconsistent with his testimony in chief.

9. Criminal law 🔑800(1)—Instruction that one recklessly operating automobile is guilty of manslaughter should he thereby "occasion" another's death held not error, as not defining proximate "cause" or limiting remoteness of occasion.

Instruction that one recklessly operating automobile without due respect for others' safety, and not using means reasonably at his command to prevent collision, is guilty of manslaughter, "should he thereby occasion" another's death, *held* not error, as not defining proximate cause or limiting remoteness of occasion; word "occasion" being used as exact equivalent of "cause."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause; Occasion.]

10. Automobiles 🔑357—Instruction that prosecution must prove that failure to use due caution in operating automobile was proximate cause of injury held properly refused under evidence.

In trial for manslaughter by automobile, instruction that prosecution must prove, not only failure to use due caution, but that such failure was proximate cause of injury, *held* properly refused as based on pretense that deceased was killed by his own automobile, whereas he was injured through instantaneous, concurrent, and united action of his and defendant's automobiles.

11. Criminal law 🔑800(2)—Instruction not defining "willful," "wanton," and "wantonness," used in explaining "gross negligence," held not error.

Instruction not defining words "willful," "wanton," and "wantonness," used in explaining phrase "gross negligence," in trial for manslaughter by automobile, *held* not error; such words being used in ordinary sense.

12. Homicide 🔑293 — "Contributory negligence" held sufficiently defined in instruction as negligence of person injured contributing to injury.

"Contributory negligence" *held* sufficiently defined, in instruction that such negligence is no defense to charge of manslaughter, by phrase, "that is, negligence on the part of the person injured which contributed to the injury."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence.]

13. Criminal law 🔑829(9, 18)—Refused instruction on reasonable doubt and presumption of innocence held sufficiently covered by instruction given.

Refused instruction that prosecution must prove every material element of offense beyond reasonable doubt, and that presumption of innocence has weight of evidence for defendant throughout trial until satisfied of his guilt beyond such doubt, *held* sufficiently covered by instruction clearly announcing usual rule as to presumption of innocence and requirement that guilt be established to moral certainty before conviction.

14. Criminal law 🔑665(1), 1144(12).

Generally, exclusion of witnesses and exceptions thereto are matters of discretion, in exercise of which error will not be implied.

15. Criminal law 🔑665(2).

Excepting police officers from order excluding witnesses *held* not abuse of discretion, in absence of more particular showing of prejudice than objection that they would be important witnesses.

16. Criminal law 🔑1170(2) — Exclusion of testimony that witness, standing where eyewitnesses were at time of collision, could not see whether automobile was driven to left of center of street, as they testified, held not reversible error.

In trial for manslaughter by automobile, exclusion of testimony that witness, standing where eyewitnesses were at time of collision, could not see whether automobile passed to left of center line of street, *held* not reversible error, in view of undisputed testimony of six unimpeached eyewitnesses that defendant's automobile was driven on wrong side of road.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Coy Halbert was convicted of manslaughter and a violation of Vehicle Act, § 141, and he appeals. Affirmed.

Perky, McConnell & Hill, of Long Beach, and B. F. Griffith, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was found guilty under counts 1 and 3 of the information. Count 2 charged the offense of violation of section 112 of the California Vehicle Act (St. 1923, p. 553), but at the trial count 2 was dismissed.

American avenue is a street running north and south in the city of Long Beach. State street is an east and west highway which crosses American avenue and is 36 feet wide between curbs. Extending along the center of American avenue is a right of way, 72 feet in width, of the Pacific Electric Railway. Between the west line of the right of way and the west curb line of the avenue the width of the driveway is 31 feet. On the east side of the right of way the width of the driveway is 26 feet. State street is open for traffic across American avenue.

[1, 2] At about 1 o'clock on the night of March 29, 1925, one Frank Jones was driving a Ford roadster, going south on the west side of American avenue. At about the same time a Ford coupé, which was the property of defendant, was being driven toward the west on State street across American avenue. One of the disputed questions in this case is the question whether or not the defendant was driving his car or was there at all. He claims that he was not there. But it is admitted that there was a collision between these two Ford automobiles. The roadster was turned over in such manner that its driver, Jones, was crushed and injured so that on the same night he died. According to the testimony of witnesses to the accident, the left front wheel of the coupé struck the left rear wheel of the roadster and whirled it around and turned it over. There is testimony to the effect that when the roadster was hit it was south of the center line of State street. It follows as a necessary inference from this fact that at the moment of collision the defendant's automobile was on the wrong side of the road along which it was traveling. After the collision the Ford coupé "stopped just an instant and then went right west" and disappeared; no one got out of this machine; no one went from it to the injured person.

The manslaughter charge is contained in count 1 of the information. As shown by the evidence, the crime committed was involuntary manslaughter. This crime is the unlawful killing of a human being, without malice, when done "in commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Pen. Code, § 192.

The foregoing statement of facts shows that the evidence was sufficient to prove that the driver of the Ford coupé was guilty of involuntary manslaughter. The only additional fact necessary to sustain the conviction would be the fact that the defendant was the driver of the Ford coupé. The corpus delicti having been established by evidence apart from any admission or confession made by defendant, there remains no doubt that the fact that the defendant was the driver of the offending machine may be established by admission made by him of that fact. People v. Moran, 144 Cal. 48, 53, 77 P. 777. The record contains testimony showing admissions made by the defendant to the effect that he was the driver of his car at the time of the collision. We will consider later appellant's further contention that the evidence of statements made by him was improperly received. Assuming for the present that such evidence was properly received, it is sufficient to establish the fact that he was present in and was actually driving his car at the time of the collision. The conclusion follows that the evidence as a whole is sufficient to sustain the verdict of guilty of manslaughter under the first count of the information.

[3] Count 3 of the information, under which also the defendant was convicted, is the crime of violation of section 141 of the California Vehicle Act (Stats. 1923, p. 517; Deering's Gen. Laws [1923 Ed.] Act 5128.) That section reads as follows:

> "Duty to Stop in Case of Accident; Penalty. —The driver of any vehicle which strikes any person or collides with any other vehicle shall immediately stop and give his name and address and the names and addresses of all passengers not exceeding five in his vehicle, also the registration number of his vehicle, to the person struck or the occupants of the vehicle collided with, and shall also render to such persons all necessary assistance, including the carrying of such persons to a physician or surgeon for medical or surgical treatment, if such treatment is required or if such carrying is requested by the persons struck or any occupant of such vehicle collided with. Any person violating any of the provisions of this section is punishable by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment."

The evidence in the present record shows that defendant's vehicle collided with the vehicle then being driven by Jones, that the defendant's car stopped momentarily only and then proceeded on its way, and that no occupant of defendant's car rendered necessary assistance or any assistance to the injured person, although that person was manifestly in a condition requiring immediate aid.

Appellant claims that there was a variance between count 3 of the information and the proof, in that the information charged that the automobile driven by the plaintiff "did then and there collide with and strike a human being, to wit, Frank Jones," etc., whereas the evidence is limited to the fact that appellant's automobile struck, not Frank Jones, but only the automobile in which Jones was riding; that, in fact, "the direct cause of the death of deceased was his own auto." This claim of appellant strikingly suggests Hood's narrative of the case of Miss Kilmansegg, who, according to the coroner's jury, was guilty of suicide, "because her own leg had killed her." We are of the opinion that the terms of the charge (which conform to the terms of the statute which we have quoted) are sufficient to include a personal injury caused by collision between the two automobiles. It would be an unreasonably narrow construction of the statute to hold that the crime there defined cannot be committed unless the automobile of the offending party actually touches the person of the injured human being. Unquestionably, a personal assault may be made by a blow delivered against the clothing which covers a man's body. Under the circumstances of an automobile collision a blow given by A's automobile to B's automobile, whereby B's automobile turns over upon and injures B, is in effect a blow delivered against B's body. This being so, the variance in the proof, for which appellant argues, is not established.

[4] It follows also that the corpus delicti, consisting of a crime committed by the driver of appellant's automobile, was established by competent evidence exclusive of any confession or admission made by the defendant. We thus arrive at the conclusion, applicable to the third count as well as to the first count of the information, that there is no merit in appellant's contention (based upon the claimed absence of competent proof of the corpus delicti) that the court erred in receiving evidence of his admission that he was in fact the driver of his automobile at the time of the collision.

[5-7] Appellant contends that the court erred in sustaining objections to questions propounded by him to a witness by whom appellant was seeking to show certain physical conditions on the ground and consequent physical impossibilities (as appellant's counsel claimed), in disparagement and contradiction of testimony introduced by the state. Alfred D. Mitchell was the witness. He stated that he was familiar with the location of the driveways at the intersection of American avenue and State street, and that he was present at that place at 9 o'clock on Monday evening, September 21, 1925. This date was about six months later than the date of the transaction which was under investigation in this case. The court refused to allow this witness to state what were the conditions of the light, or where the witness stood with reference to the street intersection, at the time of his visit there on the evening of September 21st. The court then sustained objection to three successive questions which were similar in character, except that the point of view was shifted in the several questions; but they were all directed to the purpose of showing how much or how little could be seen at the stated time from the several points of view. The third question will aptly illustrate the subject-matter of this particular inquiry:

> "Q. I will ask you if, standing at a point on the east driveway of American avenue 50 feet from the intersection of the east driveway of American avenue and State street, and looking northwest toward the intersection of the western driveway of American avenue and State street, if you were able to tell whether a car driven west on State street and crossing said intersection passed to the left or right of the center line of said intersection?"

Appellant's attorney was proceeding to ask further questions apparently of similar import when the court said:

> "I will be consistent in my rulings, so there is no use of pursuing it any further. You have got your record."

We presume that the purpose of these questions was that indicated by counsel for appellant as hereinbefore stated. Eyewitnesses of the collision which occurred on the night of March 29, 1925, had testified that at the moment of the collision they were present at certain points, which were substantially identical with the positions assumed for Mr. Mitchell in the question propounded to him. This may be illustrated by the testimony of Mrs. Elkins. She testified that immediately preceding the collision between the two automobiles she and her husband were driving northward on the east driveway of American avenue just south of State street; that she saw a Ford roadster hit on the rear by a Ford coupé. Definitely and in detail she described the collision and the results of the collision as plainly seen by her. She located the position of the Ford roadster when it was hit, and indicated that position as being south of the center line of State street.

Appellant contends that it was the duty of the court to allow him to introduce the aforesaid offered evidence of Mitchell in order to assist the jury in determining whether or not it was a physical possibility for any person, under any atmospheric conditions, from the said several points of view, to fix with any degree of certainty the center line of State street across its intersection with American avenue, so as to be able to testify to the position of appellant's automobile with respect to the center line of State street while his automobile was traveling west at said street intersection.

In People v. Hadley, 175 Cal. 118, 165 P. 442, the defendant was convicted of murder committed at night while burglarizing the house of the deceased. Mrs. Young, a neighbor who heard the shots, went to her window and saw a colored man, whom she identified as the defendant, "sneaking along in front of the house of the deceased," and then climbing over a fence. The defendant offered the testimony of a witness for the purpose of showing that under the conditions existing at the time of the homicide Mrs. Young could not have identified the defendant. The court sustained a number of objections to the questions asked of this witness, which questions apparently were for the purpose of showing the conditions existing when the witness made his observation, so that the same might be considered in comparison with the conditions existing at the time to which Mrs. Young referred in her testimony. The district attorney was insisting that before the impeaching evidence could be received precisely similar conditions (including equality of eyesight) must be established for the purposes of the experiment. Referring to this, the Supreme Court said:

> "The court did not rule upon this statement, but it is quite apparent that the prosecuting attorney believed that unless the 'experiment' touching the ability of one person to recognize another was carried out under identical conditions, even to the last leaf on the tree, with those which obtained when the witness Mrs. Young testified that she identified the defendant, the evidence was inadmissible. Of course such is not the law. Nor did the court rule that such was the law."

In order that experimental evidence in corroboration or disproof shall be of any value, it must be shown that the conditions affecting the result are, as near as may be, "identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible, but a substantial identity must exist to give the evidence value." County of Sonoma v. Stofen, 125 Cal. 32, 39, 57 P. 681, 683. Where the principal conditions in the experiment are the same as those of the evidence against which the experiment is directed, the jury may weigh and make allowance for minor differences. These affect the weight, not the competency, of the evidence. People v. Phelan, 123 Cal. 551, 568, 56 P. 424. The foregoing decisions all assume that evidence obtained by means of experiment is, under appropriate circumstances, receivable as a means of testing the reliability of testimony concerning facts observed by a witness. This case, as developed by the evidence for the prosecution, was left in a situation where the evidence offered by defendant should have been received. Therefore the court erred in ruling out the proposed questions. This error, however, applies only to the charge of manslaughter, and not to the third count of the information.

[8] Under point 5 of his brief appellant claims that the court erred in sustaining objections to the questions propounded by him to the witness Holland for the purpose of showing that Holland had made at other times statements inconsistent with his present testimony. Appellant claims that he had a right to introduce this evidence because he was surprised and prejudiced by the unexpected answers of the witness, which were different from testimony given by him at the preliminary examination of the charge against appellant. The testimony of Holland at this time was offered in relation to a subordinate issue, which was the right of the prosecution to introduce in evidence the testimony of the witness Iseminger concerning statements made by appellant at the place where he was arrested at or near the place where his Ford coupé was found shortly after the accident. Iseminger testified that when he and Officer Holland arrived at the scene of the accident at American avenue

and State street a few minutes after that accident had occurred he and Holland had been given the number of the Ford coupé which had disappeared from the scene. Following a clue, they found this Ford coupé, bearing that number and also found the defendant near the coupé and walking away from the direction of the place where it was standing. Iseminger said that at that time and place the defendant made certain statements which the witness in general terms asserted were made freely and voluntarily and without any threat or violence or promise of immunity or reward having been made to obtain such statement. It was for the purpose of contradicting this testimony and thus sustaining appellant's objection to the introduction of the purported statement that he was permitted to examine the witness Holland concerning the circumstances under which the statement to which the witness Iseminger was about to testify had been made.

After the conclusion of the evidence received concerning the foundation for introduction of said statement, Iseminger was permitted to testify to the statement which he said was made by appellant. In substance his answer was that when he and Holland found appellant near the said Ford coupé appellant said that one of the two caps found in the car was his own. "I asked him where the other fellow was, and he said there was no one with him, and I said, 'Yes; there was some other people in the car with you, wasn't there?' And he said, 'No; there was no one with me.' I said, 'Who does this other cap belong to?' He said his brother was with him then, and I asked him where his brother went to, where his brother was, and he said he didn't know, and I believe that was about all the conversation at that time."

Turning now to the matter of the court's ruling, which is the subject of appellant's complaint at this time, we find that counsel for appellant asked Holland, "Q. And isn't it a fact that he wouldn't say anything, so you handcuffed him to the front wheel of the car?" The witness having answered in the negative, appellant then sought to introduce testimony given by Holland at the preliminary examination, which reads as follows:

> "A. Well, I went—my partner was there, Mr. Iseminger; he came there when I was bringing him back down Twentieth street, and I turned him over to him, and right there we both questioned him. He would not say anything, so we handcuffed him to the front wheel of the car, and I went over and tried to call in to the station, but the telephone give me no connections; at that time other officers had been sent out there, and we turned him over to them."

From the foregoing it appears that, even according to the testimony so given by Holland at the preliminary examination, no part of the alleged statement was obtained from the defendant at or after the time when he was handcuffed. Thus far we have assumed that the statements made by appellant to these officers while they were on the street where the coupé was found were statements in the nature of a confession. The fact is, however, that those statements did not constitute a confession, but merely were admissions of facts which were in themselves insufficient to authorize a conviction upon either one of the two counts on which the defendant was convicted. This being so, the rule governing proof of confessions, and which requires that their voluntary character be first established, had no application to the real matter then at issue before the court, and all of the testimony offered by appellant in connection with his examination at that time of the witness Holland was immaterial, at least so far as counts 1 and 3 are concerned. People v. Fowler, 178 Cal. 657, 664, 174 P. 892.

[9] Concerning the court's instruction to the jury, appellant assigns error in thirteen of the instructions given and error in refusal of eight instructions requested by him and refused by the court. A few points only appear to require comment thereon in this place. Instruction 2, after defining the duty of an automobile driver to exercise reasonable care and to prevent injury to others states that if a person knowing the danger, etc., recklessly, etc., operates his automobile without due respect for the rights and safety of others, and does not use such means as are reasonably within his command to prevent a collision, the law holds him criminally responsible for such negligence or willful omission of duty, and "should he thereby occasion the death of another, he is, under the law, guilty of manslaughter." The principal criticism directed against this instruction is that it fails to define proximate cause or to limit the remoteness of the "occasion." As to the latter point, it is manifest that the verb "occasion" as used was exactly equivalent to the word "cause."

[10] The suggested point concerning "proximate cause" is further emphasized by appellant in connection with his requested instruction No. 15, which was refused by the court. This requested instruction reads as follows:

> "It is not sufficient to warrant a conviction under count 1 of the information that the prosecution prove, and you find from the evidence that the defendant failed to use due caution and circumspection under the circumstances, but the prosecution must further prove and you must further find from the evidence that the failure to use due caution and circumspection was the proximate cause, that is, that cause which in natural and continuous sequence unbroken by any sufficient intervening cause or without which the injury would not have occurred."

The principle involved has been frequently affirmed. A recent instance is People v. Wilson, 193 Cal. 512, 517, 226 P. 5, where the Supreme Court, in defining the conditions under which the defendant might be found guilty of involuntary manslaughter arising out of his careless or unlawful manner of driving an automobile, included in its statement the apparently undoubted assumption that the death of the injured person must have been "proximately due to" defendant's violation of the requirements of law which applied him under the facts stated. But we are further of the opinion that the evidence herein did not justify defendant in demanding that this rule of "proximate cause" be included in the instructions to the jury. The request for this instruction was based upon the pretense, to which we have adverted, to the effect that Mr. Jones was killed by his own automobile. But the actual facts concerning the immediate results of the accident were not in doubt or dispute. From the circumstances as proved, it is plain that Jones received his injuries through the instantaneous, concurrent, and united action of the two automobiles. Practically, there were only two really disputed facts in the case. These related to the evidence that the defendant was the driver of his car at the time of the accident and the evidence that the collision occurred at a point south of the center of State street.

[11] One of appellant's objections to instruction 12 arises from the fact that in explaining the phrase "gross negligence" the court used such words as "willful," "wanton," and "wantonness," as in the phrase "with a wanton and reckless disregard for the safety of others," without defining the words "willful," "wanton," and "wantonness." These words were used in their ordinary sense as commonly understood in the English language. A jury which did not understand them would not understand an explanation of them.

[12] Concerning instruction 13, which informed the jury that contributory negligence is not a defense to a charge of manslaughter, complaint is made that the instruction does not define contributory negligence. But the court did define it, sufficiently for the instant purpose, by using the phrase, "that is, negligence on the part of the person injured which contributed to the injury."

[13] Defendant's requested instruction No. 2 as presented by him reads as follows:

> "The information filed against the defendant is merely a formal accusation, and must not be considered by you as evidence or allowed to prejudice you or influence your minds against the defendant. In a criminal case the prosecution must prove every material element of the offense charged beyond a reasonable doubt. Probabilities, or that the greater weight or preponderance of the evidence supports the allegations of the information, will not warrant a conviction. The law presumes the defendant to be innocent of the offense charged until he is proven guilty by competent evidence beyond a reasonable doubt. This presumption of innocence has the weight and effect of evidence in the defendant's behalf, and continues with him throughout the trial until from all the evidence you are satisfied of his guilt beyond a reasonable doubt."

The court modified this instruction by striking out all of it except the first sentence. It was indicated in the judge's notation on the instruction that the stricken portions were omitted because they were covered in other instructions given to the jury. Counsel for appellant assert that the parts stricken are not sufficiently covered in the instructions given to obtain for appellant a fair and impartial trial. They have not pointed out the particulars in which the instructions given, in relation to the presumption of innocence and the doctrine of reasonable doubt, are defective. The court did clearly announce to the jury the rule as usually given, covering the presumption of innocence and the requirement that before conviction the guilt of a defendant must be established to a moral certainty, and that if there is reasonable doubt remaining the defendant should be acquitted.

[14, 15] Appellant contends that the court erred in excepting the witnesses who were police officers from its order granting appellant's request that all witnesses, while not testifying, be excluded from the courtroom. These officers were the witnesses who subsequently gave testimony covering defendant's admission to them of the fact that he was driving his car at the time of the accident. On examination of the transcript we find that the attorney for defendant objected to the presence of the police officers, for the reason that they would be important witnesses. No attempt was made to more definitely inform the judge concerning their relation to the case or the relative importance of the testimony to be given by them. The general rule is that the matter of exclusion of witnesses, and of exceptions to be made in such orders of exclusion, is discretionary, and that in the exercise of this discretion error will not be implied. In this instance, in the absence of any more particular showing to the trial court of prejudice that would probably arise from the presence in court of these persons, it does not appear that there was any abuse of discretion in the order as made.

[16] As has been stated, we think that the court erred when it sustained the objections to the questions asked of the witness Mitchell concerning the tests made by him at said street intersection on the evening of September 21st. It only remains to determine whether it is reasonably probable that the exclusion of that evidence prevented the defendant from having a fair trial. For the purposes of this question we must assume

that if he had been permitted to answer the questions Mitchell would have testified that at the time stated, while standing at the points indicated in the questions, he would not have been able to tell whether a car driven west on State street and crossing said intersection passed to the left, or whether it passed to the right, of the center line of said intersection. We further assume (although it is not in the record) that it would have been proved that Mitchell had normal eyesight. The facts concerning the collision were established by six eyewitnesses. These were Mr. and Mrs. Elkins, Mr. and Mrs. Voss, and Mr. and Mrs. Rickert. These witnesses are in substantial agreement that the night was clear, and that the light was such that they had no difficulty in seeing. Mr. Elkins saw the collision, but could not state just where the cars came together. He stated, however, that the roadster when it was struck "pivoted on about 15 feet further, whirled around and turned over," and that he found it lying about 15 feet south of the south curb line of State street. Mrs. Elkins stated that she saw the Ford roadster hit on the rear by a Ford coupé, and that the roadster when it was hit was south of the center line of State street. Mr. Voss stated that the accident took place at the southwest corner of the intersection and south of the center line of State street. Mrs. Voss stated that the impact occurred south of the center line of State street. Mrs. Riskert stated that at the time of the impact the Ford roadster had cleared the center line of State street. Mr. Rickert stated that at the moment of impact the Ford roadster was about half way between the center of the intersection and the south curb line of State street.

There is nothing in the record tending to impeach the integrity of any of these six witnesses. They all agree that the light was sufficient for them to see clearly. Their testimony leaves no reasonable doubt that at the time of the collision defendant's automobile was driven on the wrong side of the road, and there is no evidence to the contrary. In view of the overwhelming effect of this evidence, it is almost impossible to believe that the jury could have found the fact to be contrary to the testimony of these witnesses, even if Mitchell had testified that at the time of the experiments made by him—and even if made under like conditions—he would not have been able to see whether an automobile was or was not south of the center line of State street. It is our conclusion that the error which we have found in the court's ruling in respect to this matter did not lead to any miscarriage of justice.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

78 Cal. App. 380

PEOPLE v. MORHAR. (Cr. 1345.)

(District Court of Appeal, Second District, Division 1, California. June 17, 1926. Hearing Denied by Supreme Court Aug. 16, 1926.)

1. Arson ⚷37(1)—Insurance ⚷31.

Evidence *held* to sustain conviction of arson in the first degree and of destroying insured property, under Pen. Code, § 548.

2. Indictment and information ⚷110(7).

Information charging arson in the language of Pen. Code, § 447, need not state in what degree the crime was committed.

3. Arson ⚷21.

Information in prosecution for arson in first degree, alleging that building burned was occupied by a human being, *held* sufficient compliance with Pen. Code, § 452.

4. Arson ⚷18.

Information charging that defendant, at time and place stated, willfully set on fire and burned described building occupied by human being, with intent to destroy same, *held* to sustain conviction of arson in first degree.

5. Arson ⚷8.

Where defendant's wife and children actually occupied building burned, that they were not technically in possession was immaterial, in sustaining conviction for first degree arson, in view of Pen. Code, § 452.

6. Criminal law ⚷1170(1).

In arson prosecution, sustaining objections to testimony that defendant had certain sacred relics in the burned house, after the testimony was given, *held* not prejudicial error, where there was no order striking testimony from the record, and no instruction to disregard it.

7. Criminal law ⚷598(1).

If attorneys direct witnesses that they need not appear until a certain time, and the court is ready to receive their evidence before that time, it is within the court's discretion to refuse a continuance to secure them.

8. Witnesses ⚷389.

Asking, as impeaching questions, questions as to conversations, which had been propounded to defendant, and which he had denied, was proper.

9. Criminal law ⚷1170½(5).

Asking defendant impeaching questions as to conversations, which he admitted in part, and as to part of which he was evading, *held* harmless error, where answers of impeaching witness were not contradictory to defendant's.

10. Witnesses ⚷193.

Conversation between accused and wife was not privileged, where certain police officers were present when it took place.

11. Witnesses ⚷193.

A third person, overhearing a confidential communication between husband and wife, may testify to it.

12. Criminal law ⚷655(5).

Where accused's attorney summoned witnesses for specified time, and then excused them from obeying summons, so that court could not punish for disobeying the subpœnas, pertinent remarks by court in presence of jury were not misconduct.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Benjamin Morhar was convicted of arson in the first degree and of destroying insured property, and he appeals. Affirmed.

Page, Nolan, Rohe & Hurt, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

YORK, J. This is an appeal from a judgment of the superior court of Los Angeles county, and from an order denying a motion for a new trial. The appellant was convicted under two counts—the first of first degree arson; the second of destroying insured property, the crime specified in Pen. Code, § 548.

[1] The evidence is clearly sufficient to establish the fact that arson of the first degree was committed by some one in the burning of the house. At the time of the fire the house was occupied solely by the defendant and his wife and two young children. The fire occurred in the early morning, between 2 and 3 o'clock. It may be assumed, as was indicated, that the family had been several hours in bed. The house doors were locked. In escaping from the house, the occupants closed the doors, which locked them; the locks being spring locks. This was proved by the firemen, who were obliged to break open the doors. The defendant was found among the persons assembled outside the house. He was barefooted at that time. Later defendant obtained and put on a pair of shoes, and went with officers to the police station. The shoes carried an odor of kerosene. The officers called his attention to this fact, but he replied that the smell was like turpentine. At that time, according to the testimony of the witness Larimer, defendant said that he had only one pair of shoes. But at the trial defendant testified that the shoes to which the officers referred were used by him in working around the yard, and that he had not worn them the day before, but had worn another pair. This inconsistency in his statements derived its importance from the fact that at the time of the fire it was found that rags and other articles within the house and on the floor had been soaked with kerosene. If the jury believed that the defendant testified falsely concerning the shoes which he had worn in the house, such false testimony, under the circumstances, had a direct tendency to show guilty knowledge concerning the fire.

The defendant and his wife were owners of the house and furniture, both of which were heavily insured. Without further review of the evidence (all of which, however, we have examined), we conclude that, while the evidence against appellant is circumstantial, and not direct, it is sufficient. In this respect it is analogous to that produced in People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389, 394, where the Supreme Court said:

> "It is the law that neither mere opportunity to commit a crime, nor perjured testimony, is sufficient to support a verdict of guilty. Nor are false statements or suspicious circumstances sufficient. It may be conceded that no one of the facts summarized would, if standing alone, be sufficient to uphold the verdict; but, when all the circumstances which the jury may have resolved from the evidence are considered together, it cannot be held on appeal that they are not sufficient to warrant an inference of guilt."

[2-5] The information in the first count charged that the defendant, at the time and place stated, did willfully, etc., set on fire and burn the described building, "then and there occupied by one Elizabeth Morhar, a human being, with intent to destroy the same." The information failed to specify that the burning was done in the nighttime. The verdict of the jury, as applied to this count, found the defendant "guilty of arson, a felony, and we find it to be arson of the first degree, as charged in count 1 of the information."

Appellant contends that the verdict is contrary to law, in that said first count of the information does not charge the public offense of which the defendant was convicted, to wit, arson of the first degree. The two reasons assigned for this contention are that the information did not charge that the burning occurred in the nighttime and that the information did not charge the burning of an inhabited building. In an information or indictment charging arson, in the language of section 447 of the Penal Code, it is not necessary that such information shall state in what degree the crime was committed. "That is for the jury to determine, from all the facts and circumstances developed in evidence." People v. Russell, 81 Cal. 616, 23 P. 418. Section 452 of the Penal Code reads as follows:

> "To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof."

The statement in the information that the building was "then and there occupied by one Elizabeth Morhar, a human being," was a sufficient compliance with the requirements of section 452. There was no demurrer to the information, nor was any claim asserted by defendant in the court below that the information was subject to any legal objection. We think that the information sufficiently set forth in said count 1 a charge of arson, under which a conviction of arson in the first degree may be sustained. And the evidence shows that in fact the fire occurred in the nighttime, and that the house was then and there inhabited and actually occupied by Mrs. Morhar, as well as by the defendant and by their two children. That the wife and children were not technically "in possession" of the property is, under such circumstance of occupancy, an immaterial fact.

[6] In the third point raised by appellant he claims that certain evidence offered by him was erroneously excluded, to his prejudice. It is argued that this evidence was offered for the purpose of showing, not only that there was lack of motive for the defendant to commit the crime, but that it would be very improbable that he would have burned the house without taking the precaution of first removing certain sacred relics, which were kept in the house. The defendant testified that:

> "I had The Ten Commandments and a few things, you know. * * * I kept it with me all the time.
>
> "Q. What does it mean to you? A. It means a whole lot."
>
> On objection that this called for a conclusion of the witness the objection was sustained.
>
> "Is it part of your religion or—" "Same objection." "Objection sustained."
>
> The witness then testified that he had also wanted to get from the house, besides The Ten Commandments, a "taless," which was a present made to him when he was married.
>
> "Q. Has it any sginificance in your religion? A. Yes."

Following the answer, this was objected to as incompetent, irrelevant, and immaterial, and objection sustained. The attorney for defendant then said he wanted to produce this article, and intended to prove further by competent witnesses what such a thing means to a man of that type. Although the judge then stated that he did not believe such evidence competent, it was not offered at that time, nor does it appear that such evidence was offered later. The following is the only additional evidence to which we are referred on this point:

> "Q. How old were those commandments? A. About 100 years."
>
> Following the answer, the district attorney objected to this as incompetent, irrelevant, and immaterial.
>
> "The Court: Objection sustained.
>
> "Q. How old was this taless you speak of? A. About 1,000 years."
>
> "District Attorney: Same objection.
>
> "The Court: Objection sustained."

Assuming that under the circumstances of this case the defendant had the right to offer evidence tending to prove that, by reason of certain religious beliefs and feelings, he would have been moved to preserve rather than to destroy property of religious significance to him, which was in the house at the time of the fire, nevertheless, we think that this record does not show prejudicial error. The essential answers were given before the objections to the questions were made, and there was no order striking from the record the answers thus given. Practically, if not technically, they remained before the jury, without any instruction that such evidence be disregarded. We think it is not reasonable to conclude that the rulings, made in the manner stated, and of which appellant complains, had any important influence against the defendant.

[7] A stipulation was entered into which apparently covers the entire objection on the exclusion of certain witnesses, the stipulation referred to being the stipulation whereby the court allowed a continuance of several hours, in order that defendant might obtain the evidence of two witnesses. This was done upon agreement of counsel for the defendant that he would not introduce the testimony of the very witnesses to the exclusion of whose testimony he is now objecting. If attorneys direct witnesses that they need not appear until a certain time, and the court is ready to receive their evidence before that time, we think it is within the discretion of the trial court to refuse a continuance requested for the purpose of producing those witnesses. The witnesses referred to as being excluded were not on hand to testify when their evidence was offered, and it appears from the record that they were not offered again as witnesses, and the record does not show if they were ever present when the jury was in the box.

[8, 9] The fourth objection of appellant is that certain attempted impeachment of defendant's testimony was improper and irregular. In laying the foundation for impeachment, the district attorney asked the defendant whether, at a certain time and place, and in the presence of certain parties, he had stated certain things. In reply the defendant had admitted some portions of the conversations, had been evasive as to others, and denied other parts or portions of the conversations in toto; and yet, when the people put on their evidence impeaching the statements of the defendant, they did not limit such so-called impeachment to the portion of the conversation denied, but asked as to each and all of the so-called conversations. The defendant objected, on the ground that there was therefore no proper foundation for the so-called impeaching questions. However, we hold that it was proper to ask as impeaching questions the questions as to conversations which had been propounded to

the defendant and which he had denied. As to the other questions propounded, the answers of the so-called impeaching witness were not contradictory to those of the defendant, and were not such that the error in admitting them resulted injuriously to the defense.

[10, 11] The objection that certain conversation was a privileged conversation between defendant and his wife is answered by the very statement in the brief of the appellant wherein it shows that certain police officers were present when the conversation took place. This would deprive the conversation of standing as a privileged communication. "A third person, overhearing a confidential communication, may testify to it, for the same reason recognized in the privilege of a client's communication with his attorney." Wigmore on Evidence, § 2339. Also see cases cited in such section and section 2326. Also 40 Cyc. 2359; Ann. Cas. 1918A, 441; People v. Swaile, 12 Cal. App. 192, 107 P. 134.

[12] As a fifth objection it is claimed that there was misconduct on the part of the court in making certain remarks in the presence of the jury. Such remarks were called forth by the nature of the examination conducted by the attorney in summoning witnesses for a certain time, and excusing such witnesses from obeying such summons, thus placing the court in such a position that it could not punish witnesses for contempt for not appearing at the time specified in the subpœnas served upon them. The remarks made by the judge were pertinent to the situation presented, and were not such as to constitute misconduct.

An examination of the entire record in this case fails to disclose any error that has in any way resulted in a miscarriage of justice.

The judgment and order are affirmed.

I concur: CONREY, P. J.

HOUSER, J. I dissent. Particularly am I unable to concur in the conclusion stated in the majority opinion that the jury was uninfluenced by reason of the rulings made by the trial court in the matter of the attempt on the part of defendant to prove the significance to him of the several articles intimately connected with his religious belief.

At the outset it may be well to consider the fact that the evidence directly connecting defendant with the commission of the offense of which he was charged was very weak. As indicating the opinion of the judge of the trial court with reference thereto, it appears that at the conclusion of the case for the prosecution, after defendant had made a motion that the court advise the jury to acquit the defendant, the judge made several statements to the attorneys representing the respective parties to the controversy, which remarks clearly show that he was extremely loath to submit the case to the jury. Among the expressions by the judge of the trial court are the following:

> "The Court: I think I will hear from the other side. It seems to me that all you have here is a suspicion. * * * I am free to say that I have a suspicion, but I am bound to instruct the jury that they cannot bring in a verdict against the defendant on suspicion. * * * The testimony put in is very suspicious; but, if it is true and correct, I don't see why it could not just as well have been his wife as the defendant. * * * I don't want to criticize you [the district attorney] at all, or the district attorney's office, for going on with the prosecution; * * * but, no matter what my suspicions may be, I cannot allow the case to go to the jury simply on suspicions. * * * If the jury convicted him [defendant] on that evidence, I would set it aside. * * * I don't believe, Mr. Works [deputy district attorney], I would be justified in going on. Of course, all I can do is to advise the jury. I suppose you [attorney for defendant] don't want to put in any evidence?"

With so much of a concurrence in the thought that the evidence of defendant's guilt as presented by the prosecution was of the weakest character, the question of the effect which any erroneous rulings, either in the admission of evidence against the defendant, or in the rejection of evidence presumably in his favor, assumes an aspect of the greatest importance. Dealing, then, with one of the propositions discussed in the majority opinion—that is to say, the third point raised by appellant to the effect that certain evidence offered by him was erroneously excluded by the trial court—the reporter's transcript of the proceedings had on the trial shows that he is of the Jewish religious faith, and that he followed "most all" of the religious rites and customs prescribed by his religion; that inside the house which was burned (although not entirely destroyed) defendant kept "the ten commandments," a "flag," and a silver "taless," the last of which being a present made to him by his father-in-law on the day of defendant's marriage; that "the ten commandments" was a religious relic about 100 years old, and that the "taless" (also a religious relic) was about 1,000 years old. As appears by the statement made in the majority opinion of this court, although defendant technically testified to the foregoing facts, objections by the prosecution to questions relating thereto were continually sustained by the judge of the trial court. His attitude with reference thereto was distinctly hostile, undoubtedly insinuating into the minds of the members of the jury the impression that such evidence was of no consequence and unworthy of consideration. Evidence as to the significance of such objects to defendant, or to any one of the Jewish faith, was entirely excluded by the trial court. For example:

"Q. to Defendant (by Attorney Murphy): Do you have any particular collects that are essential elements of your faith or religion?

"Mr. Works (Attorney for the People): Objected to as immaterial.

"The Court: Objection sustained. You went all over that the other day" (which last remark was in fact incorrect).

A reference to the reporter's transcript of the proceedings had on the trial of the action will illustrate the attitude of the trial court with relation to all such evidence:

"Mr. Murphy (Attorney for Defendant): I have it [the taless] here. I want to produce it. I intend to prove further on by competent witnesses what such a thing means to a man of that type.

"The Court: I don't believe that is competent.

"Mr. Murphy: I think it is.

"The Court: I don't think so.

"Mr. Works (Attorney for the People): I certainly object to it.

"The Court: Objection sustained."

The judge of the trial court also refused to permit defendant to introduce a witness (a Jewish rabbi) who, it is asserted by counsel for defendant, was the rabbi of the Jewish synagogue to which defendant belonged, and who was thoroughly qualified and competent to testify concerning the religious significance and value of the various relics which theretofore had been mentioned as having been left by defendant in the house at the time the fire started; that the rabbi would have testified to the effect that the relics in question were of such importance to the average Jewish layman that they were necessary accessories to all forms of prayer, and that the Jewish layman, without these relics, does not believe his prayers will reach the ears of the Deity to whom they are directed; and that the rabbi would have testified further that the orthodox Jew would rather lose his life than lose those relics.

The materiality of evidence with reference to the religious faith of defendant in each of the particular religious "collects" or "relics" which it was shown were in the house at the time it was burned, and the significance particularly attachable to such religious "relics" by an orthodox Jew, becomes apparent on consideration of the question of motive. Prior to the attempt or attempts on the part of defendant to introduce such evidence, the prosecution had endeavored to show motive in that the house which was burned was overinsured. Defendant was permitted to make some rebuttal of the facts advanced by the prosecution in support of that particular proposition; but in reason it is clear that defendant should not have been limited to a mere contradiction, in terms or otherwise, of the essential facts introduced by the prosecution which in the judgment of the district attorney tended to show motive in the defendant for the commission of the crime. The showing of motive was not a necessary element in the guilt of defendant. That was an incidental issue, injected into the case by the prosecution. But, having tendered it, such issue was subject to all the rules surrounding any other issue.

The prosecution vouchsafed a reason which it was thought actuated defendant in the commission of the offense. The defendant thereupon had the right not only to show the falsity of the facts suggesting the reason advanced by the prosecution, but as well to show that good reason existed for defendant's abstaining from the commission of the crime. If defendant could have shown that at the time the fire occurred he had $10,000 in currency in his home, and which currency would have been destroyed, had defendant not removed it from the house, it could scarcely be doubted that he would have had the right to show such fact, as opposing any evidence of motive on his part to burn his home for the insurance money of a much lesser amount, which would have become payable to him, had his home been destroyed by fire. On the trial of the action, in addition to the specific rebuttal by defendant to which reference has been had, and as tending to show that no motive could exist in him for burning his home, as hereinbefore indicated, he made several unsuccessful attempts to show that within the house at the time the fire occurred were these sacred "relics," which, because of his religious belief, were dearer to him than life itself.

As an inference therefrom it would seem most reasonable that if defendant had contemplated the burning of his house and that within that home were located certain precious objects of such religious significance that without their possession he could not hope for religious salvation, prior to setting fire to his home he would have taken the precaution to remove such objects to a place of safety. Not having done so, the further inference would follow that he did not set fire to his home. As the admitted evidence stood —that is to say, the mere fact that the religious "relics" were within the house at the time the fire occurred, with no explanation as to their import or significance to defendant—the undoubted effect was to deprive defendant of the benefit of a most substantial portion of his defense. Without an explanation of the significance of the "relics," which meant so much to defendant, they might as well have been so much junk, so far as the jury was concerned, because it cannot be presumed that the members of the jury were, or that any one of them was, versed in matters of that kind, or that they or he had even the slightest knowledge of the bearing which the loss of such "relics" would have upon the issue of motive which had been introduced into the case.

Considering the fact, as expressed by the trial judge, that "all you (the prosecution) have here is a suspicion" of defendant's guilt, it is impossible for me to agree with my brethren of the bench in their statement that the exclusion of the evidence to which reference has been had was of no material consequence and that it had no "important influence against the defendant." To the contrary, to my mind, it manifestly appears that—the extreme weakness of the case against defendant being considered—the probabilities are that, had such evidence been admitted, defendant would have been acquitted of the charge preferred against him. Prejudicial error affecting the substantial rights of the defendant having been shown, together with the affirmative conclusion that such error in all probability resulted in a miscarriage of justice, there is no room for the application of the provisions of the Constitution (section 4½, art. 6) affecting the question at issue. The liberty and good name of defendant were at stake, and in a decision of so great import the defendant should not be obliged to take any more of the "rough chances of the law" than have been thoroughly established and recognized in principle either by existing statutes or by adjudicated cases.

Another matter discussed in the main opinion herein, in the conclusion of which I am unable to concur, is that with reference to the "stipulation" by which "the court allowed a continuance of several hours in order that defendant might obtain the evidence of two witnesses." The so-called "stipulation" was entered into some time after 11 o'clock in the morning, and a recess of the court at that time was taken until the usual time for convening court in the afternoon, to wit, 2 o'clock p. m. So that whatever accommodation, or courtesy, or consideration was involved in the matter (the usual noon recess of two hours being deducted) amounted in reality to something less than one hour's time. It appears that, relying upon the time he thought the introduction of certain evidence would take, one of the attorneys for defendant excused a certain witness until 11 o'clock. As a matter of fact, the taking of the evidence which counsel had in mind occupied less time than he had estimated, with the result that defendant "ran out of witnesses." It is also shown that defendant had subpœnaed three witnesses to appear at 2 o'clock p. m., none of whom was present in court at the time the so-called "stipulation" was entered into. Counsel for defendant desired an early recess, in order that the witnesses might testify in defendant's behalf. A transcript of a part of the proceedings had with relation thereto is as follows:

"The Court: No, Mr. Dixon (the witness expected at 11 o'clock) I will not wait for. The only stipulation and condition under which I will continue this case until 2 o'clock is that those two women—you told me what they will testify—that those two women will be the only two witnesses you will call at that time; otherwise, you will go to the jury now.

"Mr. Ramey (Attorney for Defendant): Your honor, it is not our fault.

"The Court: It is your fault that Mr. Dixon is not here. Here comes this man strolling in here, and we have been waiting quite a while. * * * In my discretion I will give you time to get these two witnesses, on the condition that you will call no others at that time.

"Mr. Ramey: I think your honor is laboring under misapprehension as to the facts. We have no agreement with any of those witnesses, except Mr. Dixon, who was to be here at 11. All of the other witnesses have been in attendance, and have been in the courtroom during the entire trial until this morning, and we didn't know until we called them that they were not here.

"The Court: Mr. Dixon should have been here. He was to be here at 11 o'clock. Now, I don't care to take any further time. Are you willing to stipulate that?

"Mr. Ramey: We have subpœnaed also, your honor, one witness, the rabbi.

"The Court: When did you subpœna him?

"Mr. Ramey: Last night.

"The Court: And he is not here.

"Mr. Ramey: He was not subpœnaed to appear until 2 o'clock. That was our fault.

"The Court: Now, I will not allow you to put him on.

"Mr. Ramey: There is nothing more that I can say, your honor.

"The Court: All right. You had something to say. Will you agree to the court's condition, because if not, we are going on now? * * * You don't have to agree to that condition, but, unless you do, we are going on with the case. * * *

"The Court: We are going on with the rebuttal and the argument, unless you accept my conditions. * * * I am not going to allow Mr. Dixon to testify, and I am not going to let you make me talk much longer in hopes he will be in here. Now, I will ask you now, and I want an answer, do you stipulate to the condition I made?

"Mr. Ramey: Yes, your honor."

It thus conclusively appears that the so-called "stipulation" was brought about by means of a threat on the part of the judge of the trial court. In order that defendant be permitted to introduce the testimony proposed to be given by two witnesses, he was forced to agree that the testimony which might have been given in his behalf by two other important witnesses be left out of defendant's case. It would seem that a sense of justice, or at least a more liberal spirit of fairness to the defendant, on the part of the trial judge might have suggested to his mind the inequality of the "stipulation." The case should either have been open for all proper purposes to the defendant, or absolutely closed as to his defense. If the trial were to be continued for any reason it is clear that so far as defendant was concerned, all his rights in the premises should have been reserved to him and protected by the trial court. The defendant was either entitled to a short recess of the court, or he was not. If not, the case should have been closed, so far as further taking of testimony by the defendant was concerned. If he was entitled to a recess, then it should have been extended to him, without the penalty attached thereto of losing some of his valuable rights.

At any rate, it is plain that whatever fault was committed, it was not of the defendant personally. If within the judgment of the judge of the trial court some punishment ought to be inflicted, the penalty should have been visited, not upon the defendant personally, but upon the person, if any, who committed the fault. A stipulation is nothing more than a form of agreement, and an agreement which is induced by any form of menace, or by overreaching, or by taking advantage by one of the parties to the agreement of the necessities of the other, if not absolutely void, certainly is not such a "meeting of the minds" as is contemplated in a court of justice as fair and reasonable, especially where a trial judge in the course of a trial is one of the parties, and a helpless litigant, with his back to the wall, fighting for his liberty and good reputation, is the other party to the agreement. A stipulation made between such parties and in such circumstances would amount to nothing less than an order of the court. If, in the first instance, whether, pursuant to a motion made by the district attorney, or through the initiative of the judge of the trial court, an order of the character of the "stipulation" here under consideration had been made, its effectiveness from a legal standpoint as affecting the ultimate constitutional and statutory rights of the defendant might well be doubted.

Additional reasons, affecting other points raised by appellant, might be given for my failure to agree in the judgment herein; but to my mind sufficient has been said. By constitutional guaranty the defendant was entitled to a fair trial. In my humble opinion he did not get it.

With the greatest respect for the good judgment of my colleagues on the bench, I cannot agree with their conclusion that justice has been done.

---

78 Cal. App. 476

PEOPLE v. SINGH.
(Cr. 1286.)

(District Court of Appeal, Second District, Division 1, California. June 22, 1926.)

1. Criminal law 🔑598(2)—Conclusion that motion for continuance to take depositions as foundation for alienists' opinions was not made in good faith and with due diligence held authorized.

Where defendant's counsel was in constant communication with him for two months before date of trial, and indicated about a month before such date that he would move for continuance, judge was authorized to determine that motion for continuance to take depositions of residents of foreign country as foundation for opinions as to defendant's insanity was not made in good faith and with due diligence.

2. Criminal law 🔑608—Denial of motion for continuance because of impracticability of locating witnesses of shooting held not abuse of discretion, in view of counter affidavits.

Denial of motion for continuance because of impracticability of locating witnesses of shooting *held* not abuse of discretion, in view of counter affidavits showing ease with which prosecution arranged for attendance of 12 such witnesses and practicability of discovering whereabouts of others.

3. Criminal law 🔑586, 1151—Granting continuance is within discretion of trial court and decision will not be disturbed, unless abuse clearly appears.

Granting of continuance rests in sound discretion of trial court, whose decision will not be disturbed, unless abuse of discretion clearly appears, though considerable indulgence and liberality generally should be exercised.

4. Criminal law 🔑589(2)—Refusal of continuance for defendant's illness held not reversible error.

Refusal of continuance, asked on ground that defendant was ill and could not be consulted by his counsel, *held* not reversible error, where court adjourned on such suggestion until following day when defendant had recovered, so far as shown by transcript, and no renewal of motion was made.

5. Criminal law 🔑1166½(8)—Denial of challenges to jurors, who stated they would follow court's instructions and accord impartial hearing on merits, held not reversible error.

Denial of challenges to jurors, who stated that they would follow court's instructions as to defenses presented and accord defendant impartial hearing on merits, *held* not reversible error, though parts of their examination left some question of their openness of mind toward him and defense of insanity, as to which he introduced no evidence; court's discretion not being clearly abused nor defendant harmed.

6. Criminal law 🔑130—Denial of oral motion for change of venue after exhaustion of peremptory challenges held not error (Pen. Code, § 1034).

Denial of oral motion for change of venue, after exhaustion of defendant's peremptory challenges, on ground that 52 of over 80 veniremen examined were excused for cause, showing that defendant could not have fair trial, *held* not error, in view of Pen. Code, § 1034, requiring written verified motion.

7. Criminal law 🔑438—Admission of photographs of scene of shooting, taken two days later, held not error.

Admission of photographs of scene of shooting taken two days later, without showing that surroundings then were identical with those at time of shooting, *held* not error; they being intended merely to illustrate, not as exact representations of conditions at time of shooting.

8. Witnesses 🔑282½.

Refusal to permit cross-examination of prosecution's witnesses as to matters elsewhere testified to by them, *held* not reversible error.

9. Criminal law 🔑369(1).

Evidence of defendant's commission of other offenses than those charged is generally inadmissible.

10. Criminal law 🔑1169(11)—Admission of evidence of defendant's attempt to kill another after killing deceased held not reversible error, where insanity was only defense.

Where insanity was only defense in murder trial, admission of evidence that defendant attempted to kill another after killing decedent *held* not reversible error; such evidence tending to support, rather than prejudice, such defense.

11. Criminal law 🔑406(7)—Defendant's statement that he "wasn't crazy," but "just mad," held admissible as admission.

In murder trial, wherein defense was insanity, defendant's statement to witness that he "wasn't crazy," but "just mad," was admissible as admission against interest.

12. Criminal law 🔑1036(1)—Defendant not objecting to questions to, nor examining witnesses testifying as to voluntary character of defendant's statements, cannot complain of admission thereof.

Defendant, not objecting to questions to witnesses who testified as to voluntary character of statements by defendant, nor examining witnesses on voir dire or cross-examination, waived such right and cannot complain of admission of such statements on ground that they were not shown to have been made voluntarily.

13. Criminal law 🔑406(3)—Voluntary character of mere admissions by defendant need not be shown.

That statements by defendant in nature of admissions, as distinguished from confession of guilt, were made without coercion or duress, need not be shown as foundation for their admission in evidence.

14. Criminal law 🔑1168(4)—Refusal to strike witness' reference to conversation with defendant as occurring "on night of murder" held not prejudicial error.

In murder trial, refusal to strike witness' reference to conversation with defendant as having occurred on "the night of the murder" *held* not prejudicial error, in view of vast amount of evidence of defendant's guilt.

15. Criminal law 🔑721½(1)—District attorney's argument as to defendant's examination of jurors concerning a defense which he "let go glimmering by" held not reversible error.

District attorney's statements, in argument to jury, that he had never before seen attorney question and excuse jurors on some defense for days, "and then let it go glimmering by," and that it was necessary for prosecution, because of their insanity plea, to have alienists and other witnesses present, *held* not reversible error; everything said by him being before jury, at least by inference.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Parker Singh was convicted of second degree murder, and from the judgment, and an order denying his motion for a new trial, he appeals. Affirmed.

See, also, 248 P. 986.

Edgar B. Hervey, of El Centro, and O. V. Willson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Ernest R. Utley, Dist. Atty., and Lee Nuffer, Deputy Dist. Atty., both of El Centro, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of murder in the second degree, and from an order denying his motion for a new trial.

Very briefly, from the evidence adduced at the trial, it appears that defendant had charge of the growing of a crop of lettuce on a large ranch belonging to a man named Victor R. Sterling, who was receiving financial assistance in the enterprise from one John B. Hager, in whose employ was a man by the name of William R. Thornberg. On March 31, 1925, some controversy occurred between defendant on the one side, and Hager and Thornberg on the other, regarding some detail of the work of harvesting the crop of lettuce. The next day Hager and Sterling had some further conversation and apparent difficulty with defendant, following which defendant fired a pistol at Sterling, who attempted to escape by running away, but who was pursued by defendant and by him killed by a second shot from the pistol near the place where the first shooting occurred. Defendant then ran after and overtook Hager, whom he also killed by shooting him with the pistol. Defendant then took an axe and with it crushed the heads of both Sterling and Hager. Immediately thereafter defendant drove a distance of five or six miles to a town where Thornberg was employed, and made an unsuccessful attempt to kill him by shooting him with the same pistol.

[1] The first assignment of prejudicial error by appellant is that of the denial by the lower court of defendant's motion for a continuance of the date of trial. From the affidavits (which include one made by defendant) filed in support of such motion, it appears that the principal defense upon which defendant expected to rely for an acquittal of the charge of murder which had been preferred against him was that of insanity; that he was a native of India, where his close relatives and most of his friends resided; that by the testimony only of such relatives and friends (proposed to be taken by deposition) would defendant be able to establish certain facts, including the life

history and family history of defendant; that the father of defendant was afflicted with epilepsy (which it is alleged is a form of insanity); and that in a fit of insanity a brother of defendant had killed two or three named persons—all of which facts, together with the circumstances surrounding the killing of Sterling and Hager, were to be used as a foundation for an opinion or opinions as to the sanity of defendant, to be given through the testimony of alienists to be introduced by defendant on the trial of the action.

Defendant was arrested for the commission of the crime of which he was convicted on the same day on which the offense was committed. Five days thereafter he was indicted by the grand jury, and on his arraignment his trial was set at a date exactly two months after the date of the commission of the crime. It appears that on at least one occasion, approximately one month before the date of the trial, counsel for defendant stated to the judge of the trial court that he had "a motion to make in the above entitled case; * * * that he was sure his motion would be granted and that the above-entitled case would not be tried on June 1, 1925"—the date set for the hearing of the action.

So far as the record discloses, prior to the date of the trial, no motion other than that for a continuance was ever presented to the lower court; from which fact it may be deduced that the motion to which defendant's counsel referred was the one now under consideration. No affidavit is presented by an alienist that the facts which were expected to be proved by the witnesses testifying by deposition, together with the facts testified on the trial, would have resulted in the expression of an opinion that defendant was insane; nor is there any intimation by any such proposed expert witness that the evidence of the facts that defendant's father was afflicted with epilepsy, and that defendant's brother in a fit of insanity had slain three persons, in any way would have affected the determination of the question whether defendant was insane at the time when it is charged that he committed the offense set forth in the indictment. Notwithstanding allegations in the affidavits presented by defendant in support of the motion for a continuance of the date of trial, to the effect that counsel for defendant became acquainted with the facts relative to said family history of the defendant at a time within one week of the date of the presentation of the motion—from the fact, as appears from the affidavits, that counsel for defendant had been in constant communication with defendant ever since the day of his arrest, and consequently might have learned at a comparatively early date of the existence of the facts relative to defendant's said family history, together with the additional fact that approximately one month before the date of trial counsel for defendant had indicated that he would make a motion for a continuance—the judge of the trial court was authorized to determine that such motion, when presented, was not made in good faith, and that defendant had not exercised due diligence in presenting it.

[2] The motion for a continuance of the date of trial was also based upon certain facts which tended to show the impracticability of locating the witnesses who were present at the scene of the shooting when the crime was committed. Counter affidavits disclosed the ease with which the prosecution had arranged for the attendance at the trial of each of twelve witnesses whose names, in accordance with the provision of the statute, were indorsed on the indictment, and also showed the practicability of discovering the whereabouts of any other persons who were either present at, or in the vicinity of, the scene of the tragedy at the time of the commission of the offense.

[3] The law appears to be well established that, although as a general proposition considerable indulgence and liberality should be exercised, the granting of a continuance is a matter which rests in the sound discretion of the trial court, whose decision will not be disturbed unless it very clearly appears that such discretion has been abused. 5 Cal. Jur. 968–70, and cases there cited.

In the case of People v. Collins, 195 Cal. 325, 233 P. 97, it is said:

> "It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed. * * *"

An examination of the several affidavits presented to the trial court and appearing in the record herein fails to convince this court that any such abuse of discretion by the trial court is shown in its order in denying the motion.

[4] Appellant further complains of the refusal of the court to grant a motion for continuance made during the trial of the action on the ground that defendant was ill and could not be consulted by his counsel. The record on appeal, however, satisfactorily shows that on such suggestion being made by counsel for defendant, an adjournment of court was had until the following day, at which time, so far as appearances as disclosed by the transcript are concerned, defendant had recovered from his indisposition and was able to advise with his counsel. At any rate, no renewal of the motion was made, and it must be presumed that defendant suf-

fered no hardship from the course pursued by the court.

[5] Objection is also registered by appellant because of the denial by the court of each of two challenges interposed by defendant to jurors who were sworn to try the cause. Although from a reading of certain parts of the examination of each of such jurors it would appear that there might be some question of his openness of mind toward defendant and his proposed defense of insanity, the concluding portion of such examination would clearly indicate that such juror would follow the instructions of the court with reference to any defense which might be presented by defendant, and that he would accord him a fair and impartial hearing on the merits of his case.

As a matter of fact, no evidence was introduced in behalf of defendant, and the defense of insanity was an issue in the case to the extent only that it was an arguable question arising solely from such inferences as might be deducible from facts presented by the prosecution, which, in the very nature of circumstances of the character of those surrounding the case, were exceedingly meager from a standpoint of actually establishing anything upon which a jury would be justified in reaching a conclusion in accordance with defendant's contention. Because of the discretion concededly vested in the trial court to determine the question of the fitness of a juror to serve, because no abuse of such discretion is apparent, and because, viewed from a practical standpoint, no harm resulted to defendant by reason of the action of the court in the premises, it must be concluded that appellant's position is unsustainable.

[6] Appellant complains of the action of the court in that after more than 80 veniremen had been examined touching their qualifications to serve as trial jurors in the cause, and after defendant had exercised all the peremptory challenges allowed him by the statute, the trial court denied an oral motion made by defendant for change of venue on the ground that 52 veniremen had been excused for cause, and, therefore, that it was apparent that defendant could not have a fair trial. No authorities are cited by appellant to sustain his position. On the other hand, the statute (section 1034, Penal Code) applicable to motions for change of venue, provides in part that such a motion must be made in writing, verified by the affidavit of the defendant, and a copy thereof served on the district attorney at least one day prior to the day of application. In the case of People v. Nolan, 34 Cal. App. 545, 167 P. 642, it is held that where such a motion is made orally and without the affidavit for which the statute provides, no error is committed by the court in denying the motion. See, also, People v. McGarvey, 56 Cal. 327. We are therefore unable to agree with appellant in his contention.

[7] It is next urged by appellant that the trial court erred to defendant's prejudice in admitting certain photographs in evidence over defendant's objection, for the reason that while the shooting occurred on April 1, 1925, the photographs of the scene thereof were not taken until two days later, and no foundation for the introduction of the photographs was laid by showing that the surroundings when the photographs were taken were identical therewith as of the time when the shooting took place. From a reading of the evidence herein relating to the photographs, it is clear that no claim was made at any time, nor could it have been understood by the jury, that the photographs were exact representations of conditions prevailing at the time when and the place where the tragedy occurred. The photographs were intended (as maps or diagrams might be used) merely for the purpose of illustrating the conditions present at the time in question. We are of the opinion that so considered no error was committed by the trial court. People v. Crandall, 125 Cal. 129, 133, 57 P. 785; People v. Phelan, 123 Cal. 551, 56 P. 424; People v. Mahatch, 148 Cal. 200, 82 P. 779; People v. Grill, 151 Cal. 592, 91 P. 515; and see, generally 13 Cal. Jur. 710, 711.

[8] Certain errors are also specified relating to the refusal of the trial court to permit counsel for defendant to interrogate one of the witnesses introduced by the prosecution as to whether he had seen the shot fired by defendant or had heard such shot only. An examination of the reporter's transcript discloses the fact that the witness was elsewhere fully examined by defendant's counsel with reference to the point at issue. One question and answer will suffice:

> "Q. You heard the shot fired, but you didn't actually see him point the gun when he fired the shot, did you? A. I only heard the shot, was all."

It is therefore clear that appellant has no grounds for complaint.

[9, 10] Appellant also contends that prejudicial error was committed by the court in that, over objection by defendant, evidence was introduced which showed in substance that after defendant had killed Sterling and Hager, he went to the town of Calipatria and attempted to kill Thornberg. It appears that Hager was the manager of the Certified Fruit Company and that Thornberg was an employé thereof; that defendant regarded Hager and Thornberg as partners; that on three or four occasions on the afternoon of the day of the killing and preceding the assault made on Thornberg, defendant drove his automobile very slowly past the business office in which Thornberg was employed—the defendant "looking into the office each time as he went by." Finally, in the words of Thornberg:

> "I was standing there, and I noticed Parker Singh (defendant) drive up in front of the office

> and cut straight across the street. He didn't go to the corner and turn around the button. He stepped out of the car and stepped up on the edge of the curb and said, 'God damn you, Thornberg, I am going to kill you,' and he pulled a gun out of his back pocket and I closed in on him, and he shot as I closed in on him."

The general rule (with some exceptions) is that evidence of the commission of offenses other than those charged in the information or indictment is inadmissible. On the theory that evidence of the assault by defendant on Thornberg was directed toward the showing of malice, motive, or guilty intent on the part of defendant as affecting the crime of which he was charged, it is readily conceivable that such evidence might be admissible. People v. Selby (Cal. App.). See People v. Selby (Cal. Sup.) 245 P. 426.[1] The evidence in the instant case was convincing as to the guilt of defendant—in fact, no claim is presented by appellant to the contrary. Judging from the record before this court as hereinbefore indicated, the only defense suggested by defendant was that he was insane at the time the crime was committed. Such being the case, evidence that in addition to killing Sterling and Hager, defendant had also attacked Thornberg, far from being prejudicial to a defense of insanity, might be considered as supporting it. Indeed, if without provocation defendant had also assaulted or attempted to kill a dozen or more people, such a circumstance might have presented a sound basis for argument that the insanity of defendant was an established fact. Having in mind, therefore, the defense upon which defendant relied for an acquittal of the charge preferred against him, it is somewhat difficult to understand how or in what manner evidence of what from one viewpoint might be considered as an insane act on the part of defendant, could be prejudicial to his case. But, to adopt the language used by the Supreme Court of this state in the Selby Case (245 P. 426, 429):

> "In any event, even if it be assumed the rulings complained of were erroneous, we think that the errors were not sufficiently prejudicial to appellant to justify a reversal, in view of all the evidence in the case and that it tended to support his claim that he was insane."

Appellant suggests a question of error in that defendant was not permitted to have answered a certain question which had been propounded to one of the witnesses introduced by the prosecution. An examination of the transcript of the record on appeal discloses the fact that no harm resulted to defendant by reason of such action of the court, for the reason that elsewhere in the cross-examination of such witness the matter embraced in defendant's question had been fully covered. From a practical standpoint, the same thing is true with reference to the additional specifications of error predicated upon the refusal of the trial court to permit a witness to answer a certain impeaching question which was put by defendant to one of the witnesses for the people. While the question might well have been answered, the situation which apparently was sought to be shown had been adequately presented through other testimony given by the same witness, with the result that no substantial injury was suffered by defendant from the action of the trial court.

[11] Appellant complains that defendant was prejudiced in his rights because the trial court denied his motion to strike out a part of an alleged conversation had between one of the witnesses and the defendant. The witness stated:

> "I don't remember now just all of it, but I remember him saying that he wasn't crazy. That is the first thing he said—that he wasn't crazy; that he was just mad."

We are unable to agree with appellant in his contention. The witness was attempting to give the substance of the conversation. If defendant made a statement that he "wasn't crazy," but that he was "just mad," it constituted an admission against interest which the jury had a right to take into consideration in making up its verdict.

[12, 13] Appellant further contends that a sufficient foundation was not laid for admitting certain statements made by defendant, in that it was not shown that the defendant was not under either coercion or duress, nor that such several statements were made freely and voluntarily. But it appears that each of the several witnesses testified in exact terms covering the identical parts of the foundation which appellant suggests were lacking. If for any reason defendant was dissatisfied with the conclusive character of either the question or the answer, the opportunity was open to him to correct such answers either through the medium of objection to such questions, by examination of the witnesses on voir dire, or through the ordinary channel of cross-examination. Having waived that right, he is in no position to complain. But, aside therefrom, it is not contended that the statements made by defendant amounted to confessions of guilt, but to the contrary, that they were concededly only in the nature of admissions. In such circumstances the rule appears to be well settled that no foundation of the nature of that required for the admission in evidence of a confession was necessary. People v. Parton, 49 Cal. 632; People v. Le Roy, 65 Cal. 613, 4 P. 649; People v. Ammerman, 118 Cal. 23, 50 P. 15.

[14] Because one of the witnesses in the course of the testimony given by him referred to a certain conversation between him and defendant as having occurred on "the night of the murder," appellant feels aggrieved and specifies the refusal by the trial court

---

[1] On hearing in Supreme Court after decision of District Court of Appeal.

to grant his motion to strike such remarks from the record as prejudicial error. While it may be that the court should have acceded to defendant's request in that regard, yet even though it may be assumed as error, considering the vast amount of evidence of defendant's guilt, the inference deducible from the remark to which reference has been had was of such small importance that we are constrained to hold that defendant's cause was not seriously affected thereby.

[15] Misconduct by the district attorney is specified as error by appellant in that, in the course of the argument before the jury, the district attorney used the following language:

> "Mr. Hervey (attorney for defendant) says, 'Oh, gentlemen of the jury, if you have any blame, don't blame the defendant, blame it on us.' I think there is plenty of blame, and there is room for plenty of blame in this case, and plenty of blame on him. Never before in all my life did I ever see an attorney question, for days and days, jurors, and excuse jurors on some defense, and then let it go glimmering by. By reason of their insanity plea, it was necessary for the prosecution, in order to be properly prepared in this case, to have alienist witnesses here, and other witnesses, and putting the county to a large expense by this insanity plea that—"

The record shows that timely objection thereto was made by counsel representing defendant; that misconduct was specified; and that the court declined to instruct the jury to disregard the remarks made by the district attorney to which we have referred. But assuming that appellant is right in his contention and that error was thus committed, when it is considered that everything said by the district attorney to which exception is taken was before the jury, at least by inference, it becomes difficult to understand how any damage to defendant's cause resulted because of such statement. At most, it cannot be said that either such error, nor any nor all of the errors committed in the course of the trial, resulted in a miscarriage of justice.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

---

78 Cal. App. 488

PEOPLE v. SINGH. (Cr. 1328.)

(District Court of Appeal, Second District, Division 1, California. June 22, 1926.)

1. Criminal law 🔑656(8)—Judge's statement that no further evidence of what caused death was required held prejudicial error as indicating his belief that defendant killed in manner stated by witness.

In murder trial, trial judge's remark on objection that no sufficient foundation was laid for question to witness as to whether deceased's wounds were sufficient to cause death, that "I don't think it requires any further evidence than that he found a man's skull crushed and his brains dashed out," *held* prejudicial error, as indicating judge's belief that defendant killed deceased with ax after shooting him, as witness had testified.

2. Criminal law 🔑656(5)—Judge's statement that state's witness' testimony on defendant's former trial for another murder did not tend to impeach him held prejudicial error.

In murder trial, trial judge's statement that he knew that state's witness' testimony on defendant's former trial for another murder did not tend to impeach him, *held* prejudicial error as probably affecting weight of remainder of his testimony in juror's minds.

3. Criminal law 🔑656(9)—Judge's remark, "After he had exhibited a gun," following statement of defendant's attorney that witness said that two men jumped on defendant, held harmless.

Judge's remark, "After he had exhibited a gun," following statement of defendant's attorney that witness said that two men jumped on defendant, *held* harmless to defendant as capable of explanation as statement merely that witness said that defendant had exhibited gun.

4. Criminal law 🔑656(9)—Judge's statements that defendant's counsel had not proved certain fact, that he had no case if he had no more evidence, and that evidence of defendant's good reputation was immaterial, held prejudicial error.

In murder trial, judge's statements to defendant's counsel that "You haven't proved that anybody jumped on him," that if defendant had no more evidence he had no case, and that testimony as to defendant's good reputation was immaterial before any evidence of self-defense was offered, *held* prejudicial error.

5. Criminal law 🔑1166½(12)—Damaging effects of remarks, indicating judge's conviction that defendant had introduced no legal defense, held not removed by instructions to disregard court's expressions of opinion.

Trial judge's instructions that jury was sole judge of evidence and should disregard any seeming expression of opinion thereof by court *held* insufficient to remove damaging effects of remarks, indicating conviction that no legal defense had been introduced by defendant.

6. Criminal law 🔑1129(1)—Failure to assign court's misconduct in making remarks, harmful effect of which cannot be obviated by retraction or instruction, does not affect defendant's rights.

Failure to assign court's misconduct in making objectionable remarks of such character that harmful effect could not be obviated by retraction or instruction does not affect defendant's rights.

7. Homicide 🔑188(6)—Exclusion of evidence that deceased, to defendant's knowledge, was in habit of carrying gun and had threatened several persons with it, held prejudicial error.

In murder trial, exclusion of evidence that deceased, to defendant's knowledge, was in habit of carrying a gun and had threatened several persons with it several times within month before his death, *held* prejudicial error, though evidence was immaterial on issue of insanity.

Appeal from Superior Court, Riverside County; M. W. Conkling, Judge.

Parker Singh was convicted of first degree murder, and he appeals. Reversed.

See, also, 248 P. 981.

Edgar B. Hervey, of El Centro, and O. V. Willson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Ernest R. Utley, Dist. Atty., of El Centro, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of murder in the first degree, from which resulted a sentence of life imprisonment, and from an order denying his motion for a new trial.

Very briefly, from the evidence adduced at the trial it appears that defendant had charge of the growing of a crop of lettuce on a large ranch belonging to a man named Victor R. Sterling, who was receiving financial assistance in the enterprise from one John B. Hager, in whose employ was a man by the name of William R. Thornberg. On March 31, 1925, some controversy occurred between defendant on the one side and Hager and Thornberg on the other regarding some detail of the work of harvesting the crop of lettuce. The next day Hager and Sterling had some further conversation and apparent difficulty with defendant, following which defendant fired a pistol at Sterling, who attempted to escape by running away, but who was pursued by defendant and by him killed by a second shot from the pistol near the place where the first shooting occurred. Defendant then ran after and overtook Hager, whom he also killed by shooting him with the pistol. Defendant then took an ax and with it crushed the heads of both Sterling and Hager. Immediately thereafter defendant drove a distance of 5 or 6 miles to a town where Thornberg was employed and made an unsuccessful attempt to kill him by shooting him with the same pistol.

[1] Appellant's first assignment of error is that, to the prejudice of defendant, the judge of the trial court was guilty of misconduct during the trial in that it having been proved that defendant had shot John B. Hager and afterward had struck him on the head with an ax as he lay on the ground, a witness was asked if the wounds so inflicted upon the body of Hager were sufficient to have caused death, to which question counsel for defendant objected on the ground that no sufficient foundation had been laid. Whereupon the judge of the trial court remarked:

> "I think that would be a matter requiring technical evidence; but so far as the other wounds are concerned, I don't think it requires technical evidence. I don't think it requires any more evidence than you already have in. I don't think it requires any further evidence than that he found a man's skull crushed and his brains dashed out, as to what caused his death."

Defendant excepted to the remarks of the judge of the trial court and requested that the jury be instructed to disregard such remarks, which request was by the court denied. Although another witness testified to facts from which the jury might have inferred that Hager was dead at the time his head was crushed with the ax, the witness, who was testifying at the time of the remarks to which objection was made, later testified that "if he (Hager) had been alive up until the time his head was crushed, then that might have caused his death," and a physician testified that such crushing of the skull would cause instant death.

The prejudice which resulted to defendant's cause by reason of the statement made by the judge was that it may have been taken by the jury as an indication of a belief in the mind of the judge that the blow struck by the ax in the hands of defendant was the cause of Hager's death—the effect of which, so far as the comment by the judge of the trial court on the facts of the case was concerned, was that in the opinion of such judge they showed that after defendant had shot Hager and while he was lying helpless, defendant had killed him by striking him on the head with an ax. The effect of the remark was further prejudicial in that it tended to show a belief in the mind of the judge of the trial court that the death of Hager resulted from malice aforethought, as indicated by the willful, deliberate, and premeditated act of defendant in crushing Hager's head with an ax after he had fallen from the pistol shot—thus affecting defendant's right to have the jury determine, first, whether defendant was guilty of any crime; and, secondly, if at all guilty, what degree of murder; or, if not murder, whether manslaughter had been committed by defendant in killing Hager by shooting him.

[2] The second charge of misconduct on the part of the judge of the trial court consists in that, at a time when counsel for defendant were attempting to impeach a witness introduced by the prosecution by reading to such witness a portion of certain testimony given by him on the trial of defendant for the murder of Victor R. Sterling, in response to an objection thereto by the district attorney to the effect that such former testimony of the witness did not tend to impeach him, the trial judge said:

> "I know that it does not tend to impeach the testimony of this witness."

An exception thereto was taken by counsel for defendant and a request made to the court that it instruct the jury to disregard the statement. An examination of the record would lead to the conclusion that at least some inconsistencies existed in the two statements of the witness to which reference has been had—notwithstanding which, the probability is that the statement made by the trial judge referred to nothing more than the absence, in his opinion, of an impeaching quality in the offered evidence—just as would have been inferable from a ruling by him of "objection sustained." The particular testimony given by the witness, in connection with the remark made by the judge of the trial court, was of itself of no great importance. It is possible, though scarcely probable, however, that the remark made by the trial judge may have produced an effect upon the minds of the jurors so far as the remainder of the testimony given by the witness was concerned, and thus may have adversely affected the defense of defendant.

[3] A third specification of misconduct on the part of the trial judge is that at a time when defendant was endeavoring to introduce evidence to the effect that Hager was known to carry a "gun"; that he had threatened other persons with a "gun"; and that prior to the time when Hager was killed such facts had been communicated to defendant—and in connection with such attempt to introduce said testimony, counsel for defendant had stated that evidence had already been introduced showing that Hager had "jumped at, or toward, or on defendant," and the judge of the trial court remarked, "after he (defendant) had exhibited a gun"—to which remark counsel for defendant excepted and requested an instruction to the jury that it disregard same.

Without reference at this time to the question of the admissibility of the proposed evidence, it is nevertheless apparent that a bald statement by the judge of the trial court, in substance that Hager had jumped at, or toward, or on defendant after defendant had exhibited a "gun," if considered as made gratuitously and without consideration of either the context or the circumstances surrounding the making of such remark, would constitute a comment by the court on the evidence in the case which might injuriously affect defendant's defense or self-defense, or weigh with the jury in the determination of the degree of murder, or whether manslaughter only had been committed by defendant. But in connection with the statement of which complaint is made, the transcript of the proceedings had on the trial of the action shows, among other things, the following:

> "Mr. Hervey (attorney for defendant): It is already in evidence that the two men jumped at or towards Parker Singh. The witness said 'jumped on Parker Singh,' whatever that may be.
>
> "The Court: After he had exhibited a gun."

With even so much of an explanation the language of the judge of the trial court is capable of the explanation that the judge was merely saying that the witness said "after he had exhibited a gun," and not that the defendant had exhibited a gun. So viewed, it is clear that the remark credited to the trial judge resulted in no harm to the defendant.

[4] In connection with the specification of misconduct last considered and as a part of the same incident, appellant directs attention to alleged additional judicial misconduct in that after some considerable discussion was had among counsel and the court, the trial judge stated that, "you haven't proved that anybody jumped on him"; to which remark defendant excepted and made the usual request that the jury be instructed to disregard it, but to which request no attention was paid by the trial court. Immediately thereafter and following a direction by the court for counsel to "proceed with the case," counsel for defendant stated, "If your honor is going to exclude all of the evidence, I don't know whether we have any case or not;" to which statement the judge of the trial court rejoined, "If you haven't any more than that, you haven't." Furthermore, in the course of the trial defendant introduced a witness by whom he was endeavoring to prove the general reputation of defendant in the community in which he lived "as a peaceful, law-abiding citizen." In sustaining an objection to testimony of such nature, the trial judge said:

> "Objection sustained at this time. If there is any evidence offered of self-defense, the court will permit you to recall the witness, but at this time it is immaterial."

Each of the foregoing comments by the judge of the trial court was of a persuasive nature, so far as the jury was concerned, and indicated that the judge considered very lightly any evidence introduced by defendant tending to establish either his legal innocence of any crime or to mitigate the offense. The statement that "you haven't proved that anybody jumped on him" had the effect of telling the jury that, no matter what testimony had been given by any of the witnesses introduced by defendant, the jury should not believe that Hager, or Sterling, or any other person had so deported himself in connection with the particular incident under consideration as to admit of the conclusion that the defendant had been assaulted prior to the time when the fatal shot was fired. The damaging effect of the remark made by the trial judge in substance that the defendant had no defense if he had no evidence of greater force or of substantiality than that which he had already introduced, is most apparent. It informed the jury that up to the time the remark was made, in the opinion of the judge, defendant had established no defense whatsoever, and suggested to the jury that any and all evidence which theretofore had been introduced, either by the people or by the defendant, which tended to show that a physical encounter provoked by Hager and Sterling had occurred between defendant on the one side and Hager and Sterling on the other, and that either defendant had acted in self-defense of his life or to prevent great bodily injury to himself, was of no consequence as a basis either for a complete defense to the accusation against him, or as affording any justification for a reduction of such charge by a verdict of murder in the second degree or of manslaughter.

The same thing is true with reference to the final statement made by the judge of the trial court that "if there is any evidence offered of self-defense, the court will permit you to recall the witness; but at this time it is immaterial." Without saying so in so many words, there could be no misunderstanding that the thought which was intended to be conveyed by such statement was that any fact theretofore introduced in evidence by defendant had no tendency to show that, in the course of the encounter between defendant on the one side and Hager and Sterling on the other, defendant had been justified from any standpoint, either in the one instance of adopting extreme measures in defense of his life or person, or in the other instance of committing manslaughter arising out of a sudden quarrel, or because of heat or passion.

The courts frequently have been called upon to express views with reference to the probable if not certain effect which remarks by a trial judge of the character of those herein adverted to have upon a jury. We refer particularly to the cases of Green v. State, 97 Miss. 834, 53 So. 415; McMinn v. Whelan, 27 Cal. 300, 319; People v. Williams, 17 Cal. 142, 147.

In People v. MacDonald, 167 Cal. 545, 140 P. 256, the court said:

> "Under a system of law which prohibits judges from charging juries with respect to matters of fact (Const. art. 6, § 19), and which gives to the jury the exclusive power to determine the facts (Pen. Code, § 1126), the trial judge should, as has often been pointed out, use the greatest care to avoid, in the presence of the jury, any utterance which may be construed as an intimation of his opinion on the issues of fact which are to be determined by the jury (citing cases). * * *"

See, also, People v. Conboy, 15 Cal. App. 97, 101, 113 P. 703; People v. Pitisci, 29 Cal. App. 727, 736, 157 P. 502; People v. Carder, 31 Cal. App. 355, 160 P. 686; People v. Frank, 71 Cal. App. 575, 236 P. 189; People v. Gordon, 88 Cal. 422, 426, 26 P. 502.

[5] In the instant case, with the thought impressed upon the minds of the several members of the jury that the judge presiding at the trial was thoroughly convinced that no legal defense had been introduced by defendant, the result was a foregone conclusion. The fact that in the course of the instructions the judge told the jury that it was the sole judge of the evidence, and that any seeming expression of opinion thereon by the court should be disregarded by the jury was insufficient to remove the damaging effects which had been induced by reason of the attitude and the plainly spoken words by the judge to which reference has been had. As suggested in the case of People v. MacDonald, 167 Cal. 545, 551, 140 P. 256, 259, the "harmful result could not be obviated by any retraction or instruction. In such cases the misconduct will furnish ground for reversal, even though the court may have taken immediate steps to correct any impression improperly conveyed to the jury" (citing People v. Derwae, 155 Cal. 592, 102 P. 266). See, also, Smith v. D. Rothschild & Co., 13 Ga. App. 293, 79 S. E. 88.

[6] While it does not appear that exception was taken by defendant to some of the objectionable remarks by the judge who presided at the trial, as is ruled in People v. Frank, 71 Cal. App. 575, 236 P. 189, even though it may appear that the attention of the court was not directed to the alleged impropriety, and though such criticised remark was not assigned as misconduct, if the objectionable remark was of such a character that its harmful effect could not be obviated by any retraction or instruction, the failure to make such assignment of misconduct would not affect the rights of the injured party. It is clear that defendant's substantial rights in the premises were seriously prejudiced by reason of the misconduct of the court. By every intendment of law the defendant in a criminal action is assured of a fair and impartial trial. Any intentional breach of such a constitutional guaranty, if recognized by our courts, would be a menace to our governmental institutions. That they may endure, justice must be done, and justice demands equal rights and protection to each citizen and institution in his or its several capacity. The rights of the defendant herein were seriously infringed. His redress, though inadequate, is by recognition of the error and by a consequent re-establishment in him of his original rights, including a new trial on the charge preferred against him.

[7] As has been hereinbefore mentioned, on the trial of the action defendant offered to prove that Hager was in the habit of carrying a "gun"; that on several different occasions, and within one month preceding his death, Hager had exhibited his "gun" to several different persons and had threatened them with it; and that such facts were communicated to defendant prior to the date when Hager was killed. Defendant's said offer of proof was rejected by the trial court, which action is herein specified as error. From a reading of the record herein it is apparent that the theory upon which the objection by the prosecution to the offered evidence was sustained was that it would be immaterial to the issue of insanity of defendant. But defendant was subject to no such restriction. He was entitled to interpose as

many defenses as he saw fit, and if any fact within the knowledge of any witness was pertinent to any one or more of his several defenses, he had a right to properly submit it for the consideration of the jury. Assuming that the evidence already before the court tended to show that immediately before the shooting occurred Hager had "jumped at, or toward, or on" defendant, with knowledge in defendant that Hager was probably armed and that theretofore with a "gun" he had threatened other persons, the serious and legally pertinent question would arise as to whether in such circumstances, as a reasonable man, defendant would be justified in believing that either his life was in danger, or that great bodily harm would result to him by reason of conditions then and there existing. It is clear that so considered the offered evidence was admissible and that defendant was substantially prejudiced by reason of the refusal of the trial court to permit such evidence to be introduced.

Appellant specifies certain other errors occurring either at the trial or in connection therewith, and, while the conclusions which have been reached as to matters heretofore considered herein render it unnecessary that a decision be reached as to any of such alleged errors, from such casual examination thereof as has been made, it may be said in passing that this court is not impressed with the correctness of any of appellant's said contentions.

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

---

78 Cal. App. 561

PEOPLE v. SCHWARZ et al.
(Cr. 1230.)

(District Court of Appeal, Second District, Division 2, California. June 30, 1926. Rehearing Denied July 30, 1926. Hearing Denied by Supreme Court Aug. 26, 1926.)

1. Criminal law 🔑278(1).

Pleas of abatement are unauthorized in criminal cases, in view of Pen. Code, § 1016.

2. Criminal law 🔑42—Witnesses who appeared before corporation commissioner in response to his subpœna and testified under oath held "compelled to testify under oath" and to be immune from subsequent prosecution as to such matters (Corporate Securities Act, §§ 14, 17).

In prosecution for conspiracy to obtain property and money by false pretenses in sale and repurchase of stock, witnesses who appeared before corporation commissioner in response to his subpœna and testified under oath *held* "compelled to testify under oath" and to be immune from subsequent prosecution as to such matters, in view of Corporate Securities Act, §§ 14, 17 (St. 1917, p. 673), giving commissioner authority to compel person to give evidence which may tend to incriminate him.

3. Contempt 🔑36.

Ministerial and other nonjudicial officers have no power to punish for contempt unless specially so authorized by law.

4. Witnesses 🔑1.

Corporate Securities Act, clothing commissioner with authority to issue subpœnas require witnesses to appear before him and testify and furnish documentary evidence, is mandatory.

5. Criminal law 🔑42.

One who is brought into court under subpœna and testifies pursuant thereto acts under compulsion.

6. Witnesses 🔑21—Person named in "subpœna" may be punished for disobedience thereof.

A subpœna is a writ and order, for the disobedience of which person named therein may be punished according to expressed will of Legislature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subpœna.]

7. Grand jury 🔑37—Indictment held not void because founded on testimony of defendant before grand jury, voluntarily given.

That indictment for conspiracy to obtain money and property by false pretenses in sale and repurchase of stock was founded on testimony of defendant before grand jury *held* not to render indictment void, where defendant appeared voluntarily as a witness before such jury.

8. Grand jury 🔑37—Indictment may be returned against witness testifying before grand jury if his testimony, or other evidence, shall so warrant.

There is no constitutional or statutory bar to appearance of any person before a grand jury as a witness, or to return of an indictment against any such witness, if his testimony or other evidence in the case shall so warrant.

9. False pretenses 🔑30—Indictment in prosecution for obtaining money and property by false pretenses in sale and repurchase of stock held sufficient as against objection of charging merely expressions of opinion.

In prosecution for obtaining money and property by false pretenses in sale and repurchase of stock, under Pen. Code, § 182, subd. 4, indictment containing a direct charge of conspiracy to obtain and of having actually obtained money by false and fraudulent representations and pretenses *held* sufficient as against objection that it did not charge false representations as to known facts, but merely expressions of opinion.

10. False pretenses 🔑49(4).

In prosecution for obtaining money by false pretenses in sale and repurchase of stock, evidence *held* to show defendant knew falsity of statements which he may have authorized his salesman to make.

11. Criminal law 🔑543(1)—Reading to jury testimony of absent witnesses given at former trial held not error; "mistrial" (Pen. Code, § 686).

That people were permitted to read to jury testimony of various absent witnesses given upon former trial, which resulted in mistrial, *held* not erroneous, in view of Pen. Code, § 686, in that diligent search was not shown to have been made for witnesses during second trial, and that one witness had left the jurisdiction after having been served with subpœna, where such witnesses upon previous trial appeared in open court in presence of defendants who cross-examined them, or had an opportunity to do so; "mistrial" being one wherein a proper decision would have completed the trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistrial.]

12. Criminal law 🔑543(2).

Whether diligence has been shown in procuring attendance of witnesses testifying at former trial so as to render their testimony admissible in their absence at subsequent trial is left to sound discretion of trial court.

13. Criminal law 🔑662(6).

Const. U. S. Amend. 6, entitling defendant in a criminal action to be confronted with witnesses against him, does not require that all witnesses must personally appear and testify in presence of a particular jury.

14. Criminal law 🔑823(12)—Instruction that whether witness, who was an accomplice, was involved in transaction with defendant must not be considered held not prejudicial, where jury were properly instructed as to their duty in weighing testimony of witnesses.

In prosecution for obtaining money and property by false pretenses in sale and repurchase of stock, instruction that whether witness, who was at one time secretary and treasurer of the company defendant was connected with and hence an accomplice, was or was not a conspirator, or was indicted in connection with the transactions involved, must not be considered, *held* not prejudicial, where jury were properly instructed as to their duty in weighing testimony of witnesses.

15. False pretenses 🔑45—Telegrams through which stock was purchased and individual sales of stock held competent in determining market value of stocks purchased and sold.

In prosecution for obtaining money by false pretenses in sale and repurchase of stock, evidence of telegrams through which purchases of stock were made, and individual sales of stock, were competent in determining market value of stock purchased and sold.

16. Conspiracy 🔑48—Rendition of separate verdicts in conspiracy prosecution, convicting some of defendants and acquitting another, held not to constitute a "miscarriage of justice."

In prosecution for conspiracy to obtain money by false pretenses in sale and repurchase of stock, rendition of separate verdicts convicting four of defendants and one acquitting another defendant, and entry of individual judgment as to each, *held* not a "miscarriage of justice."

17. Conspiracy 🔑23.

Conviction of two or more defendants of conspiracy is not dependent on conviction of all.

18. Conspiracy 🔑47.

In prosecution for conspiracy to obtain money by false pretenses in sale and repurchase of stock, evidence *held* to sustain conviction as against defendant, alleged to have been merely a victim of circumstances.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Bernard H. Schwarz, Harry C. Weist, Larry Goldner, Norman B. Frankfort, and others were indicted for conspiracy to obtain money and property by false pretenses, and the named defendants, after conviction appeal. Reversed as to last two named defendants, and affirmed as to other named defendants.

Max Schleimer, Fred H. Thompson, John S. Cooper, and Wm. T. Kendrick, Jr., all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, Deputy Commissioner of Corporations, of Los Angeles, for the People.

CRAIG, J. The appellants, together with defendant Donlin, were tried upon an indictment charging them with having conspired to obtain money and property from divers persons by unlawful, false, and fraudulent pretenses and representations. Each of the appellants was convicted and presented a motion for new trial, which was denied, and they appeal from the respective judgments and orders accordingly entered by the trial court.

It appears that Schwarz, Donlin, and one Clark were officers of a corporation known as the Securities Corporation of Southern California (referred to herein for convenience as the Securities Company), which maintained its offices and principal place of business in the city of Los Angeles, and that they conducted a stock brokerage business for some time under the corporate name, but later operated under the name of Harry C. Weist.

Stating the offense as alleged in the indictment, and as shown by the evidence, it appears that through the operation and agency of the Securities Company and Weist, as brokers and dealers respectively in shares of corporate stock, salesmen were employed to solicit customers and interest them in the purchase and sale of shares of the capital stock of the Standard Oil Company of California, and of other well-recognized corporations. Schwarz agreed to finance the business, and Weist agreed to obtain a stockbroker's license, and to invest $6,000 in the capital stock of the Securities Company; it was also understood and agreed that the profits of the business should be divided equally between Schwarz, Weist, and Donlin. Weist procured a broker's license, was elected vice president of the Securities Company, and entered into active promotion and operation of the business with Schwarz. All orders and confirmations were executed upon stationery bearing the headings, "Harry C. Weist, Broker," and "Harry C. Weist, Investment Banker and Broker," and funds received by Weist were turned into the accounts of the Securities Company, which in turn purchased shares of capital stock of Midland Trust & Savings Bank of St. Paul. Schwarz and Weist each had a desk in and occupied the same office of the suite. The former made purchases and the latter effected sales of various stocks by methods which will be more particularly described elsewhere in this opinion; Weist instructed salesmen, and both he and Schwarz signed checks, though Schwarz apparently assumed control of the business and attended to the hiring and discharging of employees of the company.

Appellants Frankfort and Goldner were stock salesmen in the employ of the company, the former having been hired by Schwarz and Weist, and the latter by Schwarz. Goldner received a salary of about $2,500 per year and commissions, and Frankfort was paid a salary of $2,400 to $2,500.

It appears that the major portion of stock sales to Los Angeles customers was initiated by means of a somewhat extensive and persistent telephone system utilized by Schwarz prior to the advent of Weist in the enterprise, and by the salesmen thereafter employed and instructed by them. It was testified that appellants Frankfort and Goldner, respectively, telephoned from the offices of the Securities Company to people whose names were obtained from directories and advertising concerns, informing them that the Standard Oil Company of California had a large surplus of oil and money and that substantial dividends would soon be declared. The salesmen thus made acquaintances, secured appointments, and ultimately met many people having funds to invest, whom they induced to purchase the Standard Oil Stock at the current market price, usually payable in installments. Thereafter the same salesmen called the purchasers on the telephone and represented to them that their Standard Oil stock was "going down," that there was an impending collapse, and that no dividend would be paid. It appears that while Frankfort was thus advocating sales, Goldner was sounding the alarm of a threatened "collapse" of the same stock, and vice versa, each using the telephones of the same suite of offices.

In the meantime Schwarz was purchasing stock of the Midland Trust & Savings Bank of St. Paul at $2.30 to $4.80 per share with the funds of the Securities Company. Frankfort and Goldner represented to purchasers of Standard Oil stock that the Midland stock was a valuable investment at $12.50 per share, and persuaded them to exchange their holdings for the latter at that price. It thus appears that the Standard Oil stock sold by the concern was repurchased from its own customers, the cheaper stock was given them therefor at a value of $12.50, and the Standard Oil stock was in turn again sold to new customers at market price, in the face of an "impending collapse" in value of the latter security.

[1] Each of the appellants contends that he was compelled to furnish to the commissioner of corporations self-incriminating evidence during the commissioner's investigation of their affairs, prior to the trial, and that he was therefore immune from prosecution under the indictment in this case. It is asserted that books, records, and papers of Schwarz, Weist, and the Securities Company were seized by the commissioner, and that Frankfort and Goldner were compelled to testify at such investigation.

It appears that previous to the institution of the criminal proceedings here under consideration one Floyd L. Eddy filed with the corporation commissioner a complaint against appellant Harry C. Weist, as a broker. Upon the hearing conducted by the commissioner in Eddy v. Weist, appellant Weist testified voluntarily, but Schwarz did not testify. One Bradley, an accountant, whom Schwarz had caused to audit Weist's accounts, testified from data which he gathered from the books and records of the brokerage business involved in this prosecution, and stated that all the information, records, and assistance afforded him during his investigation were furnished voluntarily by Schwarz and by the commissioner of corporations. There is no evidence or offered evidence before us tending to indicate that the commissioner seized, or compelled any of the parties to furnish, the books, records, or documents as insisted by appellants. Hence the claim that appellants Schwarz and Weist were compelled to give evidence before the commissioner which tended to incriminate them has no foundation. Appellant Schwarz also sought to interpose a plea in abatement upon the same grounds, and assigns as error an adverse ruling of the trial court as to such plea. We know of no authority for pleas in abatement in criminal cases. Section 1016 of the Penal Code specifies the pleas which are recognized in this state; but in any event, as we have said, these appellants were not compelled to incriminate themselves before the commissioner. This point therefore requires no further attention.

Motions to quash the indictment in the instant case were presented, at which time the reporter's transcript of the proceedings in

Eddy v. Weist was introduced, and is brought up with the record upon these appeals. It appears therefrom that appellants Frankfort and Goldner were subpœnaed, called as witnesses, and examined at length by the commissioner. It is conceded by respondent that they appeared and testified pursuant to the commissioner's subpœna. Their testimony was given over strenuous objections, and was followed by motions to strike it out, which were denied. Frankfort and Goldner testified that at the special instance and request of Weist and Schwarz they obtained customers by telephone, sold them stock which they later persuaded them to exchange for cheaper shares, in the manner heretofore related. Frankfort testified that he never had any independent knowledge of the worth of the stocks which he sold, but that Standard Oil was always sold first, and that the same buyers were thereafter induced to exchange the Standard stock for Midland bank stock, though he knew that the latter was not a better investment; that he never sold the Midland stock for less than $12.50 during the time that the record shows it to have fluctuated between $2.30 and $4.80 per share. Goldner testified that he was "back room manager," in charge of a crew of salesmen; that at the same time he advocated exchanges of Standard Oil stock by customers for Midland shares, upon the representation that the former was going to "break," he was selling the same Standard Oil stock to others at the full price.

[2] The evidence furnished by Frankfort and Goldner embraced much of the data upon which the indictment and judgment in the instant case were founded. It therefore becomes obvious that they appeared before the corporation commissioner in response to his subpœna, and testified under oath as to the matters upon which they were subsequently prosecuted and convicted. The respondent does not attempt to dispute this fact, but contends that they were not immune from prosecution for the reason that the commissioner has no power or authority to compel a person to give evidence which may tend to incriminate him. Counsel for respondent rely upon chapter 2, tit. 3, pt. 4, of the Code of Civil Procedure, which provides the method for production of evidence before a court or upon the taking of a deposition. It is argued therefrom that for any disobedience of a subpœna, or refusal to testify, the corporation commissioner could only "cite" the witness for contempt.

[3] We think this contention is untenable. The commissioner is by the terms of the Corporate Securities Act (St. 1917, p. 673), clothed with authority to issue subpœnas requiring witnesses to appear before him to testify and furnish documentary evidence. Section 17 of of said act provides that no person shall be excused from so testifying or furnishing evidence upon the ground that it may incriminate him, and section 14 further provides that every person who "wilfully violates or * * * fails, omits, or neglects to obey, observe, or comply with any order, permit, decision, demand, or requirement, or any part or provision thereof, of the commissioner under the provisions of this act, is guilty of a public offense and shall be punished by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment." Ministerial and other nonjudicial officers have no power to punish for contempt unless specially so authorized by law. People v. Latimer, 160 Cal. 716, 117 P. 1051. But penalties are provided by this statute for violations of the commissioner's orders.

[4] The commissioner's subpœnas by which appellants were summoned before him were addressed to the witnesses and recited in part:

> "You and each of you are hereby required to be and attend as a witness before E. M. Daugherty, commissioner of corporations of the state of California, * * * on Monday, the 28th day of July, 1924, at the hour of 10 o'clock a. m., in the above-entitled matter. For failure to so attend, you will be deemed guilty of contempt and liable to the penalties provided by the act of the Legislature," etc.

The act is mandatory; a witness may not refuse to appear or to testify upon the ground that his evidence might incriminate him, and it is made a public offense, punishable by fine or by imprisonment for one day to two or five years, in a county jail or penitentiary, as the case may be, for any person to violate the specific provisions of the act, or "in any other respect" to fail or refuse to obey any lawful order demand or requirement of the commissioner of corporations. But section 17 of the act further provides:

> "No person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which he shall have been so compelled to testify under oath, or to produce such documentary or other evidence. * * *"

[5] The weight of authority clearly supports the proposition that one who is brought into court under a subpœna and testifies pursuant thereto acts under compulsion. In People v. Courtney, 94 N. Y. 490, 493, it was said, "The Constitution primarily refers to compulsion exercised through the process of the courts," and not to the supposed moral coercion which impels a person to testify lest adverse inferences might be drawn from his silence. In Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, it was said:

> "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is

the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

And in United States v. Kallas (D. C.) 272 F. 742, 752, it was said, further:

> "How can it be said that, if a court required an accused to answer upon the witness chair, with the alternative of going to jail if he refused, it was such compulsion as to invalidate the evidence so obtained, and, at the same time, that a prisoner questioned in jail by his captor was not compelled to give evidence against himself?
>
> "Such a course would be to very nearly, if not quite, blind oneself as to what constitutes compulsion. As above pointed out, the compulsion forbidden by the amendment—or at least included in its prohibition—is compulsion exercised through the process of the court. The commitment by which the petitioner in the present case was held in jail is no less a compelling process than were he in court and ordered upon the witness chair for examination. * * * While it may be that many know of their rights, and, even when in prison, have the will and courage to stand upon them, there certainly are others who do not."

In Re Simon, 297 F. 942, 34 A. L. R. 1404, it was contended that a bankrupt who had failed to obey a subpœna was not guilty of having violated an order of court. But it was said by the Circuit Court of Appeals:

> "It cannot be denied, however, that a subpœna is a writ. * * * It will not be denied that a writ is a mandatory precept issued by a court, commanding the person to whom it is addressed to do or refrain from doing some act therein specified. Because it is mandatory, and is issued by a court, it is an order of the court. * * * The time was when a witness could not be compelled to go to court and testify, and if he attended and gave testimony his action was thought to bear the semblance of maintenance, and he ran the risk, if he came forward to testify, of being afterwards sued for maintenance by the party against whom he had spoken. * * * A subpœna is a writ or process, and is mandatory in its nature, being a positive command. A writ of subpœna, like a writ of scire facias, fieri facias, habeas corpus, certiorari, supersedeas, and the various other writs, 'are all commands or orders of court that something be done.' * * * In Burns v. Superior Court, 140 Cal. 1, 3, 73 P. 597, 598, the court said that the very etymology of the word 'subpœna' signifies 'an order with a penalty for disobedience.' In the case of Scott v. Shields, 8 Cal. App. 12, 96 P. 385, a subpœna is said to be: 'A writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness.'"

[6] The California cases cited in the foregoing quotation involved questions of certiorari and contempt, and therefore are dissimilar from the one here presented. But they are in harmony with the consensus of general authorities that a subpœna is a writ, an order, for the disobedience of which the person named therein may be punished according to the expressed will of the Legislature.

It has been suggested that the benefit of the immunity clause is not available to these defendants because they failed to "claim the privilege." It is obvious, however, that under such statutes there is no privilege. In Bradley v. Clark, 133 Cal. 196, 65 P. 395, the Supreme Court construed an identical provision in the Purity of Elections Law (St. 1893, p. 12). It was there said:

> "If the matter sought to be elicited by the questions was matter embraced within the purview of any of the sections * * * and if, with the defendant as a 'person offending,' the witness himself was also a 'person offending,' then, by the express provisions of section 32, and by the authority of this court in Ex parte Cohen, 104 Cal. 524, 43 Am. St. Rep. 127,[1] the witness could not claim immunity, and should have been compelled to testify."

We think, therefore, that the appellants Frankfort and Goldner were "compelled to testify under oath" concerning the acts, transactions, matters, and things constituting the offense alleged in the indictment herein, and that by the express inhibitions of the statute they were thus guaranteed immunity from prosecution therefor. For the reasons stated, the judgments, as to these two appellants, must be reversed.

[7, 8] The point is attempted to be made that the indictment was found upon the testimony of appellant Schwarz before the grand jury, and that if the business which he conducted was illegal, having answered all questions propounded to him by the district attorney during such inquisition, his testimony was of an incriminating nature, and that the indictment was null and void. It is asserted that this defendant was subpœnaed, sworn as a witness, and examined before the grand jury, and that if he incriminated himself the indictment should have been dismissed. It is stated in the brief of this appellant that a motion was made in his behalf to "quash or dismiss the indictment on the ground that it was found on his testimony before the grand jury" before the trial, was renewed after the case was called for trial, after the jury was impaneled, and before they were sworn at the close of the people's case, and "after the close of the whole case." We have examined the record thoroughly. The appellant seems to have appeared freely and voluntarily as a witness before the grand jury, and we think that each of his motions for dismissal of the charges upon this ground was properly denied.

It is sufficient to quote from the record of the proceedings before the grand jury, which was introduced in evidence by the appellant Schwarz. Answering questions put to him the following statements by Schwarz indicate his attitude in testifying:

> "A. If I may say just a few words? * * * When I came here, I came from Mr. Young-

---

[1] 38 P. 364, 26 L. R. A. 423.

worth's office, and Mr. Youngworth told me if I was given the opportunity to testify here that I should do so."

In reply to another question he said:

> "A. I am perfectly willing to testify and tell my side of the story, but it would be necessary for me to bring another party here from whom I bought the stock. * * *"

Schwarz thereupon testified at some length without hesitation or objection. It is not disclosed by the record that he appeared or gave evidence before the grand jury under any sense of compulsion or duty to the state, but rather that, if given freely and voluntarily, his version would tend to exculpate him. As was said by the Supreme Court in People v. Page, 116 Cal. 386, 392, 48 P. 326, 327, quoting with approval from People v. King, 28 Cal. 273:

> "It is only necessary to say that we know of no rule of law which made it illegal for him to testify if he felt inclined to do so, nor do we know of any rule of law which makes the voluntary testimony of the defendant before the grand jury a ground for setting aside the indictment."

Numerous authorities holding that the constitutional right to trial by jury and like guaranties cannot be waived are cited on behalf of appellant, but we are unable to see how such rule has any application here, since there is no constitutional or statutory bar to the appearance of any person before a grand jury as a witness, or to the return of an indictment against any such witness if his testimony or other evidence in the case shall so warrant.

[9] Nor is there merit in the contention that the indictment did not charge false representations as to known facts, but merely expressions of opinion. It is argued for reversal that the allegations of the indictment amount to no more than accusations that the defendants stated merely the probable future value of the Midland stock, which consisted of familiar artifices of salesmanship known as "puffing," and therefore that no offense was charged. We think counsel have misconstrued the language of the indictment. It was alleged that the defendants conspired to obtain from various named persons divers sums of money in excess of $200, by unlawful, false, and fraudulent pretenses and representations; that in furtherance of such conspiracy they represented that the Midland stock was then and there of the value of $12.50 per share, whereas in truth and in fact said stock was at no time worth more than $5 per share: that the defendants did then and there by such false representations obtain money from said persons, well knowing that their statements as to value were false and untrue. Other allegations of the indictment charged false representations as to the consolidation of the Midland Company with another bank, with equal precision and detail. This constituted a direct charge of conspiracy to obtain, and of having actually obtained, money, by false and fraudulent representations and pretenses, and was sufficient.

The fourth point advanced by appellants is that the indictment was groundless because the nature of the offense charged was a violation of the Corporate Securities Act, and that since said act is not mentioned in section 182 of the Penal Code, this prosecution is barred by section 183, which provides that "no conspiracies, other than those enumerated in the preceding section are punishable criminally." In Doble v. Superior Court, 46 Cal. App. Dec. 434, it was ruled that a conspiracy to violate the Corporate Securities Act was not a crime, but the Supreme Court subsequently passed upon the same case and held otherwise. Doble v. Superior Court (Cal. Sup.) 241 P. 852. It was there expressly held that the second penal paragraph of section 182 of the Penal Code imposes a penalty "for a conspiracy to commit any and all misdemeanors, whether defined by the Penal Code or by any other statute, and for conspiracies to commit all felonies which are *defined and penalized by some law other than the Penal Code.*" (Italics in original.) Nevertheless, it should be borne in mind that this proceeding was not founded upon an alleged violation of, or conspiracy to violate, any of the provisions of the Corporate Securities Act. The indictment was based upon subdivision 4 of section 182, denouncing it as an offense for two or more persons to conspire "to obtain money or property by false pretenses."

Another theory upon which the validity of the indictment is challenged is that it charged the defendants, as brokers and dealers, in the buying and selling of stocks, with having misrepresented the value of the stock of the Midland Company, and that said company was then in the process of consolidation. It is argued therefrom that, since the purpose of the Corporate Securities Act was, as entitled, to provide "penalties for the violation thereof," and since section 13 of that act prescribes penalties for falsely stating the values of corporate stock, it necessarily was all comprehensive, and that infractions of its provisions were not cognizable by the provisions of the Penal Code. We are also reminded that this statute embraces the clause, "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." Section 29. This argument is not only founded, as we have seen, upon an erroneous premise as to the crime charged, but it is conceded that the Corporate Securities Act is a continuation of the Investment Companies Act (St. 1913, p. 715), which in itself is a cogent reason for the existence of the repealing clause in the later legislation. Appellants do not attempt to assert that section 182 of the Penal Code was thereby repealed, nor do they indicate any provision of the act in question with which it could be said that said section is inconsistent. The fact that appellants were not charged primarily with having misrepresented, but with having conspired to obtain money by false and fraudulent representations and pretenses as a means of furthering the object of such conspiracy, is entirely ignored by their argument, but it constitutes a complete answer to their contention.

[10] On behalf of the defendant Schwarz it is insisted that the people failed to make any showing tending to prove that he knew of the falsity of statements which he may have authorized the salesmen to make. In addition to what has already been said of the facts in this case, there is an abundance of circumstantial evidence which alone would suffice to sustain the verdict and the judgment, if believed by the jury. People v. Flynn, 73 Cal. 511, 15 P. 102. It also appears without contradiction that Schwarz was the instigator and chief executive of the Securities Company's business, and that he enlisted the services of Weist, who thereafter collaborated with him, and that the two promoted the enterprise along the lines previously described; that Schwarz made careful and extensive inquiries, by telegraph and otherwise, as to the value of Midland stock, and obviously purchased it upon information so acquired; that at no time was he informed that it was worth more than $4.80 per share, although Weist and the salesmen at all times represented this same stock to be worth $12.50, and sold it to all comers upon such representations at the latter figure. The financial statement of the Midland Company received by Schwarz and offered in evidence in his behalf, contains information which is in itself sufficient to establish Schwarz' knowledge of the falsity of the statements in question. The highest value that appellant claims that this self-serving statement could possibly warrant as to Midland stock is $11.65, and some of the salient recitals contained therein are significant. It informed appellant, and other Midland stockholders to whom it was transmitted, that the assets of the company were *believed* to be sound, and that "there will eventually be little, if any loss on any of them, but the real fact is that some of them cannot be realized on at the present time, either as to principal or interest"; "a few have resulted in absolute loss which had to be charged off. We do not expect that very much more will have to be charged off. * * *" Again, one of the false representations which are charged to have been made by the conspirators is that the Midland Company was in process of consolidation with another institution. This was flatly contradicted by the testimony of the witness Strickler, who was vice president of the Midland Company. While the appellant was in possession of such a statement as that just mentioned, which at most might instill a sense of hope rather than confidence, and of other information as to value, he was purchasing the stock in question as low as $2.30 per share, and yet his forces were actively campaigning for buyers of the same stock at $12.50. There is no evidence anywhere in the record, so far as we have been able to ascertain, that this stock ever had a value of $12.50 per share, though Schwarz was consistently receiving the latter price for stock which at times cost him little more than one-fourth such figure. We think the jury were wholly justified in concluding from the evidence, as they apparently did do, that appellant knew that the price or value of Midland stock was misrepresented.

It is objected that the indictment charged a conspiracy to defraud by the false representation that the market value of Midland stock was $12.50 per share, whereas it was then and there in fact worth $5 per share, that the people failed to prove the market value as alleged, and that the judgment should therefore be reversed. It is further argued that the market value of unlisted stock is the book value, or the price at which it may be bought in the nearest market. The indictment did not so charge. It alleged that said stock was not worth in excess of $5 per share. While the people made no proof as to the actual value based upon assets and liabilities of the Midland Company, the financial statement of that corporation introduced as a part of the defense showed affirmatively that its actual value did not exceed $11.65. However, there is considerable evidence in the record to sustain the contention that the stock had a market value in Minneapolis, and that in that market it was only $2.30 to $4.80. The witness Parks, who qualified as an expert, being a broker from Minneapolis and familiar with the stock in that market, testified that during the period in which Schwarz bought and sold this stock the minimum market value was $2.30 and the maximum was $4.50. In addition to this there is the undisputed evidence of many purchases by these defendants in Chicago and Minneapolis at approximately these latter figures. Objection to this evidence as proof of the market value of the stock goes to its weight and not to its admissibility.

[11, 12] It appears that the people were permitted to read to the jury the testimony of various absent witnesses, given upon a former trial of this case. It is contended that this was error for the reasons (1) that the latter was not a "former trial" within contemplation of section 686 of the Penal Code, but that it was a "mistrial"; (2) that diligent search was not shown to have been made for the witnesses during the second trial; and (3) that as to one such witness it was admitted that he had left the jurisdiction after having been served with a subpœna. The legal distinction, if any there be, between a "former trial" and a "mistrial," as applied to the instant controversy, is not indicated

by appellants, and we are aware of none. A "mistrial" is one wherein "a proper decision would have completed the trial." Stern v. Wabash R. Co., 52 Misc. Rep. 12, 101 N. Y. S. 181; Fisk v. Henarie (C. C.) 32 F. 425, 427. It is not denied that the witnesses in question, upon the previous trial of the same issues, appeared in open court, in the presence of the defendants, who either in person or by counsel cross-examined them, or had an opportunity to do so. This being true, all the requirements of the statute were satisfied. It was testified that certain of the witnesses who resided and maintained businesses outside of this state were known to have left the jurisdiction, and that at the time of their departure they stated that they would not return; that process servers thereafter called at the local hotel where they had been, and were there informed that the witnesses had gone. It appeared that these witnesses were not expected for the retrial of the case, although an attempt was made to serve them. The trial court concluded that under the circumstances a sufficient showing of diligence had been made to render their previous testimony admissible. The question of diligence in such cases is left to the sound discretion of the trial court, based upon the facts and circumstances before it, and we think there was no abuse of such discretion in this instance. People v. Ramos, 52 Cal. App. 491, 199 P. 544. Again, the mere fact that the witness Rayburn had received a subpœna before he left the jurisdiction is not material. We know of no rule, and are cited to none, requiring that the service of process may be said to render incompetent testimony otherwise admissible under the provisions of the statute. We find no error in the rulings upon these objections.

[13] Upon the trial objections were interposed to the testimony last mentioned, and it was followed by motions to strike, upon the ground that the statute of this state which authorized its reading was unconstitutional. Appellants advanced the somewhat novel argument that the Sixth Amendment to the Constitution of the United States provides that a defendant in a criminal action is entitled "to be confronted with the witnesses against him"; that article 1, § 3, of the Constitution of the state of California, declares that "the Constitution of the United States is the supreme law of the land"; that the Sixth Amendment to the federal Constitution was in full force and effect at the time of the adoption of the California Constitution in 1879, wherefore, it is said, the amendment to the federal Constitution must be deemed a part of the Constitution of California, and hence that the Legislature "had no jurisdiction to enact that part of subdivision 3, § 686, of the Penal Code, which permits the reading of the testimony of a witness given on a former trial in a criminal action, because that provision is in direct conflict with the provision of the Sixth Amendment" quoted. It is not even suggested that the witnesses in question did not appear at the first trial or were not cross-examined upon all the issues concerning which they gave direct evidence. It must be conceded that at that time they confronted the defendants, and that therefore their testimony, when read to the second jury, complied with all the requirements of the Sixth Amendment to the Constitution of the United States.

This amendment does not require that all witnesses must personally appear and testify in the presence of a particular jury. Its object is to provide a person who is being tried for public offense full opportunity for cross-examination, and this right these appellants admittedly had exercised. Counsel freely admit that their argument is confronted with numerous decisions holding that section 686 is constitutional, but they assert that in those cases the courts overlooked the fact that the Constitution of the United States was in force when the state Constitution was adopted. However, since the Constitution of the United States is the "supreme law of the land," the fact that the ratification of an amendment antedates the state Constitution or a state statute can afford it no greater force than an amendment thereafter incorporated into the organic law of the land. As was said in People v. Wilson, 26 Cal. App. 336, 146 P. 1048:

> "'The Fifth and Sixth Amendments of the Constitution of the United States are restrictive of the powers of the federal government and not restraints upon the states.' Davis v. Texas, 139 U. S. 651, 653, 11 S. Ct. 675, 35 L. Ed. 300; Brown v. New Jersey, 175 U. S. 174, 20 S. Ct. 77, 44 L. Ed. 119. We are of opinion that this conclusion is not affected by the statement contained in section 1897 of the Code of Civil Procedure, that the written law of this state is 'contained in its Constitution and statutes, and in the Constitution and statutes of the United States.'"

[14] It is said that the instruction that "the question whether the witnesses Clark and Farrell or any other persons not named in the indictment, were or were not conspirators, or were or were not indicted in connection with the transactions involved in this case is wholly irrelevant and immaterial," and must not be considered, was prejudicial error because Clark was at one time secretary and treasurer of the Securities Company, and was, therefore, an accomplice. The jury were properly instructed as to their duty in weighing the testimony of witnesses, which was the only material consideration. The existence of the indictment, or the fact that others may or may not have been accused of the same offense, had no bearing upon the question of guilt or innocence of the defendants then before the court. The instruction did not, as claimed by appellants, proclaim as a matter of law that the witnesses were accomplices.

[15] Certain instructions which were requested by the defendant Schwarz and refused were to the effect that telegrams in evidence should not be considered by the jury in determining the market price of the stock, also that individual sales of stock were not to be considered in determining the market value. We are cited to no authority sustaining these propositions. Many authorities are cited which hold that certain other evidence is admissible and proper in measuring market value. In some of the cases cited by appellants it is said that where stocks are unlisted it is proper to prove the market value by showing the assets of the corporation and deducting therefrom its liabilities, but in none of these decisions is there any statement to the effect that other evidence is not admissible, or, indeed, sufficient. On the other hand, there is an abundance of authority upholding the use of evidence of actual sales and offers for sale to establish "market value," or "market price." In Muser v. Magone, 155 U. S. 240, 15 S. Ct. 77, 81, 39 L. Ed. 135, it was held that "market value" is the price which dealers are willing to receive and purchasers are compelled to pay. To the same effect are Sanford v. Peck, 63 Conn. 486, 27 A. 1057; Murray v. Stanton, 99 Mass. 345, 348; Palmer v. Penobscot L. Ass'n, 90 Me. 193, 38 A. 110; K. C. W. & N. W. R. Co. v. Fisher, 49 Kan. 17, 30 P. 111; Dady v. Condit, 188 Ill. 234, 58 N. E. 900; Pittsburgh, V. & C. R. Co. v. Vance, 115 Pa. 325, 8 A. 764. Further, transactions had at about the time in question may be shown. Noonan v. Ilsley, 22 Wis. 27. Hence, the telegrams were competent, as purchases of Midland stock by the defendants were made through them as a medium.

[16, 17] It is further contended that the rendition of separate verdicts convicting four of the defendants, and one acquitting the defendant Donlin, and the entry of individual judgments as to each, constituted a "miscarriage of justice." We are not cited to any authority or given a valid reason for so holding, and we are unaware of any possibility of advantage to appellants from a consolidated verdict finding them guilty of the offense charged. In all jurisdictions where to our knowledge the question has been decided, separate verdicts have been sustained. Davis v. State, 8 Ala. App. 147, 62 So. 1027; Woodward v. State, 84 Ark. 119, 104 S. W. 1109; State v. Cotterel, 12 Idaho, 572, 86 P. 527; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; Hughes v. State, 65 Ind. 39; Arnold v. Comm., 55 S. W. 894, 21 Ky. Law Rep. 1566; State v. Johns, 259 Mo. 367, 168 S. W. 587. It is too elementary to require the citation of authority that a conviction of two or more defendants of the crime of conspiracy is not dependent upon a conviction of all.

[18] Aside from the questions heretofore considered, it is said in behalf of the defendant Weist that he was merely a victim of circumstances, and that the evidence was insufficient to convict him of conspiracy with his codefendants. We cannot say as a matter of law that the verdict of the jury was unsupported, or that it was insufficient to sustain the judgment. It at once appears quite obvious that many of the circumstances which resulted in his conviction were of his own ingenious creation, in confederation with the defendant Schwarz.

There are no other alleged grounds of appeal which merit attention.

The judgments as to appellants Frankfort and Goldner are reversed.

As to appellants Schwarz and Weist, the judgments and orders appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

GENERAL MOTORS ACCEPTANCE CORPORATION v. GANDY. (Civ. 3050.)

(District Court of Appeal, Third District, California. June 30, 1926. Rehearing Denied July 30, 1926. Hearing granted by Supreme Court August 26, 1926.)*

1. Pleading ⚷165.

Plaintiff need not answer special defense set up by defendant.

2. Estoppel ⚷110—Plaintiff may prove estoppel without pleading it, as against defendant's plea.

Plaintiff may prove an estoppel without pleading it, as against guarantor's plea that his guaranty had no application to contracts and notes giving rise to the action.

3. Estoppel ⚷116—Burden rests on person asserting equitable estoppel to prove all its elements.

Existence of estoppel is question of fact, and burden rests on party asserting equitable estoppel to prove all elements constituting it.

4. Estoppel ⚷54—Actual ignorance of material facts arising from false representation or concealment is essential to estoppel.

False representation or concealment of material facts is essential to estoppel, and party to whom such representation is made, or from whom such facts are concealed, must have been ignorant, actually and permissibly, of the truth.

5. Estoppel ⚷118.

Estoppel must be so established as to leave nothing to surmise or questionable inference.

6. Guaranty ⚷36(3)—Partner indemnifying against loss in purchasing firm's notes, held, under evidence, not estopped to deny liability to purchaser of notes from corporation of same name organized by him.

Where firm partner contracted to indemnify plaintiff against loss in purchasing firm's notes, etc., and subsequently organized a corporation under same name to engage in similar business, and both entities were operated at same place, defendant was not estopped to deny liability under guaranty on notes purchased from corporation, where these were executed to the corporation, and plaintiff's subsequent letters concerning these notes were addressed to the corporation.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action to recover money due on a contract of guaranty by General Motors Acceptance Corporation against C. W. Gandy. Judgment for plaintiff, and defendant appeals. Reversed.

A. J. Carlson, of Modesto, for appellant.
Charles W. Haswell, of San Francisco, for respondent.

HART, J. This action was brought by plaintiff to recover the sum of $3,063.65, alleged to be the amount due on a contract of guaranty executed by the defendant for the purpose of indemnifying the former against any loss which it might incur by reason of taking over by purchase certain notes or other evidences of indebtedness accruing in favor of a certain partnership with which the defendant was connected as a copartner. The cause was tried by the court, sitting without a jury, and plaintiff was awarded judgment for the sum of $1,668.70, from which this appeal is prosecuted by the defendant upon a record made up in pursuance of the provisions of section 953a of the Code of Civil Procedure.

The plaintiff, a corporation, as its name to an extent implies, is what is known as an acceptance corporation, engaged in the business of buying and discounting conditional contracts of sale of motor vehicles, and promissory notes, and other written evidences of indebtedness given to dealers in such vehicles by those purchasing the same on credit. The defendant, at the time he executed the contract of guaranty upon which the plaintiff declares and one J. A. Anderson were, as copartners and under the firm name of "Modesto Motors Company," engaged, in the city of Modesto, in the business of selling the Oakland, the Davis, the Paige, and the Haynes automobiles. The Oakland automobile was manufactured by a corporation known as the "General Motors Corporation." The copartnership arranged to discount its automobile paper—notes, conditional contracts of sale, and other written evidences of indebtedness owing to it by purchasers of the automobiles from it on time credit, and to perfect said arrangement, and in pursuance of a demand by plaintiff therefor, the members of the partnership (defendant and Anderson) executed and delivered to plaintiff, on the 8th day of April, 1920, although the instrument was dated March 30, 1920, the contract of guaranty upon which this action is predicated. The said guaranty provides as follows:

> "In consideration of General Motors Acceptance Corporation, hereinafter called the 'corporation,' hereafter extending credit at any time and to any extent to Modesto Motor Company, hereinafter called the 'dealer,' or to any one at the request or for the benefit of said dealer, through issuing, drawing, accepting, indorsing, discounting, purchasing, or acquiring any draft, note, acceptance, bill of exchange, letter of credit, or other instrument or obligation, for the account or the behalf of said dealer, or hereafter refraining to any extent from enforcing any rights under any contract or arrangement entered into by said dealer, and of other good and valuable consideration, the undersigned agrees to hold the corporation harmless from, and does hereby unconditionally at all times guarantee the performance and pay-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*For opinion on hearing by Supreme Court, see 253 P. 137.

ment at maturity of, each and all drafts, notes, acceptances, bills of exchange, letters of credit, negotiable instruments, and agreements, and other obligations between the dealer and the corporation, heretofore or hereafter issued, drawn, accepted, executed, entered into, indorsed, discounted, purchased or acquired by the corporation, for the account or in the behalf of said dealer, including all costs, expenses, and attorney's fees, heretofore or hereafter incurred by said corporation, in connection with the default of said dealer.

"This is a contract of continuing guaranty and, until canceled as hereinafter provided, shall not be limited to any amount, and shall at all times include the full indebtedness of the said dealer to the said corporation.

"The liability of the undersigned for any unpaid balance shall not be affected by any indulgence, compromise, settlement, extension of credit, or variation of terms, effected by or with the dealer or any other person interested, nor by the amount of dealer's obligations outstanding at any one time, nor by payments previously made by the dealer or the undersigned, nor shall it be necessary for the corporation to procure the consent of the undersigned or give any notice in reference thereto.

"The undersigned hereby does expressly waive and dispense with notice of acceptance of this guaranty, notices of nonpayment and nonperformance, notices of amount of indebtedness outstanding at any time, protests, demands, and prosecution of collection, foreclosure, and possessory remedies.

"This guaranty is to remain in full force and effect until written notice of the withdrawal of the same has been served by the undersigned upon the corporation at its principal office at New York City, provided that such withdrawal shall in no case be effective except as to new transactions subsequent to the actual receipt of such notice.

"The obligation of all parties signing this guaranty, where more than one, shall be joint and several.

"The benefits and obligations hereof shall extend to and bind the heirs, administrators, successors, and assigns of the respective parties hereto.

"This guaranty and the performance thereunder shall be construed and determined according to the law of the state of New York."

Gandy testified that the partnership held the agency in Modesto and adjacent territory of the Oakland, the Davis, the Paige, and the Haynes cars; that the General Motors Corporation, as seen, manufacturer of the Oakland cars, finally objected to the partnership "handling so many other makes of cars," and it was hence decided by the partnership, or Gandy and Anderson, the sole members thereof, to organize a corporation, and to transfer to such corporation the agencies, in Modesto, of the Oakland and Davis automobiles; that, in pursuance of this decision, a corporation was by said parties formed on the 11th day of June, 1920—approximately 2 months after the above contract of guaranty was executed—under the name of Modesto Motor Company. The articles of incorporation were filed in the office of the county clerk of Stanislaus county on the 21st day of June, 1920. A short time after the organization of said corporation, so defendant continued to testify, the partnership transferred to the corporation the agencies for the Oakland and Davis cars and certain personal assets of the former to said corporation, consisting of "certain personal property and some automobiles." As a consideration for such transfer, the stock of the corporation was issued to the copartners in the partnership, Gandy, the defendant, receiving, approximately, two-thirds of the stock, Anderson one-third, and one Bryan Milton one share thereof. Defendant testified that immediately upon the organization of the corporation he became president and his copartner in the said parnership, Anderson, became vice president thereof. The Modesto Motor Company, partnership, and the Modesto Motor Company, corporation, occupied the same premises—that is, there were two buildings, Gandy testified, on one lot but connected together—the entire premises being in the possession and under the control of the partnership, the front building, however, occupied by the corporation, and the rear by the partnership. Both the Modesto Motor Company, a partnership, and the Modesto Motor Company, a corporation, were doing business on the same premises at the same time.

The defendant, having been called by the plaintiff as a witness under section 2055 of the Code of Civil Procedure, a number of times stated that he severed his connection with the corporation some time in the fall of the year 1921. When testifying as a witness for himself, however, he stated that it was some time in the fall of 1920 that he severed his connection with said corporation by selling his stock therein to one Knorr, who became president thereof, and another party whose name he was unable to recall. The Modesto Motor Company, partnership, continued to carry on business on the same premises that were occupied by the corporation of the same name until the month of January, 1921, when the Gandy Motor Company, a corporation organized by defendant, took over the business of the Modesto Motor Company, partnership.

Gandy, further testifying, stated that in the month of October, 1920, after the corporation was formed and he had sold and relinquished all interest he had in the said corporation, he and the Mr. Knorr spoken of above as the party succeeding to the presidency of the corporation, called on the manager of plaintiff in San Francisco and that he, in the presence of Knorr, informed said manager that he (defendant) had disposed of his interest in the agency of the Oakland car; that Mr. Knorr was the president of the Modesto Motor Company, Inc., and that Knorr or said corporation would handle the Oakland cars from that time on in Modesto;

that his partner, Anderson, would remain with the corporation, while he would control the Modesto Motor Company, partnership, until he discontinued the same, as he then contemplated, and turn over its business and the Paige and Haynes agencies in Modesto to a corporation he intended to organize under the name of Gandy Motor Company. Defendant stated that the plaintiff's manager asked him why "we called it (the corporation) the 'Modesto Motor Company, Incorporated,' under the same name as our company. I told him because we were going to discontinue the Modesto Company, a copartnership, and that I was going into the Gandy Motor Company, and that the agencies for the Paige and the Haynes would be turned over to the Gandy Motor Company, and that Mr. Anderson was going to continue with the Modesto Motor Company, Incorporated, but I was leaving it altogether." Defendant further testified that, on the same occasion, he asked plaintiff's manager "to check up the contracts that were outstanding, and I told him I would personally see that the terms were carried out, but wouldn't go any further because I had nothing to do with the company"; that the manager gave him a statement of the status "of the contracts that were outstanding, and I checked up my books and I followed each contract out to see that it was taken care of"—that is, he continued:

> "I had the books and in a good many cases I collected the money and sent it in to the General Motors Acceptance Corporation. * * * The contracts that have been offered in evidence here (those upon which this action is founded), numbered Exhibits 2 to 8, inclusive, were not in existence at that time."

Certain letters passing between plaintiff and the Modesto Motor Co., Inc., after the corporation was formed—those from the latter being signed by Knorr as president of said corporation—were introduced in evidence. The letters to plaintiff from the corporation were upon sheets of paper containing the following at the top thereof: "Modesto Motor Co., Inc., 1204 Ninth Street, Modesto, California." One of the letters from the plaintiff to the corporation, dated October 10, 1921, called for a guaranty covering contracts which might hereafter be taken over by plaintiff, and in said letter it was suggested that the guaranty, the form of which was enclosed with the letter, be executed by "all the officers of the corporation." The guaranty thus requested was executed by the officers of the corporation on the 4th day of November, 1921, and was forwarded to plaintiff with a letter from the corporation dated November 7, 1921. Under date of October 9, 1920, the corporation, as we have referred herein to the Modesto Motor Company, Inc., addressed and mailed to the plaintiff the following letter or card:

"GMAC Form No. 517.
"Name, Modesto Motor Co., Inc.
"Address, 1204 9th St., Modesto,
"Dated, Oct. 9, 1920.

"To General Motors Acceptance Corporation:

"Below find signature of those authorized until further notice, to execute and/or indorse, in behalf of the undersigned, notes, acceptances, contracts, and all other instruments or assignments thereof used in connection with your wholesale and retail financing plans. In the absence of special instructions signature of any one individual may be accepted.

"A. S. Hinckley, President.
"E. L. Callander, Vice Pres.
Secretary.
Treasurer.

"Yours truly,
"[Name] Modesto Motor Co., Inc.,
"By A. S. Hinckley, President."

The defendant's testimony that the contract for the sale of automobiles which plaintiff took over, and which are the bases of this action, were made by and between the Modesto Motor Company, Inc., and the purchasers, is not contradicted. In fact, the contracts themselves show this to be true. One of these contracts was dated and, therefore, presumptively executed, on the 11th day of December, 1921, 7 days after the guaranty last hereinabove spoken of was executed.

The complaint, after setting out in hæc verba the contract of guaranty of April 8, 1920, alleges that "plaintiff on the faith of said guaranty * * * extended credit to the said Modesto Motor Company, a corporation, the principal named in said guaranty, by accepting, purchasing and acquiring certain notes, acceptances and conditional sales contracts, which said instruments were duly set over by the said Modesto Motor Company, a corporation, to the plaintiff herein, for a valuable consideration, and were purchased and acquired by the said plaintiff, in the regular course of business with the said Modesto Motor Company, a corporation, and endorsed by said Modesto Motor Cmpany, a corporation, through and by its duly authorized officers," etc.; that the said notes or the respective balances thereof are now due and payable, but that the makers thereof, although demanded by plaintiff to do so, have "wholly refused, neglected and omitted to pay the said balances," etc.

A demurrer, on both general and special grounds, was interposed by the defendant and the same overruled. Thereupon defendant filed an answer specifically denying the averments of the complaint, and also affirmatively declaring: That "the contract of guaranty in said complaint set forth does not apply to or include or cover any of the contracts or notes referred to in plaintiff's complaint"; that he (defendant) "is not responsible for the payment of any of the items or outstanding balances referred to" in the complaint or set out in "Exhibit A of said complaint," which exhibit involves a bill of particulars setting forth in detail the balances respectively due on the promissory notes referred to in the complaint.

The court found the existence of the partnership between Gandy and Anderson under the name of the "Modesto Motor Company" during the period above mentioned, the organization of the corporation by the same parties under the same name, and that the two entities were operated for the period of time above indicated at the same time and place, and then found as follows:

> "That the defendant, C. W. Gandy, did not serve any notice upon said General Motors Acceptance Corporation of the existence of a corporation known as the Modesto Mótor Company, Inc., or advised the said plaintiff, General Motors Acceptance Corporation, of any distinction between the Modesto Motor Company, a copartnership, and the Modesto Motor Company, a corporation.
>
> "That by reason of the premises the said plaintiff, General Motors Acceptance Corporation, purchased certain notes, conditional sales contracts and evidences of indebtedness from the Modesto Motor Company, Inc., a corporation, relying upon and believing that in truth and in fact it was the same firm or entity and described as Modesto Motor Company as set forth in the said contract of guaranty executed by the defendant herein.
>
> "That the said defendant, C. W. Gandy, by reason of permitting the Modesto Motor Company to operate under the same identical name both as a copartnership and a corporation, and at the same place of business, and interchanging the assets of the said copartnership to the corporation, caused the plaintiff, General Motors Acceptance Corporation, to rely and believe that the said Modesto Motor Company, either as a partnership or as a corporation, was the same entity as described as Modesto Motor Company, in the contract of guaranty executed by the defendant herein.
>
> "That by reason of the foregoing acts on the part of the said defendant, C. W. Gandy, the court further finds that the contract of guaranty was intended to, and did, guaranty all obligations of the Modesto Motor Company, either as a copartnership or as a corporation, and that the defendant, C. W. Gandy, is, by reason of the premises, estopped to deny the obligations incurred under the said contract of guaranty by the Modesto Motor Company, a corporation.
>
> "That the said contract of guaranty provided that the same should be in full force and effect until revoked in writing to the office of the said plaintiff, General Motors Acceptance Corporation, in the city of New York, state of New York.
>
> "That the said contract of guaranty was not revoked within the terms and in accordance with the conditions of the said contract, but was in full force and effect at all times herein mentioned."

The theory upon which the plaintiff tried its case below and presents it on this appeal embraces several hypotheses, and may be stated as follows: (1) That the organization of the Modesto Motor Company, a corporation, was not effectuated for the purpose of dissolving or terminating the partnership, but that the corporation was formed by the parties constituting the partnership as a mere agency for the purpose of the more conveniently carrying on the partnership business, and that, therefore, the acts of the corporation within the scope of the partnership purposes and business were those of the partnership (see 6 Cal. Jur., § 201, p. 338, for a statement and an application of the rule by which the proposition stated is supported); (2) that defendant is estopped from denying his liability upon the contract of guaranty sued on for the reason that, assuming that said contract was in any way affected or impaired by reason of the formation of the corporation, his conduct and acts with reference to the organization of said corporation were such as to have had the effect of misleading plaintiff, or, rather, leading it to the belief that the Modesto Motor Company was, at all times during the subsistence of the contract of guaranty, a single entity, as to the legal form or status of which the plaintiff had no knowledge until the month of November, 1921, when, for the first time, plaintiff received information that a corporation under said name had been organized independently of the partnership existing and conducted under the same name; (3) that, assuming that the corporation was formed for the purpose only of acting as trustee or agent for the partnership in carrying on of the latter's business transactions, the defendant was bound and would remain bound to the terms of his guarantyship until he revoked the contract of guaranty in the mode prescribed thereby, to wit, by serving upon the plaintiff, at its principal office, at New York City, his withdrawal from said guaranty.

The general contention of the defendant that the findings vital to the legal integrity of the judgment derive no support in the evidence necessarily involves an attack upon the position of the plaintiff, as above specifically pointed out, since, as will be noted, the theory of the findings is in accord with the theory upon which the plaintiff evidently presented its case below and presents it on this appeal.

Although, as we have above pointed out, several different propositions are advanced here in support of the appeal, still the real problem the solution of which is decisive of the case is reducible to the simple question whether, as the court found, the defendant, upon the facts and circumstances characterizing the transactions culminating in this controversy, must be held to be estopped from claiming immunity from the obligations of the contract of guaranty pleaded in the complaint. In other words, the plaintiff's case, as we view the record, can only be sustained upon the theory that the circumstances attending the formation of the corporation—the part taken by defendant therein, his interest in both the corporation and the partnership, the fact that both the partnership and the corporation bore substantially the same name, and the asserted concealment from the plaintiff by him of the fact that the partnership and the corporation represented two separate and independent entities—were such as legally to foreclose in him the right to deny his liability upon the contract of guaranty, regardless of whether the promissory notes discounted and acquired by plaintiff were executed and delivered to the partnership or to the corporation.

[1, 2] The plaintiff did not plead an estoppel. Its case, as made by its pleading, rests entirely upon the contract of guaranty. And thus it had the right to proceed. It was not required to anticipate any defense that might be pleaded or relied upon by the defendant. Under our system of pleading, unlike that of the common-law system, whereby, if necessary, a series of pleadings by the respective parties were required and could be resorted to in order to accomplish a joinder of issue upon any particular or other matter, the law answers for the plaintiff any special defense set up in the answer by the defendant. Therefore, the plaintiff here was entitled to introduce or rely upon the proof of any fact or facts which would impeach any special defense which the defendant by his answer has interposed, and this either by evidence directly contradicting the facts constituting such defense or by evidence of facts which, assuming the existence or truth of the facts upon which the special defense is predicated, will tend to avoid the legal effect thereof. Hence, the plaintiff here was at liberty to prove, if it could, an estoppel as against the defendant upon his plea that the contract of guaranty has no application to the contracts and the notes giving rise to the present litigation and that, consequently, as a guarantor on said guaranty, he was not legally "responsible" for the defaults of the makers of said notes in payment thereof. The important question, then, is: Does the evidence warrant the finding that the defendant is estopped by reason of his conduct with respect to the several transactions involved herein from denying his liability upon the contract of guaranty?

[3] The existence of an estoppel is a question of fact, and the settled rule as to the proof of equitable estoppel is that the burden rests upon the party asserting such estoppel to prove all the elements constituting it "by evidence having some reasonable tendency to establish the fact." 10 Cal. Jur. p. 656, § 31. See, also, cases cited in the footnotes to said section. The plaintiff, it appears clear to our minds, failed to sustain this burden. In the first place, it is to be noted that the evidence, without conflict, shows that the Modesto Motor Company, a partnership, and the Modesto Motor Company, a corporation, were two separate and independent entities, the partnership, from and after the formation of the corporation, being the agent for and dealing in certain kinds of automobiles, and the corporation the agent for and dealing in other kinds of automobiles. It is also undisputed and, indeed, indisputable, that the guaranty declared upon by plaintiff was executed and in operative effect some two months before the corporation was formed. In the second place, it is to be observed that, save and except the testimony of Wm. Robb, the assistant credit manager of plaintiff, and the only witness introduced by the latter, that he did not know, when the contracts and the notes directly concerned herein were taken over by the plaintiff, that the Modesto Motor Company was incorporated, the plaintiff made no affirmative showing in support of an estoppel, nor did it make any attempt to do so. Aside from said testimony of Robb, it relied entirely for the support of an estoppel upon facts brought out upon the examination of defendant under section 2055 of the Code of Civil Procedure and on his cross-examination, the fact that the partnership and the corporation bore the same name, and the asserted fact that it was not informed by defendant or any other person connected either with the corporation or the partnership or any other party to the contract of guaranty, prior to its acquisition of the contracts and the notes involved herein, that the corporation had been formed and that the automobile agencies with which said contracts and notes were alone concerned had been transferred to said corporation. This, as stated, embraces the entire foundation for the claim and the support of the estoppel.

The testimony of defendant on his examination by plaintiff under section 2055 of the Code of Civil Procedure was substantially the same as that given by him when he testified as his own witness or in his own behalf, both upon direct and cross-examination. Attention, however, may here be called to the testimony of the defendant that, within a brief time after the formation of the corporation and the transfer to the latter by the partnership of the agencies of the Oakland and Davis automobiles, and prior to the time at which, respectively, the contracts and the notes involved herein were acquired by plaintiff, he called at the offices of the plaintiff, and, in the presence of Knorr, informed its manager (a Mr. Warner, he believed to be the name of the manager) that the corporation had been formed, that the Oakland and Davis agencies had been transferred by the partnership to said corporation and that he had severed his connection with the latter concern; that said manager stated to him (defendant) that the notice thus given was sufficient, and that it was not necessary for him to transmit to and file with the main office of the plaintiff, in New York City, the written notice required by the contract of guaranty where the guarantors desire to withdraw therefrom as such guarantors. As before stated, this testimony of the defendant was not directly contradicted. Neither plaintiff's manager at San Francisco nor any other official of the plaintiff was called by the latter to give testimony in rebuttal of the defendant's testimony, if, indeed, any such adversary showing could have been made by the plaintiff. Nor was any explanation vouchsafed for the failure of plaintiff to call the said manager as a witness.

But it may be conceded that the court, as the trier of the issues of fact, in the exercise of a sound legal discretion, hedged by those tests which constitute the criterion by which the credibility of a witness may be determined, and, therefore, the weight and the probative value of his testimony may be determined and appraised by the jury or the court by which the questions of fact are tried, was legally at liberty to disbelieve and so disregard the defendant's testimony. In support of the finding as to an estoppel, such would be the presumption. But, this being so or at least assumed, it follows that there is no testimony remaining in the record as to the knowledge of the plaintiff of the fact of the formation of the Modesto Motor Company, a corporation, prior to the acceptance by the former of the contracts and the notes involved herein other than the documentary evidence consisting of the contracts themselves and the letters passing between plaintiff and the Modesto Motor Company, a corporation, after the latter was formed, and the testimony of Robb to the effect that he did not know of the existence of the Modesto Motor Company as a corporation. The letters from the plaintiff to the Modesto Motor Company, corporation, after the acquisition by the former of the contracts and the notes themselves show beyond all question that plaintiff then had full knowledge of the fact that the Modesto Motor Company, with which it was dealing as to said contracts and notes, was a corporation. And, in this connection, it is important to note that there is absolutely no testimony in this record that the plaintiff did not know, at the time the contract of guaranty was executed and delivered to it, that the Modesto Motor Company with which it was then dealing was a partnership. But further consideration of the evidence need not be pursued, since the problem presently before us is not one whose solution is to be controlled so much by a consideration of the rule as to evidentiary conflicts as upon a consideration of the question whether the estoppel claimed is the necessary effect of the facts and circumstances from which it must have arisen, if at all.

[4-6] Among the dominant essentials of equitable estoppel or estoppel in pais are that there must have been a false representation or a concealment of material facts of the matter as to which the estoppel is claimed, and the party to whom such representation is made or from whom such facts are concealed must have been ignorant, actual and permissibly, of the truth of the matter. As a rule, manifestly, an equitable estoppel must be proved by oral testimony, hence the rule that certainty is essential to all estoppels is peculiarly applicable to estoppels in pais. The estoppel must be so established as to leave nothing to surmise or questionable inference. In other words, the representation, whether express, or implied from the conduct of the party against whom the estoppel is sought to be invoked, must be such as to justify a prudent man in acting upon it, and must be plain and not doubtful. Bigelow on Estoppel (5th Ed.) pp. 570–578, inclusive. Clearly, the estoppel claimed here does not measure up to the requirements of the above rules relating to the establishment of equitable estoppel. The testimony of Robb that he did not know, at the time material here, that the Modesto Motor Company, incorporated, was in existence and the entity with which plaintiff was dealing with respect to the contracts and the notes in question is contradicted by the documentary evidence, and, indeed, by the plaintiff's own pleading. Assuming, though, that personally he had no knowledge of that fact, certainly it cannot be denied that he and other officers of the plaintiff were familiar with facts and circumstances sufficient to put them on notice as to the existence of two separate entities under the name of the Modesto Motor Company, and that the plaintiff in the transactions involved here was dealing with the corporation of that name.

It is hardly necessary to suggest that the contract of guaranty had no relation to or connection with the Modesto Motor Company, Incorporated. That instrument applies solely to the partnership of that name, and, therefore, the requirement of said contract that a withdrawal therefrom by one or all of the guarantors could be effected only by a written notice filed in the New York office of plaintiff to that effect has no bearing upon any transactions had with the Modesto Motor Company, incorporated.

The judgment, for the reasons above stated, is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM. One proposition only do we deem it necessary to notice specially in disposing of the petition. The point has reference to what is said in the original opinion relative to certain letters from plaintiff to defendant concerning the transactions involved in the controversy. Counsel, in their petition say:

> "We respectfully contend that the decision overlooks the very essential fact that these letters were subsequent to the purchase of the contracts, the letters in question being dated,

respectively, November 7, 1921, and October 10, 1921."

Referring then to "Plaintiff's Exhibit 2," which was a letter from defendant to plaintiff, the petition proceeds:

> "While the letters 'Inc.' appear on the letter head, and this letter is dated January 8, 1921, we cannot conceive that this gives sufficient notice of the change of the entity of the company."

The fact of the writing and the receipt of those letters subsequent to the purchasing of the contracts by the plaintiff was not overlooked when the original opinion was prepared. In said opinion, as will be noted, we showed as the record shows, that the contracts themselves, as they were written and executed, were between the purchasers of the automobiles and the "Modesto Motor Company, Inc.," and not with the partnership of that name. This fact itself we held and still hold was sufficient to indicate clearly to the plaintiff that it purchased contracts of the corporation and not contracts of the partnership, and, as showing or tending to show that the plaintiff must have known that it was at all times, after the purchase of the contracts, dealing with the corporation and not with the partnership known as the Modesto Motor Company, we referred to the letters mentioned. As shown in the original opinion those of the letters written by the plaintiff were in terms addressed to the corporation and not to the partnership. This we held constituted evidence of a very strong character that the plaintiff knew from the contracts themselves that, as to said contracts, it was dealing with the corporation and not the partnership.

We are satisfied with the conclusion announced in the original opinion herein that the plaintiff failed to support its defense of estoppel in pais as in avoidance of the defendant's plea that his contract of guaranty related to contracts made by the partnership before the corporation was brought into existence.

The petition for a rehearing is denied.

79 Cal. App. 41

CHARLES L. DONOHOE CO. v. SUPERIOR COURT OF GLENN COUNTY et al.

(Civ. 3160.)

(District Court of Appeal, Third District, California. July 28, 1926.)

1. Mandamus 🔑26—Erroneous proceeding of court entertaining jurisdiction may not be reviewed on application for mandamus.

Generally, when court does not refuse to act, but entertains jurisdiction, its proceedings, however erroneous, may not be reviewed on application for mandamus.

2. Mandamus 🔑4(1)—Writ is proper, in entire absence of showing of good cause for lower court's action, though not to correct mere errors, where appeal lies, or review reasonable deductions, on conflicting evidence or conceded facts.

Mandamus does not lie to correct mere errors, where appeal is open, nor to review court's reasonable deductions, on conflicting evidence or conceded facts, but is proper, in entire absence of showing of good cause for lower court's action, in which case appellate court may pass on sufficiency of findings as question of law.

3. Mandamus 🔑164(4).

Where petition for writ of mandate and court's answer are submitted without evidence, answer must be taken as true.

4. Mandamus 🔑154(4).

Record on which court acted in refusing to dismiss action, on ground that stipulation was made continuing trial, so as to avoid provisions of Code Civ. Proc. § 583, should be presented on petition for writ of mandate to compel dismissal.

Application by the Charles L. Donohoe Company for writ of mandate to the Superior Court of the County of Glenn and Claude F. Purkitt, Judge thereof. Proceeding dismissed without prejudice, with leave to file a new petition.

W. T. Belieu, of Willows, for petitioner.

George R. Freeman, of Willows, for respondents.

PER CURIAM. Proceedings dismissed without prejudice, and with leave to file another petition, if so advised.

On Petition for Rehearing.

This matter is again before us on petition for rehearing from an order of this court heretofore made dismissing the proceedings without prejudice, and with leave to file another petition, if so advised.

The petitioner in this case seeks a writ of mandate requiring the judge of the superior court of the county of Glenn to dismiss a certain action therein pending, wherein Frank Freeman is plaintiff and Charles L. Donohoe Company et al. are defendants, action No. 2400. It appears in the petition for a writ of mandate that application was made to said superior court to dismiss said action on the ground that more than five years had elapsed since the filing of the defendants' answer in said action, and that no written stipulation extending the time of trial had been made, and that said cause was not brought to trial within the time specified in section 583 of the Code of Civil Procedure. Upon the return made to this court it was made to appear by the answer filed in this proceeding that the trial court heard certain evidence upon the application made to it for the dismissal of said proceedings; that the evidence in said proceedings tended to show that one Joseph E. Bien was an attorney for the defendants in the action herein referred to, being the action for which an order of dismissal was sought; that said attorney had entered into stipulations with the plaintiff continuing said cause for trial; and that the court, after hearing said evidence, denied petitioner's motion on the following grounds, to wit:

> "A. That said Joseph E. Bien was in fact the attorney at law, in said foreclosure action, of said defendant.
>
> "B. That a stipulation in writing was made, between said defendant and the plaintiff in said foreclosure action, that the time within which such action should be brought to trial should be extended for a period longer than five years from the filing of the answer of said defendant, and that plaintiff took all proper steps to bring said action to trial within a reasonable period after the making of said stipulation.
>
> "C. That, if said Joseph E. Bien was not in fact the attorney at law in said action for said defendant, said defendant is estopped from denying that Joseph E. Bien was such attorney at law, and is also estopped from denying that the stipulation aforesaid had been made."

The evidence upon which the trial court acted in reaching the conclusions just referred to was not set out, either in petitioner's petition or in the respondents' answer, and the correctness of the trial court's conclusions could not, therefore, be determined. For the purpose of allowing petitioner to file another petition, setting forth fully all and singular the testimony and the facts presented to the trial court, this court made its order dismissing the petition without prejudice, and with leave to file another petition if so advised. The petitioner now asks that we set aside said order and grant another hearing upon the original petition, and take testimony, or submit the matter to some court for the taking of testimony, as to disputed questions of fact.

[1, 2] We understand the law in applications for writs of mandamus, after a hearing has been had in the trial court, to be set forth in 16 California Jurisprudence, 822, 823, to wit:

> "The general rule has been laid down that, when the court below has entertained jurisdiction of an action, its proceedings, however erroneous, may not be reviewed on an application for mandamus. Thus it is said that where, instead of refusing to act, the court has acted judicially, its action may not be controlled by the writ, for to allow the writ so to be used would be equivalent to making it a writ of error. But, when the court has refused to act in the case, the question whether the refusal was rightful may be entertained.
>
> "While in one sense it is correct to say that the writ may not be made to perform the functions of a writ of error, in another sense it is not. Undoubtedly mandamus does not lie to correct mere error, where an appeal is open to the moving party, and it may not be used to review reasonable deductions of a court upon conflicting evidence, or on conceded facts. However, the facts otherwise justifying it, the writ is proper, where there is an entire absence of showing constituting good cause for the action of the lower court. In such a case, the appellate court may pass upon the sufficiency of the findings as a question of law in determining the right of the trial court to take the action complained of. It may not be claimed that it is a matter within the discretion of the trial court arbitrarily to take one course of action, where the statute imposes the duty to take another course upon the facts shown."

Were the record before us as made in the trial court, and the evidence there taken presented to us upon the petition, this court would then be in a position to determine whether there was in fact any legal evidence justifying the conclusions of the trial court, and also whether the conclusions of the trial court as a matter of law were or were not correct.

[3, 4] The rule seems to be settled that, where a petition for a writ of mandate and the answer of the court are submitted without evidence, the answer must be taken as true. Sherer v. Superior Court, 96 Cal. 653, 31 P. 565. The answer in the case at bar sets up the findings of the court as we have herein stated, and, if a stipulation were in fact entered into continuing the trial of the action sought to be dismissed, so as to avoid the provisions of section 583 of the Code of Civil Procedure, that would be a complete answer, and we think the record upon which the court acted in coming to such conclusion should be presented upon a petition for a writ of mandate, wherein it is sought to compel the superior court to make an order different from that entered after the introduction of evidence in the trial court. While we cannot in mandamus act as a court of appeal, and review as a court of appeal the proceedings of the trial court, we can act within the limits of the law as set forth in the foregoing quotation from California Jurisprudence.

Petition for rehearing denied.

199 Cal. 257

In re BLACK'S ESTATE.

STATE v. ESTABROOK et al.

(S. F. 11390.)

(Supreme Court of California. Aug. 23, 1926.)

1. Wills 🔑312.

Hearing on petition for probate is supplementary to, not wholly independent of, contest.

2. Wills 🔑324(1).

Evidence on which verdict sustaining validity of will would necessarily be upheld on appeal is sufficient to warrant submission of case to jury.

3. Wills 🔑312.

Order of procedure on hearing of petition for probate and trial of contest is within trial court's discretion.

4. Wills 🔑316(1).

Determination of issues on will contest is for jury, if demanded, but for court alone on hearing of petition for probate.

5. Wills 🔑312—Court cannot determine issues raised by contest, on preliminary formal showing of due execution, in proceedings involving both petition for probate and contest.

On probate proceedings involving both contest of will and petition for probate, court cannot finally determine issues raised by contest on preliminary formal showing of due execution but only whether prima facie case in favor of validity of will, sufficient to warrant submission of case to jury, has been established.

6. Wills 🔑316(1).

Under Code Civ. Proc. § 1312, issues raised by will contest should be submitted to jury, unless there is such a dearth of evidence that granting of motion for nonsuit would be proper.

7. Trial 🔑159.

When party having burden of affirmatively proving issue introduces no substantial evidence in support of it, nonsuit is proper.

8. Wills 🔑324(2)—Evidence held to warrant submission of issues to jury, so as to require reversal of order denying probate on preliminary showing as to execution, after hearing testimony of only one subscribing witness on question of testator's competency.

Evidence of testator's competency to make and execute valid will *held* to warrant submission of issues to jury, so as to require reversal of order denying probate on mere preliminary showing involving due execution of will, after hearing testimony of only one subscribing witness as to testator's incompetency.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceedings by Seward M. Estabrook and others to probate the will of Frank M. Black, deceased, contested by the State of California. From an order denying probate, proponents appeal. Reversed.

Jos. E. Bien and Frederick Olds, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Frank L. Guerena and L. B. Browne, Deputy Attys. Gen., for the State.

PER CURIAM. Appeal from an order denying probate of the last will and testament of Frank M. Black, deceased. The will was offered for probate by the joint executors named therein. An opposition to the probate of the will was filed by the Attorney General of the state upon the theory that, as Frank Black had no known relatives, if the will were overthrown the property would escheat to the state, and that therefore the state was an interested party. A trial by jury was demanded by the proponents of the will, and a jury was duly impaneled and sworn.

The court ruled, upon motion by the contestant, that the proponents of the will should make preliminary proof of the due execution of the will. For this purpose the two subscribing witnesses to the will, William H. Kroning and Dr. Mullen, were called by the proponents of the will. Mr. Kroning, the attorney who drew the will, testified that all of the legal formalities requisite to the due and proper execution of a will had been complied with, and that, in his opinion, the testator at the time of the execution of the will was competent to execute it. Dr. Mullen, assistant medical superintendent of Agnews, the state hospital for the insane, at which place the will was executed, testified that although he had been a witness both to the will and to Frank Black's mark, yet in his opinion Black, at the time of the execution of the will, was incompetent to make a will. In this behalf he testified that, at the time of the execution of the will, Black was an inmate at Agnews, having voluntarily presented himself for treatment at that institution; that at that time, and for some time previous thereto, he was suffering from paresis, or softening of the brain, and that he died as a result of said disease the day after the execution of the will. Relying upon the testimony of Dr. Mullen, and ignoring the testimony of Mr. Kroning, the trial court held that Black was incompetent to make the will at the time he was alleged to have executed it; refused to permit the case to go to a jury upon the issue of Black's competency: refused the petition for the probate of the will; and also refused to hear further evidence upon the question of Black's competency.

Appellants contend that, in view of the conflict of evidence as to the competency of the decedent, the trial court did not have the right to withhold the question of the competency of the decedent from the jury and decide the entire case upon a mere preliminary showing involving the due execution of the will, upon the testimony of one only of the subscribing witnesses, without going into the merits of the case and without hearing the testimony of three other witnesses who were also present at the time of the execution of the will and who were ready in court to testify. In this behalf appellants insist that, having adduced evidence upon the preliminary showing sufficient to obviate the possibility of the granting of a nonsuit or a motion for a directed verdict for their opponents upon a trial of the contest of the will, they were entitled by virtue of section 1312 of the Code of Civil Procedure to have the case go to the jury upon the question of the competency of the deceased to make a valid will and testament.

Section 1312 of the Code of Civil Procedure provides that:

> "If any one appears to contest the will, he must file written grounds of opposition to the probate thereof and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto, upon any of the grounds of demurrer provided for in part two, title six, chapter three of this Code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing, or otherwise obviating or avoiding the objections. Any issue of fact thus raised, involving: (1) The incompetency of the decedent to make a last will and testament; * * * *must*, on request of either party in writing * * * be tried by a jury. * * *" (Italics ours.)

[1] It is respondent's theory, however, that the proceedings had not progressed to the point of a trial of the contest, that only a hearing of the petition for a probate of the will had been had, and that, until a trial of the contest was commenced, the proponents of the will were not entitled to have the issues raised by the contest submitted to a jury for determination.

Respondent relies for support of this theory upon those cases in California which hold that upon a contest of a will before probate there are two separate proceedings pending before the court: (1) The petition for the probate of the will; and (2) the contest of the probate of the will. Estate of Relph, 192 Cal. 451, 458, 221 P. 361; Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; Estate of McDermott, 148 Cal. 43, 49, 82 P. 842; Estate of Cullberg, 169 Cal. 365, 146 P. 888; Estate of Cartery, 56 Cal. 470; Estate of Gregory, 133 Cal. 131, 136, 65 P. 315; Estate of Dalrymple, 67 Cal. 444, 7 P. 906; Estate of Doyle, 73 Cal. 564, 15 P. 125; Estate of Gharky, 57 Cal. 274. From the holding of these cases, respondent apparently reaches the conclusion that the two proceedings are wholly independent of each other, and are, in fact, two separate trials of the case upon its merits; that in one proceeding the court is the judge of the facts, that in the other proceeding upon the same issues the jury is the judge of the facts; and that, if in either proceeding the findings are against the proponents of the will, the will must be denied probate.

[2] An analysis of the cases, however, discloses the fact that the cases just cited do not proceed upon the theory that the two proceedings are independent trials of the issues involved. Rather, they proceed upon the theory that the hearing of the petition for the probate of the will is supplementary to, and in aid of, the hearing upon the contest. That the hearing upon the petition for probate is supplementary to the contest is indicated by the fact that, if the hearing upon the petition be postponed in the discretion of the trial court until after the hearing upon the contest, then the court need only hear evidence as to those acts requisite to constitute the execution of the valid will which were not raised by the contest. Estate of Cartery, supra. And it seems to be the theory of those cases wherein the hearing upon the petition for probate preceded the hearing of the contest that the duty of the trial court was not to proceed to determine the case upon its merits but to determine whether sufficient evidence had been adduced by the proponents of the will to warrant the submission of the issues to a jury. Estate of Cullberg, supra. In arriving at a solution of this question, it seems to us that the general rule as to the granting of a motion for a nonsuit may well be applied. See Estate of Babcock, 67 Cal. App. 309, 227 P. 657. That is to say, if enough evidence has been introduced by the proponents of the will that a verdict of a jury in favor of the validity of the will would necessarily be upheld on appeal, then sufficient evidence has been adduced to warrant the submission of the case to the jury for its decision.

[3] Moreover, the theory that the two proceedings are independent trials of the same issues does not seem to be compatible with the oft-cited and frequently reiterated rule that the order of procedure upon the hearing of the petition for probate, and the trial of the contest of the will is within the discretion of the trial court. Some of the cases cited hold that the better practice is to withhold the hearing of the petition for probate until after the trial of the contest of the will, in which event, as above indicated, the court need only hear evidence on all the points required by the statute for the validity of a will which were not raised by the contest. Estate of Cartery, supra; Estate of Dalrymple, supra. Other cases hold that the better practice is to require the proponents of a will to establish a prima facie case pre-

liminarily to the hearing of the contest. Estate of Cullberg, supra; Estate of McDermott, supra. Other of the cases simply hold that it is a matter entirely within the discretion of the trial court. Estate of Relph, supra.

[4, 5] Upon the theory advanced by respondent it follows that the right of the proponents of a will to a trial by jury depends upon the discretion of the trial court as to the order of procedure of proof. If the hearing of the petition for probate be postponed until after the trial of the contest, the proponents of a will will be entitled to a jury trial of the issues raised by the contest; if the petition for probate be first heard, the trial court may, by denying probate of the will, preclude the proponents from having a trial by jury of the issues raised by the filing of the pleadings in the contest of the will. It would scarcely seem proper that a party's right to a trial by jury should be dependent upon the discretion of the trial court in the order of the procedure of proof.

It may also not be amiss to point out that if the two proceedings be deemed to be two separate trials an anomalous situation may well arise. Upon the contest of the will the determination of the issues is for the jury, if a jury is demanded. Upon the hearing of the petition for the probate of the will, the determination of the issues is for the court alone. Estate of Relph, supra. It might well happen that if the hearing of the contest precede the hearing of the petition for probate the jury, upon the trial of the contest, upon a conflict in evidence might bring in a verdict upholding the validity of the will and the court, upon the hearing of the petition for probate upon the same issue involved in the contest, arrive at a diametrically opposite conclusion. A deadlock as to the admission to probate of the will would be inevitable.

We are satisfied that, upon proceedings for the probate of a will involving both a contest of the will and a petition for probate, the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether or not a prima facie case has been established in favor of the validity of the will, sufficient to warrant the submission of the case to a jury.

[6] Inasmuch as section 1312 of the Code of Civil Procedure guarantees to either party litigant the right to a trial by jury upon any of the issues raised by the contest, it seems to us that the issues should be submitted to a jury for its determination, unless there is such a dearth of evidence that the granting of a motion for a nonsuit would be proper.

[7, 8] Of course when a party having the burden of affirmatively proving an issue fails to introduce any substantial evidence in support of that issue, a nonsuit is proper. Such was the situation in Estate of Gunther (Cal. Sup.) 248 P. 514. Such, however, is not the situation here. In the instant case sufficient evidence was introduced on behalf of the proponents of the will to support a finding of the jury in their favor that the testator at the time of the execution of the will was competent to make and execute a valid will. It seems, therefore, that sufficient evidence was adduced to warrant the submission of the questions at issue to a jury.

Judgment is reversed.

---

199 Cal. 263

In re MONROVIA EVENING POST. (L. A. 8459.)

(Supreme Court of California. Aug. 26, 1926.)

1. Newspapers 🔑3(3)—Paper held not "newspaper of general circulation" "printed," and "published," in particular city, where mechanical work and printing was done in another city (Pol. Code, §§ 4458, 4460, 4463).

Newspaper *held* not qualified to print legal notices, which are required to be published in a "newspaper of general circulation" in particular city, under Pol. Code, § 4458, where mechanical work and printing is done elsewhere, since, under section 4460, a newspaper of general circulation must be printed and published where it seeks patronage of such notices, and under section 4463 "printed" means mechanical work of production, and "published" means issuance from place where printed.

[Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Print—Printing, Publish.]

2. Constitutional law 🔑81.

Legislature may not impose onerous or unreasonable burdens on lawful and useful occupations, in guise of exercising police power.

3. Constitutional law 🔑81.

State has inalienable right to reasonably regulate private business enterprises, in interest of public health, peace, morals, or general welfare, and public interest alone warrants its exercise.

4. Constitutional law 🔑48, 70(3).

Reasonableness of police regulations is primarily for legislative determination, and courts will exercise liberality to uphold legislative intent.

5. Newspapers 🔑3(1)—Provision for notice in newspaper, printed and published where notice is given, held valid (Pol. Code, §§ 4458, 4460, 4463).

Provision, under Pol. Code, §§ 4458, 4460, 4463, that legal notices shall be published only in newspapers of general circulation, both printed and published in the place where such notices are given or made, *held* valid exercise of police power of state.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Statutes 🔑179—Terms defined in statute wherein they are found will be construed in sense of the definition.

Legislature has power within reasonable limitations to define its own language, and terms defined in the statute will be construed according to such sense.

In Bank.
Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

In the matter of the application of the Monrovia Evening Post to be declared a newspaper of general circulation, pursuant to section 4460 of the Political Code. On appeal from judgment declaring petitioner to be such a newspaper. Reversed.

Walter F. Dunn, John A. H. Sturgeon, and Dunn & Sturgeon, all of Monrovia, and Harland G. Palmer, of Los Angeles, for appellant.
Vernon M. Brydolf, of Pasadena, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment of the superior court of Los Angeles county declaring the Monrovia Evening Post to be a newspaper of general circulation, pursuant to section 4460 of the Political Code. The evident purpose of petitioner was to procure a decree authorizing the legal publication in that newspaper of official notices of the city of Monrovia. It had previously lost a competitive bid for the Monrovia city printing on the charge that it was not a newspaper of general circulation within the city. This petition was then presented.

The trial court found that "the Monrovia Evening Post * * * is now, and has been continuously since July 9, 1923, a daily newspaper established and published in the city of Monrovia, county of Los Angeles." This finding is contrary to the evidence. The evidence is without conflict to the effect that the Monrovia Evening Post is a daily newspaper which was established in July, 1923, and has an associated press membership and a substantial subscription list in and about the city of Monrovia. An office has been continuously maintained at Monrovia since the organization of the paper. Subscribers and news items are solicited there, and the literary features of the newspaper are actually performed in that city. All the mechanical portion of making-up and issuing the paper, however, including the stereotype plates, typesetting and press work are done at the city of Pasadena, some distance from Monrovia in the office and shop of the Pasadena Evening Post, in conjunction with which newspaper the Monrovia Evening Post is regularly issued and circulated. This arrangement was conducted in the interest of business economy.

When the law of California requires the publication of official notices or advertisements by any officer of this state, or any political subdivision thereof, or any officer of any court or county, city or town within the state, such publication must be made "only in a newspaper of general circulation * * * within the jurisdiction of such officer," unless no such paper exists within that jurisdiction, in which event it may be published in a newspaper of general circulation nearest thereto. Pol. Code, § 4458.

The Legislature has specifically defined the requirements of a newspaper of general circulation as well as the meaning of the terms "established," "printed," and "published."

Section 4460 of the Political Code provides that:

> "A newspaper of general circulation is a newspaper * * * *printed and published* at regular intervals, in the state, county, city, city and county, or town, *where such publication, notes by publication, or official advertising is given or made*, for at least one year preceding the date of such publication, notice, or advertisement." (The italics are inserted by the court for emphasis.)

Section 4463 of the same code provides that:

> "* * * The word 'printed,' as used in said section, [4460] shall mean, and be construed to mean, that the mechanical work of producing such a newspaper of general circulation, that is to say, the work of typesetting and impressing type on paper, shall have been performed during the whole of the period as designated and required by said section. The word 'published,' as used in said section, shall mean, and be construed to mean, that such a newspaper of general circulation *shall have been issued from the place where it is printed.* * * *" (The italics were inserted by the court.)

It was the clear intent of the Legislature, expressed in these two sections, to require a newspaper of general circulation to be both printed and published in the city, town, or county wherein it seeks the patronage of such legal notices. The word "publish" ordinarily means to disclose, reveal, proclaim, circulate, or make public. But, as that term is used in section 4460 of the Political Code, it is limited by the provisions of section 4463 to mean that the newspaper shall have been actually issued from the identical city or political subdivision where it is printed. And the last-mentioned section specifically holds that it is "printed" where the mechanical work of producing the paper, to wit, the operation of typesetting and impressing the types upon the paper, is performed.

[1] Applying the foregoing legislative definitions to the instant case, as it is presented by the uncontradicted evidence, the Monrovia Evening Post is printed where the typesetting and mechanical part of the work is performed. The mechanical work is done at

Pasadena and not at Monrovia. It necessarily follows that the Monrovia Evening Post is printed and published at Pasadena, and not at Monrovia.

It may have been a matter of excellent excellent business economy to print and publish the Monrovia Evening Post in conjunction with the Pasadena Evening Post at its shop in Pasadena, but certainly, according to the clear letter of the statute, it is neither printed nor published at Monrovia, and is, therefore, not a newspaper of general circulation within the city of Monrovia, nor qualified to print legal notices which are required to be published in a newspaper of general circulation within that particular city.

In Re McDonald, 187 Cal. 158, 201 P. 110. it was held that the Ontario Weekly Herald, a newspaper published and circulated at Ontario, Cal., to a bona fide list of subscribers and possessing the other qualifications required by section 4460 of the Political Code, was not prevented from enjoying the privileges and the status of a newspaper of general circulation merely because the mechanical operation of typesetting and press work was actually done in the city of Colton. The court said that to so disqualify a newspaper, merely because it was published and circulated in one city, while the mechanical work of printing the paper was done in another city, would be to unduly restrict the evident intention of the Legislature.

In the case of Stanwood v. Carson, 169 Cal. 640, 147 P. 562, the validity of a notice of street improvements was challenged on the ground that the notice appeared in a newspaper published in a building situated on the boundary between the city engaged in the street improvements and an adjoining city. The press work was performed within the boundary of one city and the editorial and literary work was done in another city, although the entire process was conducted beneath the same roof of a single building. The court held this was a sufficient compliance with the statute. It was there said:

> "The vital consideration being notice by publication, such publication is the publication contemplated by law, with little or no regard paid to the mere place of printing, even when the word 'printing' coupled with publication is embraced in the statutory requirement."

In both of these cases, however, the opinions are clearly based upon the legislative intent expressed in the statute as it then existed. The last case cited was decided in February, 1915. The McDonald Case was decided in September, 1921. The contestant in the McDonald Case was the California Press Association. It is a significant fact that the legislative definitions of the terms "established," "printed," and "published," as appear in section 4463 of the Political Code were added to the code in 1923, after these decisions had been rendered. A comparison of the language employed in section 4463 of the Political Code, with the construction placed by the court on the terms "printed and published," as appears in the McDonald opinion, makes it apparent that the Legislature deliberately adopted the specific definitions of these terms for the express purpose of overcoming the effect of this decision. Since the adoption of this amendment, it is now very clearly the legislative intention to require that a newspaper of general circulation be printed, published, and issued from one and the same city, town, county, or place where the notice of publication or official advertising is to be given or made, and that such newspaper shall be established, printed, and published at regular intervals during the entire period required by section 4460.

The respondent in the instant case contends that to require the mechanical printing to be done in the same city where the newspaper is published and circulated is an unreasonable and unconstitutional violation of the police powers of the state. Many cases are cited in which it has been held that various unreasonable restrictions of certain occupations were unconstitutional and void. None of these cases involve the exact question here presented, and are, therefore, scarcely worthy of review.

On the contrary, there are numerous cases in which it has been held that a great variety of lawful occupations and professions have been subject to reasonable legislative supervision. Nothing will be gained in reviewing these cases, since it appears that the reasonableness of such regulations must be determined largely from the surrounding facts and circumstances of each particular case.

There are a number of decisions of other jurisdictions which have declared that the place where the actual printing of a newspaper is done is immaterial in determining whether it is a newspaper of general circulation. We have been cited to no case, however, so holding, where there is a statute such as we have in California, specifically defining the meaning of the terms "established," "printed," and "published," or where the Legislature has, in terms, attempted to provide that the place where the mechanical work and printing is done is an essential factor in determining whether a newspaper is one of general circulation.

[2-4] It is true that the Legislature, in the guise of exercising its police powers, may not impose onerous or unreasonable burdens upon lawful and useful occupations. But it is equally true that the state has the inalienable right to reasonably regulate private business enterprises in the interest of public health, peace, morals, or the general welfare. The question of the reasonableness of police regulations is addressed primarily to the Legislature, and courts will exercise the

utmost liberality in upholding the legislative intent. 23 Cal. Jur. 757, § 132; Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716. To be sure the police power may not be resorted to merely to promote private gain, but the public interest, as distinguished from that of private individuals, is the basis of its power and alone warrants its exercise.

Does not the prescribing of the qualifications constituting a newspaper of general circulation, authorizing it to print the official advertising and public notices required by law, come directly within this rule? We think it does.

[5] The very purpose of requiring the publication of official notices is to inform the people concerning proceedings of a public nature for their general welfare. It appears reasonable to require such notices to be published in newspapers having a fixed and permanent domicile and a substantial circulation at the city or place where the inhabitants live who are most vitally interested in the transactions respecting which notices are required. At least, it is not unreasonable to expect the citizens of a particular community to rely upon their local newspaper primarily to inform them of the proceedings of their own local officers and the affairs of local public importance. No doubt it is on this theory that the Legislature has seen fit to require such official advertising to be done only in newspapers of general circulation, both printed and published in the place where such notices are given or made.

[6] The intention of the Legislature must be determined from the language of the statute. 25 R. C. L. 961; Ex parte Goodrich, 160 Cal. 410, 117 P. 451, Ann. Cas. 1913A, 56. "It is well settled that a legislative body has the power within reasonable limitations to prescribe legal definitions of its own language, and when an act passed by it embodies a definition it is binding on the courts." 25 R. C. L. 1049.

In construing the language of the Legislature as it exists in the California Bank Act (St. 1909, p. 87 as amended) wherein trust companies were classified and defined as banking institutions, this court said in Estate of Wellings, 192 Cal. 506, 519, 221 P. 628, 634:

> "We therefore entertain no doubt that it was competent for the Legislature, considering the business which trust companies are doing in this state, to define such business as banking, if it were not such in fact, and to throw around it the general safeguards provided for the banking business proper."

> "Terms defined by the statute in which they are found will be presumed to have been used in the sense of the definition, and will be construed accordingly." 23 Cal. Jur. 751; Meade v. Watson, 67 Cal. 591, 8 P. 311.

We are of the opinion that the definitions found in sections 4458, 4460 and 4463 of the Political Code, prescribing the qualifications of a newspaper of general circulation and defining the meaning of the terms "printed and published" are controlling on this court; that those sections of the Code are not unconstitutional or void; and that the trial court erred in holding that the Monrovia Evening Post is a daily newspaper established and published in the city of Monrovia.

For the foregoing reasons the judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.

---

199 Cal. 780

CALIFORNIA CREDIT & COLLECTION CORPORATION, Plaintiff and Respondent, v. Emma R. D. MOONEY, Defendant and Appellant. (S. F. 11927.)

(Supreme Court of California. Aug. 23, 1926.)

In Bank. Appeal by defendant from a judgment of the Superior Court of Napa County; Edward I. Butler, Judge, in an action upon promissory notes. Reversed.

Clarence N. Riggins, of Napa, for appellant.

J. R. Cunnyngham and Daly B. Robnett, both of San Francisco, for respondent.

PER CURIAM. Upon examination of the record in this case we are satisfied that the trial court was in error as to each of the two main questions presented upon this appeal. We are further satisfied that a practically parallel situation is presented upon this appeal as that presented and considered by the District Court of Appeal in and for the Third Appellate District in the cases of California Credit & Collection Corporation v. Randall, 244 P. 958 (decided January 27, 1926), California Credit & Collection Corporation v. Goodin, 246 P. 121 (decided March 8, 1926), and California Credit & Collection Corporation v. Carpenter, 246 P. 126 (decided March 10, 1926).

In the latter two of the above cases a petition for hearing in this court was denied. Upon the authority of these cases the judgment herein is reversed.

78 Cal. App. 426

PEOPLE v. HEWITT. (Cr. 888.)

(District Court of Appeal, Third District, California. June 17, 1926. Rehearing Denied July 17, 1926. Hearing Denied by Supreme Court Aug. 16, 1926.)

1. Larceny 🔑31—Robbery 🔑17(4).

In charging robbery or grand larceny, when the property is taken from the person of another, alleging its value is not necessary, in view of Pen. Code, §§ 487, 967.

2. Indictment and information 🔑154.

By failure to demur to information clearly charging robbery, any special objection which might have been raised to it, including failure to describe money taken, was waived.

3. Criminal law 🔑543(2).

Evidence that officers made every reasonable effort that could be expected to locate missing witness *held* to sustain finding of "due diligence," authorizing admission of his testimony taken at preliminary hearing.

4. Criminal law 🔑543(2).

"Due diligence," required by Pen. Code, § 686, allowing testimony of witness at preliminary hearing to be read, if with due diligence he cannot be found within the state, does not require entire state to be searched, or a subpœna to be sent to every county.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Diligence.]

5. Criminal law 🔑1144(12).

Trial court, in admitting deposition of missing witness taken at preliminary examination, is presumed to have properly exercised its discretion, which presumption must be overcome by clear want of facts before order will be disturbed.

6. Criminal law 🔑1043(1)—Objection held not to raise issue whether deposition of absent witness was properly authenticated, so as to require appellate court to pass thereon.

Objection to deposition of absent witness taken at preliminary hearing, on ground that due diligence to secure him had not been shown and that it was not the best evidence, did not raise issue of whether it was properly authenticated, so as to require appellate court to pass thereon.

7. Criminal law 🔑1144(12).

Where record did not show that deposition of missing witness taken at preliminary hearing was not properly certified, it would be presumed on appeal, in absence of specific objection, that deposition was properly certified.

8. Robbery 🔑 24(1).

Evidence *held* to sustain conviction of robbery.

9. Criminal law 🔑1173(1)—Refusal to instruct as to fact which was common knowledge held not reversible error.

Refusal to instruct according to Code Civ. Proc. § 2061, subd. 4, that testimony as to oral statements should be received with caution, which section contravenes Const. art. 6, § 19, forbidding juries to be charged as to matters of fact, was not reversible error, since such fact is common knowledge.

10. Criminal law 🔑1173(1)—Refusal of instruction, though correct as abstract proposition of law, held not reversible error, in view of evidence.

Refusal of instruction that robbery includes larceny, though correct as an abstract statement of law, *held* not reversible error where evidence, without conflict, shows that larceny from person of complaining witness was accomplished by force.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

J. Hewitt was convicted of robbery, and he appeals. Affirmed.

Wallace Shepard, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The accused was convicted in the superior court in and for the county of Sacramento of the crime of robbery. He appeals from the judgment of conviction and an order denying his motion for a new trial.

The point first urged for a reversal is that the information upon which the defendant was tried and convicted is "fatally defective," in that it does not describe with sufficient particularity or definiteness the character of the property alleged to have been taken by the defendant, or state its value. The information is as follows:

> "The said J. Hewitt on or about the 2d day of May, A. D. 1925, in the said county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, feloniously, and forcibly take from the person, possession, and immediate presence of one V. Fink a certain sum of money, the amount of which is to the district attorney unknown, and of the personal property of said V. Fink, which said taking was then and there without the consent and against the will of the said V. Fink, and was then and there accomplished as aforesaid by means of force used upon and against the said V. Fink by the said defendant, and by then and there putting the said V. Fink in fear, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

The specific objection to said pleading is that it does not describe the particular kind and denomination of the money and the amount thereof taken from Fink, the complainant, and it is hence argued that under the information the defendant might be put upon trial for a different offense from that with which it was the intention to charge him; that the offense is not so described as to protect the defendant, in case of his conviction or acquittal under the information, against a second or subsequent prosecution for and conviction of the same offense; that the information is so vague and uncertain in the particular mentioned that it fails sufficiently to inform the defendant of the particular offense attempted to be charged or the particular transaction upon which said offense is founded to enable him to prepare a defense; that "the offense must be described with such particularity that a reviewing court, after conviction, may decide from the record whether the facts as proved were sufficient to warrant the conviction and support the judgment."

[1, 2] The crime of robbery, like that of grand larceny, when the property has been taken from the person of another, does not depend upon the value of the property taken. Penal Code, § 487. It would seem, therefore, that, in charging robbery or grand larceny, when the property is stolen from the person of another, it is not necessary to allege the value of the property taken. Still we will not say that where robbery is charged that a sufficient description of the property taken should not be given in the information or indictment, where such description can be given, to apprise the accused of the particular property he is charged with having taken, and thus enable him the better to defend against the charge. No demurrer, however, was interposed to the information, and, as it clearly states the crime of robbery, it must be assumed that any special objection which might have been raised to the pleading was waived by the failure to demur. A like objection under a similar situation arose in the case of People v. Chuey Ying Git, 100 Cal. 437, 34 P. 1080. The charge there, as here, was robbery, but the several varieties of property alleged to have been taken were not specifically described in the information, but were therein referred to by their common or generic names, to wit, "money, jewelry, and hair ornaments." The Supreme Court, in denying the validity of the objection thus urged, said:

> "The authorities hold almost universally that the description of the property taken in robbery is required to be equally specific with that required in larceny. Prior to the amendment of 1880 to our Penal Code a much greater degree of particularity was required in this respect than at present. By section 967 it is now provided that in an indictment or information for the larceny or embezzlement of money, bank notes, etc., it is sufficient 'to allege the larceny or embezzlement * * * to be of money, bank notes, * * * without specifying the coin, number, denomination, or kind thereof.'
>
> "This statute does not in terms apply to cases of robbery, but, as the latter crime is but larceny from the person accomplished by force or fear, and as the same reasons exist for the modification of the rule in such cases, it may well be held that a rule which often required impossibilities in description, the existence of which courts often regretted as tending to thwart rather than promote justice, should be modified. Be this, however, as it may, after judgment in an action without objection, whether in a civil or criminal case, a pleading which states a cause of action or offense, but states it defectively, cannot be successfully attacked. It is not in such cases a defective allegation but a total lack of allegation which renders the judgment void, and hence open to attack.
>
> "There is here an attempt to describe the personal property taken, a lame one it must be confessed, but, imperfect though it be, it is nevertheless such an one as will support a judgment.
>
> "Wharton on Criminal Pleading and Practice, quoting Blackburn, J., says 'that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that, unless this averment were true, the verdict could not be sustained, in such case the verdict cures the defective averment, which might have been bad on demurrer,' and in this respect there is no distinction between the pleadings in civil and criminal proceedings. Section 760; People v. Swenson, 49 Cal. 388."

In the case of People v. Cox, 40 Cal. 275, cited by defendant, in which the charge against the accused, a clerk, was embezzlement of the sum of $800 received in the course of his employment as such clerk, it was held that the indictment did not properly state the offense for the reason that the money alleged to have been embezzled was not described with the particularity with which that species of property is capable of being described—that is, that it was not described as "lawful money of the United States" or as gold or silver or specifying the denomination thereof. In deciding the case, the Supreme Court, by Wallace, J., made the following significant suggestions:

> "For obvious reasons it may be difficult to give such a description of property embezzled, particularly where the offense is committed by a person in the course of a continuous employment, as a clerk, cashier, or the like; but I find nothing in the law authorizing us to make any distinction upon this point between offenses of larceny and embezzlement. It would promote the ends of justice, perhaps, if a statute should be passed to correct the law in this particular, as has been done in England, where it is enacted by Stats. 7 and 8, Geo. IV, c. 29, § 48, that 'it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security,' " etc.

As is to be observed from the above-quoted extract from People v. Chuey Ying Git, the Legislature did change the law "in this particular," and, therefore, the Cox Case is not applicable to this or other like cases in which the indictment has been filed since the amendment of section 967 of the Penal Code, as above shown.

In the case of People v. Ammerman, 118 Cal. 23, 50 P. 15, also cited by defendant, the objection to the information was that it did not state the crime of robbery, because it contained no allegation as to the ownership of the money which it was alleged was taken by the accused from the person of the complaining witness by force. That, however, is not this case. The information here, it will be seen, states that the money alleged to have been taken was the property of the party from whom it is alleged to have been taken.

The case of People v. Hunt, 251 Ill. 446, 96 N. E. 220, 36 L. R. A. (N. S.) 933, is squarely in line with the position of defendant here. But it does not appear from the opinion in that case whether the state of Illinois has, or at the time of the rendition of the judgment in the case had, a statute (section 967, Pen. Code) similar to ours as it was amended by the Legislature of 1880, and as it was construed, as so amended, in People v. Chuey Ying Git, supra. We may assume that the common-law rule requiring a definite description of the property alleged to have been taken in an indictment or information charging robbery or larceny prevailed in said state at the time the case of People v. Hunt arose. Even, however, if it be true that the rule in Illinois was then and is now the same as it is now declared in section 967 of our Penal Code, the Hunt Case would not be binding upon the courts of this state, nor even persuasive, in view of our own decisions to the contrary.

[3-5] The point next submitted for a reversal is founded upon the ruling of the trial court admitting in evidence the transcript of the testimony given by the complainant, Fink, before the magistrate at the preliminary hearing of the charge, it having been made to appear at the trial that said Fink was not present when the case was called for trial nor during the trial. The objection to the transcript was based on the ground that the requisite diligence was not exercised by the officers to subpœna, and so secure the presence of Fink at the trial. Pen. Code, § 686. The record shows that on the 29th day of May, 1925, the case was set down for trial on June 19, 1925, at 10 o'clock a. m.; that on said 19th day of June, 1925, by agreement of counsel on both sides, the court ordered a postponement of the time of trial to the 13th day of August, 1925, and the trial of the cause was then set for that day; that on the 8th day of June, 1925, one Ed Nicholas, then county detective in and for the county of Sacramento, and, as such officer, attached to and connected with the office of district attorney of said county, caused a subpœna to be issued out of the superior court of said county for said Fink. The record further shows that said Fink was an itinerant, that his usual occupation was that of a sheepherder, and that he had been in California but a few days prior to the time at which he is alleged to have been assaulted and robbed of his money by the defendant; that, consequently, he had no permanent residence anywhere. So far as was known, he had no relatives or acquaintances in Sacramento county or in this state, except such acquaintances as he might have made within the brief period of time during which he was in Sacramento or elsewhere in the state prior to the date of the trial. Nicholas stated, however:

> That he located Fink "at a ranch out by Rio Linda. I went out there," testified Nicholas, "and he had left there, and I went to, I guess, two dozen lodging houses in the lower end of town (meaning Sacramento), and to the address given at the preliminary examination. I have also visited most of the employment offices in the lower end of town (referring to Sacramento), particularly the Enterprise Employment Agency, where he has been going out of on different jobs, and I have been unable to locate him.
>
> "Q. By the court: Did you inquire at these lodging houses? A. I did. I looked at the register and also inquired of the landlady. * * * They (the landladies of said houses) don't know him, and there was no name—I looked on the registers, and I have looked it up all over, and I can't find no trace of it. He is well known at the Enterprise Employment Agency.
>
> "Q. But they don't know his address at the present time? A. They haven't it. I was down the last time yesterday.
>
> "Q. And some inquiries were made of his former employer, Mr. Johnson, near Roseville? A. Yes, sir; there has been correspondence with Mr. Johnson at Roseville.
>
> "Q. What does he say about it? A. He doesn't know his whereabouts, haven't heard from him. * * *
>
> "Q. You haven't been able to get in touch with Mr. Fink, at all, or have you been able to serve the subpœna upon him? A. I have not.
>
> "Q. Were you able to find anybody that was acquainted with him? A. I found somebody out at the ranch where he had been employed and the owner of the Enterprise Employment Agency is well acquainted with him. He remembers him and sent him out to the job that he was on just—I think he quit around the 1st of June. * * *
>
> "Q. You know of no other place that you would be likely to find the witness, Mr. Fink? A. I do not.
>
> "Q. By the court: Do you know of anybody else who is acquainted with him or did you hear of anybody that is acquainted with him that you haven't inquired from? A. I do not.
>
> "Q. You have inquired from everybody that you have learned that knew the witness? A. I did.
>
> "Q. You inquired from, you say, about two dozen lodging houses in town? A. Yes. I think he gave his number at the preliminary examination—it is there—I think it is 128—or the number there; I looked all over J and K street and all those numbers. It is some number he gave there, and I think it is the wrong number, but I took that number on the other streets—looked it up particularly in those places. * * * It may be that Mr. Green (assistant district attorney) has referred me to some number. I wouldn't say now that it was in the transcript. * * * I read this transcript over in regard to the address of Mr. Fink some time ago. I went down to the address given in the transcript and endeavored to locate him by inquiring around, and couldn't find him.
>
> "Q. By the Court: He isn't there? A. No; he isn't there. * * * The time I went out to the sheep ranch and endeavored to locate him was

some weeks past. Since that time I have inquired around occasionally."

The witness stated on cross-examination that after his first visit to the sheep ranch of one Fuski, who had employed Fink a short time after the preliminary examination through the Enterprise Employment Agency at Sacramento, in search of the complainant, he did not again go to said ranch for the reason that he knew that said Fuski employed sheepherders and other laborers through the Enterprise Employment Agency, and that he took the matter up with said agency. He further repeated that his visit to Fuski's ranch was a week or so prior to the 19th day of June, 1925. It was further shown, before the transcript was introduced in evidence and read to the jury, that the defendant was represented at the preliminary hearing by an attorney, who, in behalf of the defendant, cross-examined the witness Fink.

We cannot say, as a matter of law, that the above is not indicative of a sufficient showing of diligence to have justified the action of the trial court in permitting the deposition of Fink to be read to the jury. The officers seem to have made every effort which reasonably could be expected or demanded, under the circumstances of the case, to find and subpœna Fink and so cause him to be in attendance at the trial. The witness, as shown, was a comparative "newcomer" to Sacramento, had no acquaintances in that city or the state except such persons as he had met during the short period that he had been in that city, and, besides, was an itinerant laborer, having, therefore, no permanent place of abode. The officer to whose hands the subpœna was committed for service made inquiries at every place where his best information indicated that the witness might be found, if he could be found at all, and made inquiries with a view of ascertaining his whereabouts of all persons whom he (the officer) was informed might have any knowledge of where the witness might be found. The "due diligence" required by section 686 of the Penal Code does not mean or require that the entire state shall be searched for an absent witness, or a subpœna sent to every county in the state with instructions to the officers thereof to make a search for the witness, and, therefore, no such showing is required to be made as a prerequisite to or foundation for the allowance of the deposition of the absent witness taken at the preliminary examination at the trial. The rule is well stated in Heintz v. Cooper, 104 Cal. 668, 670, 38 P. 511, 512, as follows:

> "Diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed."

See Jones v. Singleton, 45 Cal. 92; Baker v. Joseph, 16 Cal. 180; Kenezleber v. Wahl, 92 Cal. 202, 28 P. 225; People v. Johnson, 13 Cal. App. 779, 110 P. 965; People v. Boyd, 16 Cal. App. 130, 116 P. 323.

[6, 7] The ruling admitting the deposition of Fink in evidence is further declared to involve error for the reason, as is the claim, that it was not "properly authenticated." No specific objection to the introduction of the deposition was made by defendant at the trial on that ground, although, in addition to the objection that the "due diligence" required by the statute had not been shown, the objection that the transcript of the testimony offered was "not the best evidence" was also made. We think the objection was not sufficiently specific to raise the issue upon that proposition or to render a review thereof by this court of any avail to the defendant. A specific objection—that is, an objection directly specifying that the deposition was not "authenticated" as required by law—should have been made so that the court could have directly and specifically ruled thereon, and, furthermore, so that the district attorney could, if able to do so, have obviated the objection by showing that, as a matter of fact, the deposition was duly authenticated. The record, however, does not show that the deposition was not properly certified. As is said in People v. Buckley, 143 Cal. 375, 383, 77 P. 169, 173:

> "Even where the record entirely fails to affirmatively show that the reporter properly certified the transcript of his shorthand notes, but does not show that there was no such certificate, it will be presumed in this court in support of the ruling of the court below, in the absence of specific objection on the ground of want of a proper certificate, that the transcript was properly certified by the reporter."

See People v. Reilly, 106 Cal. 648, 40 P. 13; People v. Witty, 138 Cal. 576, 72 P. 177; People v. Grundell, 75 Cal. 301, 304, 17 P. 214.

That the transcript introduced in this case, however, accurately represented the testimony or deposition given by Fink before the committing magistrate, was shown by the shorthand reporter who took and transcribed said deposition, he having been called by the people for that purpose, and thus orally verified said transcript without objection by defendant.

[8] The contention that the verdict does not derive sufficient support from the evidence is wholly untenable.

Fink, whose home was in the state of Idaho, and who, as above stated, was, at the time of the alleged robbery, a recent arrival in California, went to the city of Sacramento on the 1st day of May, 1925. On the succeeding day (May 2d) he met the defendant for the first time. Just at what hour of that day they first met is not shown; but it appears that they became apparently quite companionable, and, paradoxical as the statement may seem in these days of strenuous prohibition (?), they had a few drinks together of intoxicating liquor, not a sufficient number, however, so Fink testified, to produce intoxication. The early evening of that day found them together in a pool hall near Third and L streets, and engaged together in playing a game of pool. After a few games were played, defendant, so Fink testified, accused the latter of owing him (defendant) a dollar. Fink denied the indebtedness and left the pool room and stepped out upon the sidewalk. He was immediately followed by defendant, who was still insisting that Fink owed him a dollar. Fink then said to him: "I would rather give you a dollar than to have trouble," whereupon defendant struck Fink a blow of sufficient force to knock him down upon the sidewalk and to produce temporary unconsciousness. The defendant thereupon immediately kneeled and bent himself over the body of Fink, placed his hand in the latter's trousers watch pocket and abstracted therefrom, so one witness testified, something that bore the appearance of paper. Defendant, so other witnesses testified, then arose and started to walk rather hastily towards K street in said city. Fink testified that, before he was knocked down by defendant, there were in the watch pocket of his trousers three $20 bills; that he had occasion to examine that pocket about an hour prior to the time he was knocked down; that, when he regained consciousness, only a few minutes after being struck, he immediately examined said pocket and then discovered that the three $20 bills were missing. He stated that, while he had taken several drinks of intoxicating liquor on the 2d of May, he was not intoxicated at the time he was playing pool with defendant, or when struck down by the accused.

Elton J. Plato, city purchasing agent of the city of Sacramento, testified that in the early part of the evening of May 2, he and his family were taking an automobile ride; that he drove down Second street from Second and K streets to L, and thence to Third and L. Just as he was approaching the latter corner and when only a few feet therefrom, he saw the defendant strike Fink and "knock him down"; that he thereupon "slowed down," and saw defendant lean over Fink, and that he then brought his car to a full stop and observed defendant "feeling about the man"; that "defendant started to get away pretty fast, * * * and I chased the defendant and overtook him on K street, between Third and Fourth." Several other parties also followed the defendant to the point mentioned on K street. These parties held him until a policeman, in response to a telephone call, arrived on the scene and took defendant in charge. Plato testified that, before the officers arrived and while he "was struggling to get away," the defendant, addressing his captors, said: "Let me go; I'll give you the dough." Plato went to the police station and was present when defendant's person was searched by the officers; saw the officers take from the accused a $20 bill and, the witness thought, "some silver."

Fred O. Turner, an employee of the S. P. Company in Sacramento, saw defendant and Fink fight near Third and L streets at the time referred to by the witness Plato. He testified that the defendant "knocked Fink down," the latter falling to the sidewalk face downward; that defendant then reached down, "rolled him (Fink) over" and put his hand in Fink's trousers watch pocket and "take something out of his pocket, a paper or papers. I couldn't see whether it was money or what not. And" continued Turner, "from taking it out of his (Fink's) pocket, he (defendant) goes to work and shoves it into his watch pocket." After this occurrence, the defendant remarked, so Turner testified, "You'll pay me now." Defendant then started in the direction of K street, Turner, with others, following, overtaking, and stopping him on K street, and holding him until the arrival of an officer. Turner stated that he, on the suggestion of Plato, held the defendant until Plato could go to the phone and call for an officer; that, while Plato was thus employed, the defendant said to the witness (Turner): "Don't arrest me; I'll give you the money; I'll split with you. Then after he said that," Turner proceeded, "he says: 'You let me loose and I'll pay the money back.' That is the words he used." The officer then arrived, stated Turner, and took the defendant to the police station.

A. H. Selander was present at Third and L at the time defendant struck and knocked Fink to the sidewalk. He testified that he saw defendant stoop and put his hand in the watch pocket of Fink's trousers; that he also followed defendant when he retreated from the scene of the trouble toward K street, and was present when the witness Turner got hold of defendant; that he heard defendant say to Turner that he would "split with Turner if he (Turner) would let him (defendant) go"; that he also heard defendant say at that time, addressing Turner: "I will pay you back, if you let me go."

Policeman Warren testified that, on searching defendant at the police station, he found one $20 bill only, a few pieces of silver and some small "trinkets."

Thus, it would seem, the people made a very strong case against the accused. The fact, however, that but one $20 bill was found in the possession of the defendant when he was searched by the officer after his arrest, and the further fact that defendant was at all times within sight of his pursuers while he was going toward K street, and, while going toward said street, was not seen to do anything which would indicate that he had disposed of any article then in his possession, are stressed by defendant as circumstances which strongly tend to show that Fink testified to a falsehood when he stated that, just prior to the assault, he had in his possession and upon his person three bills of the denomination of $20. But the apparent discrepancy thus arising constituted a matter for the jury to consider and resolve. The jury, believing, as presumptively they did, the testimony of Turner, were warranted in concluding and finding that the defendant took from Fink's pocket something which had the appearance of being paper of some kind, and further concluding from that circumstance and the testimony of Turner, Plato, and Selander that he offered to "split" or return the money, if allowed to go, that the paper so taken was paper money. This was a sufficient predicate for their verdict. In other words, if they believed beyond a reasonable doubt, as well they could so believe from the circumstances as disclosed to them, that some money was abstracted from Fink's pocket by defendant, then with the facts showing the circumstances under which said act of taking was done, they were legally authorized to find that defendant had committed robbery, even though they might have believed that Fink was mistaken or told an untruth as to the amount of money he had on his person at the time, and regardless of whether the amount was $60, or only $20, or even less.

[9] Lastly, it is contended that the court erred, to the prejudice of the rights of the accused, by refusing to allow, upon his request, the following instructions:

> "The jury is instructed that, with respect to all verbal admissions, it may be observed that they ought to be received with great caution. Such evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, as the party himself being either misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It also frequently happens that the witness by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.
>
> "The court instructs the jury that the crime of robbery includes the crime of larceny, and that, under an information for the first offense of robbery the jury may find the defendant guilty of larceny if they entertain a reasonable doubt as to which of the two offenses he was guilty."

The first of the above instructions is based on subdivision 4 of section 2061 of the Code of Civil Procedure, which provides that upon the proposition contained in said subdivision, as well as upon the several propositions set forth in 6 other subdivisions of said section, the jury "is to be instructed by the court on all proper occasions." Said section 2061, in so far as it purports to authorize judges to give to juries an instruction based on subdivision 4 thereof, has been held to be in direct contravention of section 19 of article 6 of the Constitution to the effect that juries shall not be charged or instructed with respect to matters of fact. Kauffman v. Maier, 94 Cal. 269, 273, 29 P. 481, 18 L. R. A. 124; People v. O'Brien, 96 Cal. 180, 31 P. 45; People v. Wardrip, 141 Cal. 229, 231, et seq., 74 P. 744; People v. Moran, 144 Cal. 48, 64, 77 P. 777. In these and subsequent cases, however, it was held that either the act of giving or the act of refusing to give the instruction would not be held to be sufficient to justify the reversal of a judgment, since the proposition contained in subdivision 4 of said section is a "mere commonplace," or, as is said in Kauffman v. Maier, supra, the fact that the statements of a witness as to what some other person has orally said to him are liable to be erroneous and should, therefore, be received with caution, involves a matter of common knowledge, and the assumption must always be that a jury, in considering the testimony of a witness purporting to involve a repetition of any oral statement which the defendant in a criminal or any party to a civil action or a witness in either has made to another with respect to the case or any issue directly involved or incidentally arising therein, would know as well as the judge or any other person that it would be their duty to view it with that degree of caution which the circumstances of the particular case or those under which the oral statement was made justly exacted or required. See, in addition to the cases above named, People v. Raber, 168 Cal. 316, 320, 143 P. 317, and cases referred to therein.

[10] The instruction last hereinabove quoted contains a correct abstract statement of the law with respect to the elements of the crime of robbery. Larceny is essentially one of the ingredients of the crime charged in the information, and yet where, as here, the evidence, without conflict, shows that the larceny or felonious asportation of the property from the person of the complaining witness was accomplished by means of force, then the distinctive crime of grand larceny is swallowed up by the more aggravated crime of robbery, and in such case an instruction that, the crime of grand larceny being, abstractly, within the crime of robbery, it was within the legal discretion of the jury to find the accused guilty of grand larceny, would not be pertinent to the case as made by the proofs. The defendant himself did not testify in this case, and no other witness was produced on his behalf to say that the substantially uniform story of all the eyewitnesses to the commission of the crime, and who testified for the prosecution as to the circumstances under which and the vio-

lent means by which the defendant despoiled Fink of his money, was not true.

No other asignments of error are presented. The judgment and the order appealed from, for the reasons hereinabove given, are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

79 Cal. App. 20

PEOPLE v. HEATH. (Cr. 1374.)

(District Court of Appeal, Second District, Division 1, California. July 26, 1926.)

1. Witnesses 🔑274(1)—Evidence of lewd conduct with other girls than those involved in charges is admissible when appropriate to cross-examination of defendant's character witness (Pen. Code, § 288).

Evidence of lewd conduct with other girls than those involved, in charges of violating Pen. Code, § 288, is admissible when appropriate to cross-examination of witness testifying to defendant's good reputation for morality and chastity.

2. Criminal law 🔑1170½(5)—Cross-examination of defendant's character witness as to knowledge of his lewd conduct with other girls than those involved in charges on trial held not prejudicial.

Cross-examination of defendant's character witness as to whether she had heard of defendant's lewd conduct with other girls than those involved in charges on trial *held* not prejudicial to defendant, though slightly premature.

3. Infants 🔑20—Defendant's testimony that his wife filed complaint between certain dates to discredit him in pending divorce action held properly excluded as not supported by record.

In trial for lewd acts with girls under 14, defendant's testimony that complaint was filed at his wife's instigation between certain dates, pursuant to conspiracy to discredit him in pending divorce action, wherein each was seeking custody of child, *held* properly excluded, where one who filed complaint had testified that he first complained to authorities before first of such dates, and was not shown to have had any acquaintance or communication with defendant's wife.

4. Criminal law 🔑829(9).

Refusal of instruction to reconcile all circumstances shown with defendant's innocence, if reasonably possible, *held* not prejudicial error, in view of instruction that presumption of innocence related to all evidence introduced.

5. Criminal law 🔑829(19)—Refusal of instruction that no juror should vote for conviction because of other jurors' opinions held not error, in view of instructions given.

Refusal of instruction that no juror should vote for conviction because of other jurors' opinions *held* not error, in view of instructions that conviction must be solely on evidence and law as declared by court.

6. Criminal law 🔑829(17)—Refusal of instruction that defendant's testimony is entitled to same consideration as any other witness' held not error, in view of instructions given.

Refusal of instruction that defendant's testimony is entitled to same consideration as that of any other witness *held* not error, in view of correct instructions on rules for determining witnesses' credibility.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Johnie L. Heath was convicted of lewd and lascivious acts with females under 14, and he appeals. Affirmed.

M. J. Gordon and M. M. Gordon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Lionel Beale Browne, of San Francisco, for the People.

CONREY, P. J. The information is in two counts, each of which charges the commission of a described lewd and lascivious act upon and with the body of a female child under the age of 14 years. The first child will be herein designated as Gertrude and the second as Martha. A third count relating to still another child was "ordered off calendar" at the beginning of the trial.

Appellant's first point is:

> "That the attitude of the prosecuting attorney was error in bringing before the jury imaginary offenses claimed to have been committed upon other girls. This he did after gaining permission of the court to examine witnesses upon the voir dire."

The four witnesses to whom appellant refers in his argument on this point were all witnesses who, in behalf of defendant, had testified that they knew the general reputation of the defendant in the community of his residence for morality and chastity. The manner in which the subsequent examination by the district attorney was conducted may be illustrated by the record concerning the testimony of Mrs. Knowlton. After she had stated that she knew defendant's reputation in said community for morality and chastity, the defendant's attorney inquired: "Is it good or bad?" To which the witness answered, "Good." On request of the district attorney this answer was stricken out in order that he might "ask her on voir dire," which we interpret to mean that he desired to test the qualifications of the witness to answer the principal question. After the witness, in answer to the district attorney's questions, had stated that she had discussed the defendant's general reputation in the community as to his morals, and had discussed that reputation with certain named persons, the district attorney apparently ignored the fact that the answer to the principal question had been stricken out, and examined the witness on the assumption that said answer remained in the record. Thus, referring to a conversation of the witness with one Mrs. Knopp:

> "Q. About him generally with other children there in that community? Didn't she mention other cases besides Maxine's case?" (Maxine was the girl named in count 3 of the information, which count was not then on trial.) "A. I do not remember whether she did or not.
>
> "Defendant's attorney: I object to that in the presence of the jury as improper.
>
> "The Court: Overruled. A. I don't remember of her mentioning the others that day.
>
> "Q. You have heard quite a number of instances, haven't you? A. Well; since the trial came around.
>
> "Q. Involving the defendant with little children in that community? A. Since he was arrested.
>
> "Q. Since he was arrested; yes. You have considered all these matters in connection with your testimony here as to his general reputation, have you? You have not taken this into consideration at all? A. Not his reputation. I put it down at that time as hearsay.
>
> "Q. Now, his general reputation, as to what it is in the community at the present time, is that your testimony now, that it is good, after having talked with these people at that time? A. No, sir; I am giving you my opinion of what his reputation was when I lived there.
>
> "Defendant's Attorney: Is it good or bad? A. His reputation is good. This other is hearsay."

[1, 2] In claiming error appellant relies upon authorities to the effect that upon the trial of this kind of an action evidence tending to show lewd conduct of the defendant with girls other than those involved in the charges then on trial is not admissible. In People v. Wyett, 49 Cal. App. 289, 292, 193 P. 153, the rule is stated and other decisions to like effect are cited. But in this declaration of the rule or principle there is nothing inconsistent with the right of the district attorney to bring out facts of this character when they are appropriate to cross-examination of a defendant's witness who has testified to the good reputation of the defendant for morality and chastity. Technically the questions asked by the district attorney, and to which the objection is made, were not admissible as part of the preliminary examination on the qualifications of the witness. But, although slightly premature, they were admissible as cross-examination directed to the witness' testimony that such reputation of the defendant was good. Therefore we are of the opinion that the error was in fact not prejudicial to the rights of the defendant.

[3] During the direct examination of the defendant, as a witness in his own behalf, he testified that at the time of his arrest he was living separately from his wife, and that on the 27th of October, 1925, his wife filed against him an action for divorce and for custody of their minor child. (The information herein was filed on December 24, 1925, the complaint before the magistrate had been filed November 23, 1925, and the dates of the alleged offenses were June 21, 1925, and April 1, 1925, respectively.) It was suggested by counsel for defendant that he desired to make a statement by way of explanation of further intended questions. The trial before the jury was then suspended for a few minutes while this statement was made and discussed before the judge in chambers. The defendant, court reporter, and clerk were present with the judge in chambers. In presenting his statement to the judge, counsel for defendant said that he was offering to show by the witness that a conspiracy existed and was entered into by defendant's wife "and others" to involve him in a criminal action for the purpose of discrediting him in the divorce action, wherein each was seeking custody of their minor child. Counsel stated in detail the status of the divorce action and of the issues concerning the custody of said child as existing on certain dates in November, 1925, and included in his statement of his offer of proof that he would show that the complaint in this action was filed at the instigation of the defendant's wife. The judge announced as his conclusion that there was nothing relevant to the present case in any of the offered evidence. Accordingly the said offer was not urged any further when the trial was resumed in the presence of the jury.

Counsel for defendant at that time relied, as he now relies, on the decision in People v. Reyes, 194 Cal. 652, 229 P. 947, as authority for his claim that said offered evidence of conspiracy should have been admitted. In People v. Reyes the crime charged was of the same description as in this action. The trial court sustained objections of the district attorney to questions propounded to the defendant relating to the marital troubles of the defendant and his wife and divorce proceedings instituted by her. The Supreme Court said:

> "Prima facie the questions objected to called for evidence immaterial and irrelevant to the issue involved in the case. Standing alone, the testimony sought to be elicited by the questions was rightfully objected to by the district attorney and rightfully rejected by the trial court. Counsel for the defendant did not attempt to explain the purpose of the questions nor offer to show wherein the answers sought to be elicited would in any way relate to the issue of the defendant's guilt or innocence. If, as counsel for the defendant seems to intimate, the purpose of these questions was purely preliminary to a further showing that the defendant and his wife were hostile to one another and that the charge against the defendant originated with the wife because of her hostility, he should have made a statement to that effect to the trial court. In the absence of such a showing he will not now be heard to complain."

In the case at bar, while the defendant's counsel stated that he would show by the witness (the defendant) that between November 10, 1925 (when the matter of the custody of defendant's daughter was scheduled for hearing in the divorce action), and November 16, 1925 (the date to which that hearing had been continued), the complaint in this case was filed "at the instigation of the defendant's wife," yet from the record herein it appeared that said complaint was filed on November 23, 1925, by one Thomas Vick. Prior to the time when this offer was made, Thomas Vick had testified that he first made complaint to the authorities several months prior to November, about the alleged offense against the child Gertrude. On cross-examination he was asked whether or not defendant's wife ever talked to him about this matter, and he replied, "I don't know the woman." It will be noted that in the offer of proof, as made to the judge while in chambers, it was not claimed that the witness (defendant) could or would give any testimony showing any acquaintance or communication whatever between Vick and defendant's wife, or that he or any witness who had testified in behalf of the people, was one of the "others" with whom she conspired to bring this charge against the defendant. We are satisfied that in view of the record as made at and prior to the time when said offer of proof was presented, the conclusion announced by the judge was correct.

[4] No exception is taken to the instructions given by the court to the jury. Appellant contends, however, that the court erred in refusing to give several instructions requested by the defendant. Argument is presented in support of appellant's contention concerning three only of these requested instructions. Requested instruction No. 2, in relation to the presumption of innocence, particularly asked that the jury be instructed that it was their duty to "reconcile any and all circumstances that have been shown with the innocence of the defendant, if you can reasonably do so," etc. In this refusal there was no prejudicial error. In People v. Patino, 9 Cal. App. 192, 194, 98 P. 199, where it appeared that the jury had been instructed that the presumption of innocence related to all the evidence introduced during the trial, this court said:

> "It cannot be said that defendant was prejudiced by the refusal of the trial court to add the further direction that the jury must, 'if possible, reconcile the evidence with the presumption of innocence.'"

[5] Requested instruction No. 9 is the instruction sometimes given to the effect that the defendant is entitled to the individual opinion of each member of the jury, and that no member of the jury should vote for the conviction of the defendant because of the opinion of other members of the jury, as long as he himself has a reasonable doubt as to the guilt of the defendant. But the refusal to give this instruction, when viewed in connection with the instructions actually given, was not error.

> "Where the instructions given to a jury correctly and sufficiently advise it that a verdict of guilty must be found solely on the evidence and the law as declared by the court, no error will be held to have been committed by the refusal to give the additional advice that the defendant is entitled to the opinion of every member of the jury and that a juror should not vote for a conviction because of the opinion of the other jurors." People v. Quon Foo, 57 Cal. App. 237, 240, 206 P. 1028, 1030.

See cases there cited.

[6] Requested instruction No. 13 contains advice to the jury that, where the defendant is a witness in his own behalf, his testimony is entitled to full and fair consideration by the jury, the same as that of any other witness. The refusal of this instruction was not error.

> "The jury having been instructed correctly upon the rules which should be followed in determining the credibility of witnesses, it was not necessary to state a particular rule concerning these witnesses because they happen to be the defendants. It has been held that justice would be more surely accomplished if such instructions, directed particularly to the testimony of a defendant, were not given. People v. Boren, 139 Cal. 210, 215 [72 P. 899]; People v. Fritz, 54 Cal. App. 137 [201 P. 348, 350]." People v. Quon Foo, 57 Cal. App. 237, 241, 206 P. 1028, 1030.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

78 Cal. App. 781

PEOPLE v. DERWIN et al. (Cr. 1288.)

(District Court of Appeal, First District, Division 1, California. July 22, 1926.)

1. Criminal law 🔑775(3).

Instruction on alibi in robbery case that evidence of alibi should be considered with all other evidence *held* not erroneous.

2. Criminal law 🔑814(3).

In prosecution for robbery, where defense of alibi alone was relied on, instruction on assault was properly refused as not authorized by evidence.

3. Criminal law 🔑1172(2).

In robbery prosecution in violation of Pen. Code, § 487, subd. 2, where watch taken was in evidence, and owner's testimony that it had pecuniary value was uncontradicted, refusal to instruct that state must show subject of offense had some value, if error, *held* harmless.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Harold Derwin and Martin Hayes were convicted of second degree robbery, and they appeal. Affirmed.

Nathan C. Coghlan, of San Francisco (Austin W. Arnold, of counsel), for appellants.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

CASHIN, J. Defendants were jointly charged by indictment with the crime of robbery. A jury returned a verdict against both and determined the crime to be robbery of the second degree. Their motions for a new trial and in arrest of judgment were denied, and they appeal from the order denying a new trial and from the judgment. The grounds urged for reversal are that the court erred in giving and in its refusal to give certain instructions to the jury.

It was shown by the testimony that Robert Weir, the complaining witness, at about 1:30 o'clock a. m. of December 25, 1924, was walking in a northerly direction along Valencia street in San Francisco when, upon reaching a doorway thereon in which two persons were standing, he stumbled over the foot of one of them, whereupon he was attacked by both, was beaten, and after a struggle his watch, of the value of $50, with certain letters, were taken from his person. Defendants were arrested within a few minutes after the occurrence, and both denied then and at the time of the trial that they had seen the complaining witness previous to the arrest. The arresting officer testified that one of the defendants threw into the street letters which were identified as the property of Weir, and the latter's watch with a broken chain attached was found a few feet from the letters. The clothing of the defendants was blood-stained, and both were identified by Weir as the persons who committed the robbery.

[1] Defendants having denied that they were present at the time or place of the alleged crime, an instruction was given defining the nature of an alibi, in which it was stated that "all the evidence should be carefully considered by you, and if the evidence on this subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendants, you should acquit them." The part of the quoted portion of the instruction to which defendants except consists of the words "considered with all the other evidence," it being contended that the evidence adduced in support of the alibi should be considered independent of the other evidence in the case, and that the instruction was prejudicially erroneous.

We find no merit in defendants' contention. It was necessary for the prosecution to prove beyond a reasonable doubt that defendants were present at the time and place of the crime alleged, and while, as held in People v. Winters, 125 Cal. 325, 57 P. 1067, the alibi sought to be shown was not strictly a matter of defense, it being sufficient that there be adduced evidence sufficient to raise in the minds of the jury a reasonable doubt as to the fact, the jury in its determination of the fact may properly consider any evidence relevant to the issue. As the rule is stated in American and English Ency. of Law (2d Ed.) "Alibi," vol. 2, p. 56, the true doctrine seems to be that, where the state has established a prima facie case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt nor by a preponderance of evidence, but by such evidence and to such a degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of the guilt of the accused. And in Corpus Juris, vol. 16, p. 977 (Crim. Law):

> "As a general rule an instruction on the defense of alibi is proper and sufficient which * * * charges that if the evidence of an alibi in connection with all the other evidence in the case raises a reasonable doubt of the presence of the accused at the time and place of the crime he should be given the benefit of such doubt and be acquitted."

It is held in other jurisdictions that instructions charging that if by reason of the evidence in relation to the alibi the jury has a reasonable doubt of the guilt of the accused it should acquit are erroneous as predicating a doubt on the evidence of the alibi alone. McClain v. State, 182 Ala. 67, 62 So. 241; Jenkins v. State, 22 Wyo. 34, 134 P. 260, 135 P. 749.

[2, 3] The court refused two instructions offered by the defense, which were as follows:

> "The court instructs the jury that if they find from the facts in this case that these defendants were merely guilty of an assault upon the person of the complainant they should find these defendants guilty of the crime of assault."
>
> "The court instructs the jury that unless the prosecution in this case prove beyond any reasonable doubt that the article or articles alleged to have been taken had some value, intrinsic or relative, you must find defendants not guilty."

No instruction should be given which is not based upon some theory logically deducible from some portion of the evidence. People v. Sanchez, 24 Cal. 17, 27; People v. Atherton, 51 Cal. 495; People v. Hatch, 163 Cal. 368, 383, 125 P. 907. In the instant case the only evidence offered by defendants was that tending to prove that they were not present at the time and place of the alleged crime; and under the evidence before them the only verdict which the jury could render was one of guilty as charged in the indictment or of acquittal. The instruction first mentioned, there being no evidence to which it could refer, was properly refused. People v. Barry, 90 Cal. 41, 27 P. 62; People v. Wright, 93 Cal. 564, 568, 29 P. 240; People v. Stanton, 106 Cal. 139, 39 P. 525; People v. Fitts, 4 Cal. App. 432, 91 P. 536; People v. Ong Git, 23 Cal. App. 148, 156, 137 P. 283.

In view of the evidence the offense charged included that of a violation of subdivision 2 of section 487 of the Penal Code. If it be admitted, as contended by defendants, that the law requires that the subject of these offenses be shown to have some pecuniary value, where, as here, the watch was introduced in evidence, and according to the testimony of its owner, which was uncontradicted, it had a pecuniary value, no finding that the article was valueless would have been supported by the evidence; and the refusal of the second instruction, if erroneous, was not prejudicial to a degree which justifies the conclusion that the result was a miscarriage of justice.

The evidence being sufficient to support the verdict and no prejudicial error being shown, the judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

78 Cal. App. 785

MENEFEE v. RAISCH IMPROVEMENT CO. (Civ. 5338.)

(District Court of Appeal, First District, Division 1, California. July 23, 1926.)

1. Automobiles 🔑247.

Finding that plaintiff was driving in careful and prudent manner *held* sufficient finding on issue of contributory negligence.

2. Automobiles 🔑204—Inability to stop automobile within 20 feet before collision held not to show contributory negligence (Vehicle Act, § 94).

That plaintiff, suing for damages to automobile, before collision, was unable to stop within 20 feet, *held* not to show absence of brake equipment required by Vehicle Act (St. 1923, p. 545) § 94, necessitating finding of contributory negligence.

3. Automobiles 🔑204—Place of automobile collision held not residence district, within statute (Vehicle Act, § 114, subd. [c]).

Place of accident, not within municipality nor signposted, as required by Vehicle Act (St. 1923, p. 554) § 114, subd. (c), *held* not a residence district, within subdivision (b), as affecting question of plaintiff's contributory negligence in driving automobile at speed of 25 miles an hour.

4. Damages 🔑113.

Measure of damages to automobile from collision is difference in its value immediately before and immediately after injury, or reasonable cost of repairs, if less than difference in values.

5. Damages 🔑46.

To recover damages to automobile from collision, it is not necessary to prove that liability incurred for repairs has been discharged.

6. Damages 🔑188(1)—Evidence 🔑318(1).

Itemized bill for automobile repairs *held* hearsay, and insufficient alone to prove reasonable value of such repairs, their necessity, or that time consumed in making them was reasonable.

7. Damages 🔑188(1).

Itemized statement for automobile repairs, admitted without objection, and other testimony, *held* sufficient to support judgment for plaintiff, in action for damages from collision.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by R. E. Menefee against the Raisch Improvement Company. Judgment for plaintiff, and defendant appeals. Judgment modified, and, as modified, affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

C. M. Booth and Maurice J. Rankin, both of San Jose, for respondent.

CASHIN, J. An action was brought by plaintiff alleging that defendant corporation, in the operation of a motor truck owned by it, negligently caused damage to an automobile in the possession of plaintiff, the elements of damage alleged being injuries to the automobile and the temporary loss of its use. Judgment was entered for plaintiff, from which defendant appealed.

The grounds urged for reversal are that defendant's special demurrer should have been sustained, that the evidence was insufficient to support the findings, and that the court failed to find on the issue of contributory negligence.

The testimony shows that the injuries alleged were caused on July 25, 1924, while plaintiff was driving in a northerly direction on the east side of Lincoln avenue in Santa Clara county; that the automobile was one in his possession under a contract for its purchase and used in the course of his occupation; that when he reached a point 20 feet south of a private road or driveway leading into the highway from the east and a view of which was obstructed by shrubbery, defendant's truck emerged therefrom; that no warning of its approach was given, and that no horn or other warning device was carried by it; that plaintiff applied his brakes, but was unable to stop before striking the truck.

[1] The court found defendant to have been guilty of negligence proximately causing the injury, and that plaintiff was driving in a careful and prudent manner. The latter was a sufficient finding on the issue of contributory negligence. Arrelano v. Jorgensen, 52 Cal. App. 622, 199 P. 855.

[2] Defendant offered no evidence, but urges that contributory negligence appears from that adduced by plaintiff; that, it appearing that the latter's brakes were applied at a point 20 feet from that of the collision, it follows from the fact that the car failed to stop before the impact that it was not

equipped as required by section 94 of the Vehicle Act (St. 1923, p. 545), which provided that "every motor vehicle operated upon a public highway shall be provided at all times with brakes which shall be adequate to promptly check the speed of and to stop such motor vehicle," and that by the use of ordinary care the car might have been turned to the left of the truck and the injury avoided. The findings of the trial court are fairly supported by the evidence, and we cannot say, as a necessary conclusion therefrom, that the brakes were defective, or that in view of the sudden appearance of danger plaintiff was wanting in ordinary care in failing to turn to the left.

[3] Defendant further contends that the evidence shows that the highway at that point traversed a residential district; and that it appearing that plaintiff's speed there exceeded 20 miles per hour, to wit, 25 miles per hour, it follows as a matter of law that he was guilty of negligence proximately contributing to the injury.

A residence district within the meaning of the Vehicle Act is "the territory contiguous to a public highway which is on the line of said highway not mainly devoted to business where for not less than a quarter of a mile the dwelling houses and business stuctures on such highway average less than 100 feet apart." Subdivision (b), § 114, Vehicle Act, Stats. 1923, p. 517. The act further provides that "No territory shall be deemed to be within a business or residence district unless signposted as provided in this act." Subdivision (c) § 114, Vehicle Act. The place of the accident was not within a municipality, nor, as far shown by the record, had signs as provided by the act been posted restricting the speed of vehicles to 20 miles per hour.

[4, 5] The court found that plaintiff was obliged to expend $361.77 as the reasonable cost of repairing the automobile, and suffered further damage in the sum of $205 due to the loss of use during the period reasonably required for making the repairs. The measure of damages in cases of this character is the difference in the value of the property immediately before and immediately after the injury, subject to the proviso that, if the property be susceptible of repair at an expense less than such difference, the measure of damages is the reasonable cost of the repairs (Kincaid v. Dunn, 26 Cal. App. 686, 148 P. 235; Rhodes v. Firestone Tire & Rubber Co., 51 Cal. App. 569, 197 P. 392; Conner v. Dale, 63 Cal. App. 338, 218 P. 462), and it is unnecessary to prove that the liability incurred for such repairs has been discharged (Kincaid v. Dunn, supra).

[6, 7] That plaintiff caused the car to be repaired and incurred a liability therefor is clearly shown, and an itemized statement rendered by those performing the service was introduced in evidence without objection. The statement was hearsay and insufficient alone to prove the reasonable value of the repairs, their necessity, or that the time consumed in making them was reasonable (Galveston, etc., Elec. Ry. Co. v. English [Tex. Civ. App.] 178 S. W. 666; Conrad Co. v. St. Paul City R. Co., 130 Minn. 128, 153 N. W. 256); but, having been admitted without objection, the statement therein that certain material and labor had in fact been furnished not having been contradicted, the court was justified in accepting it as evidence tending to prove the facts stated (Lucy v. Davis, 163 Cal. 611, 126 P. 490). This evidence was supplemented by a qualified witness, who testified that the difference in value of the car before and after the accident was the sum of $550. As held in Overpeck v. Rapid City, 14 S. D. 507, 85 N. W. 990, the difference in value of the property before and after the injury is presumptively the amount it would cost for repairs. He further described generally the character and extent of the injuries, stating as his opinion that the items shown on the statement mentioned were necessary to the repair of the car, and that the charges therefor were reasonable. While unable to testify from personal knowledge that the items shown were in fact furnished, the witness had from time to time observed the car during the period of repair and was familiar with its condition. The witness further testified that portions of the work done, namely, repainting the car and the straightening of the frame, were done by other firms, and that in the ordinary course of business the time consumed in making the repairs as a whole was not unusual.

The evidence fairly supports the inference that the repairs were made necessary by the accident, and was, together with testimony as to the reasonable value of the use of the car of which plaintiff was shown to have been deprived, sufficient reasonably to support the conclusions of the trial court.

The complaint stated a cause of action, and appellant's special demurrer, being directed to uncertainties appearing from allegations therein, which were immaterial, was properly overruled.

It is admitted by respondent that the allowance for loss of use exceeded the amount prayed for in this behalf, and that the judgment should be modified to that extent. This difference is the sum of $30, and the judgment is therefore modified by deducting said sum therefrom, and, as so modified, is affirmed, respondent to recover his costs on appeal.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 34

LINDHOLM v. NORTHWESTERN PAC. R. CO. (Civ. 5476.)

(District Court of Appeal, First District, Division 1, California. July 27, 1926.)

1. Negligence 🔑32(1)—Owner owes no duty to licensee, except to refrain from willful injury.

One entering another's premises without express or implied invitation for his own benefit, pleasure, convenience, or curiosity, having no relation to owner's business, is at best a mere licensee, to whom owner owes no duty, except to refrain from willful or wanton injury.

2. Negligence 🔑32(1)—Owner owed no duty to licensee entering shipyard, except to keep premises in safe condition.

Plaintiff, who entered shipyard solely to call upon a relative, and while passing between some machinery was struck in the eye by a rod, was at best a mere licensee, to whom owner owed no duty to keep the premises in safe condition.

3. Negligence 🔑32(3)—licensee exceeding invitation, held to become bare licensee, to whom there was no liability.

Even if one entering shipyard to visit a relative on shipboard was an invited licensee, when he discovered that ship had not arrived and went towards another ship, to ascertain when it would arrive, and while passing between machinery was struck in the eye by a workman, unaware of his presence, he became a bare licensee, to whom there was no liability, since responsibility to an invited licensee is limited to the portion of the premises required for the purpose of the visit.

4. Negligence 🔑32(1).

Where defendant's employees, who injured bare licensee, were unaware of his presence, rule that owner must exercise reasonable care to avoid injury to bare licensee by active or overt act of negligence was inapplicable.

5. Negligence 🔑32(1).

Defendant, who was lawful occupant of premises, as against plaintiff using them by sufferance, was clothed with rights of owner, and might invoke rule limiting owner's liability to bare licensee to willful or wanton injury.

Appeal from Superior Court, City and County of San Francisco; George C. Jones, Judge.

Action for personal injuries by John Lindholm against the Northwestern Pacific Railroad Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Rothchild & Golden and Sylvester J. McAtee, all of San Francisco, for appellant.

Stanley Moore and R. W. Palmer, both of San Francisco, for respondent.

KNIGHT, J. An appeal by plaintiff from a judgment of nonsuit in an action to recover damages for personal injuries sustained by plaintiff as a result of the alleged negligent acts of defendant's employees. The correctness of the trial court's ruling on the motion for nonsuit depends mainly upon the determination of the question of whether appellant, at the time he received the injuries, was, as he claims, an invited licensee upon the premises where the accident occurred, or was, as the trial court declared by its judgment of nonsuit, "a trespasser or at best a bare licensee." The following are the facts:

During the lunch hour on the day of the accident, appellant, a hoisting engineer employed by the King Coal Company, whose premises adjoined those of the Moore Shipbuilding Company in Oakland, entered the yards of said shipbuilding company for the purpose of visiting a relative aboard a vessel which he supposed was docked in said yards. The entire shipbuilding yards are inclosed by a fence, the only entrance thereto from the land side being through a gate at which a watchman is stationed, but plaintiff was allowed to enter said yards unchallenged, on account of having been in there frequently on business connected with his employment by the coal company. After passing through the main gate appellant walked along a railroad track, down the center of one of the docks toward a boat, which he supposed was the bark Hecla, and on which he expected to find his kin; but after going some distance down the track he discovered he was mistaken as to the identity of the vessel. Thereupon he turned and proceeded toward a vessel, the Pactolus, which was moored in said yards, intending to ascertain from the crew of that vessel the probable date of arrival at the yards of the Hecla. The steamer Cazadero, owned by respondent Northwestern Pacific Railroad Company, was at this time in the dry dock of said plant, being repaired by the Moore Company, and much of its machinery had been lifted out of the hold, dismantled, and strewn over the dock, for the purpose of allowing respondent's employees to repair the same. In order to reach a ladder hanging over the side of the Pactolus, appellant turned at the point where he realized he was mistaken regarding the identity of the vessel supposed to be the Hecla, and proceeded directly across the dock through the dismantled parts of the Cazadero's machinery toward a stringer on the edge of the dock, about 25 or 30 feet distant from the Pactolus' ladder, along which stringer he meant to walk until he reached the ladder. In selecting this route, it was necessary for him to follow a narrow space through the Cazadero's machinery, and thence to pass closely by the north end of its steam condenser, measuring some 8 or 10 feet square, at the other end of which three of respondent's employees were engaged in lining up the tubes by forcing a blunt rod through them with hammers.

Just as appellant attempted to pass said condenser, the workmen thrust the rod through one of the tubes, striking appellant in the eye, causing a severe injury thereto, which necessitated the subsequent removal of the eyeball. There was no evidence offered to show that respondent's employees were aware of appellant's presence near said condenser, nor that the course taken by him in attempting to reach the Pactolus was a regular passageway. Neither did the evidence show that there was a likelihood of any person being at the particular location where appellant received the injury. Appellant testified that before he attempted to pass the condenser he observed the workmen and knew the nature of the work they were engaged in, but, as he explained, it was customary when performing such work to place a lookout, or to rope off a space at the end of the condenser, so as to prevent persons from being injured, which in this case was not done.

[1] The determination of the question of whether the status of a person entering the premises of another is that of a bare licensee, or a licensee by invitation, turns on the nature of the business which brings the licensee upon the premises, and it is held generally in this respect that, where one enters the premises of another without express or implied invitation, and the object of his visit is solely for his own benefit, pleasure, convenience, or curiosity, having no relation to the business of the owner, he is at best a mere licensee; the license being enjoyed by him with its concomitant perils, and with the assumption of all risks attached to the condition of the premises, or which are incident to the operation of the business conducted thereon, the owner owing him no duty except to refrain from doing him wilful or wanton injury. Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; citing authorities from other jurisdictions; Grundel v. Union Iron Works, 141 Cal. 564, 75 P. 184; Kennedy v. Chase, 119 Cal. 637, 52 P. 33, 63 Am. St. Rep. 153; Giannini v. Campodonico, 176 Cal. 548, 169 P. 80; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580; Cleveland, C., C. & St. L. Ry. Co. v. Means, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375; Pauckner v. Wakem, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118; 2 Cooley on Torts, pp. 1265–1268; Thompson on Negligence, vol. 8, §§ 946–949; 20 R. C. L. pp. 57 and 69.

[2] The evidence here shows without conflict that appellant, having entered said yards with the sole object of calling upon a relative, was upon the premises of his own volition concerning a matter personal to himself and was not there to promote the interests of the owner. Therefore, under the rule above mentioned, his status was at best, as the trial court concluded, that of a mere licensee. 20 R. C. L. p. 69; Nelson v. Burnham & Morrill Co., 114 Me. 213, 95 A. 1029; Dixon v. Swift, 98 Me. 207, 56 A. 761; Norris v. Hugh Nawn Co., 206 Mass. 58, 91 N. E. 886, 31 L. R. A. (N. S.) 623, 19 Ann. Cas. 424; Woolwines' Adm'r v. Chesapeake & O. R. Co., 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859; Galveston Oil Co. v. Morton, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611. As such licensee respondent owed appellant no duty to keep the premises in a safe condition; and in the absence of such duty, no negligence can be imputed to respondent. Grundel v. Union Iron Works, supra.

[3] But, aside from the question of whether appellant's purpose in entering said premises to call upon a relative constituted him an invitee or a bare licensee at the time he entered said yards, the uncontroverted fact, as established by appellant's testimony, proves that when injured he was not in pursuit of such purpose, but was then on a mission purely of his own, namely, to ascertain from the crew of another vessel the probable date of arrival of the Hecla. The evidence is without conflict that, soon after he passed through the gate of said yards, and while he was in the middle of said dock, he discovered that the purpose for which he entered said premises was futile; that, notwithstanding such discovery, he diverted his course and attempted to cross the dock by finding his way through the Cazadero's dismantled machinery, intending to ascertain from the crew of the Pactolus the probable date of arrival of the Hecla; and that while in pursuit of such mission he was injured. He admits that, after discovering his mistake as to the identity of the vessel, he could have retraced his movements back up the dock, and obtained the desired information as to the Hecla's arrival at the company's office, but that he did not do so, because he was in a hurry to get back to his work on time. It is therefore apparent that, from the time he realized his error as to the identity of the vessel until he suffered the injury, he was pursuing a purpose for his own benefit and convenience, to accomplish which he was traversing portions of said shipyards where he was neither invited nor expected to go, and where his original mission in entering said yards did not require him to be.

Therefore, giving appellant the benefit of the most liberal construction of the evidence, by assuming that, as he contends, his original purpose in going upon the premises created the status of an invited licensee, it is manifest he was not clothed with such status at the time he was injured, for he was then in pursuit of a different purpose, which was one entirely his own. Under such circumstances he became and was clearly a bare licensee (Herzog v. Hemphill, 7 Cal. App. 116, 93 P. 899; Corbett v. Spanos, 37 Cal. App. 200, 173 P. 769), and his case must be governed by the rule stated in the case of Kennedy v. Chase, supra, wherein it was said that, as to an invited licensee, the duty of the owner "has relation to the object for which the right of entry is extended, and is limited to responsibility for the condition of that portion of the premises required for the purposes of the visit; it does not impose liability for the want of safety at a point without those limits, and where the injured party was neither invited nor expected to go. 1 Thompson on Negligence, c. 7, p. 308; Zoebisch v. Tarbell, 10 Allen [Mass.] 385, 87 Am. Dec. 660; Murray v. McLean, 57 Ill. 378; Schmidt v. Bauer, 80 Cal. 565 [22 P. 256, 5 L. R. A. 580]." There the facts showed that the injured party departed from the portion of the premises where his duty required him to go, and he was injured while going about for his own convenience. The court said:

> "When the defendant owners permitted the plaintiff to go aboard the ship for a specific purpose, they did not give him the right, by implication or otherwise, to roam at will over their vessel for his own purposes. They undertook that their decks should be reasonably safe where plaintiff was required by his employment to traverse them, but not elsewhere. 'We have found no support for any rule,' says Mr. Thompson, in speaking of the rights of trespassers, or mere licensees, 'which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives or private convenience, in no way connected with business or their relations with the occupant.' 1 Thompson on Negligence, 303. See, also, Redigan v. Boston, etc., R. R. Co., 155 Mass. 44, 47 [28 N. E. 1133, 14 L. R. A. 276] 31 Am. St. Rep. 520, and cases there cited."

The rule stated in Bush v. Weed Lumber Co., 55 Cal. App. 588, 204 P. 24, is to the same effect.

[4] Appellant further contends that, although his status may have been that of a mere licensee, respondent was nevertheless charged with the duty of exercising ordinary care to protect him from injury resulting from overt acts of negligence as distinguished from passive negligence such as arises from an unsafe condition of the premises, citing in support thereof, among others, the cases of Lucas v. Walker, 22 Cal. App. 296, 134 P. 374, 379, and Herold v. P. H. Mathews Paint House, 39 Cal. App. 489, 179 P. 414. The facts of the cases just cited show, however, that the application of the rule contended for by appellant is grounded upon evidence showing that the licensor was or had good reason to be aware of the presence of the licensee in the place of danger. Under such circumstances it may be conceded that the owner is charged with the duty of exercising reasonable care to avoid injury to the licensee by any active or overt act of negligence. 20 R. C. L. pp. 59, 60. In the instant case, there was no evidence whatever to show that respondent's employees at any time were or had reason to be aware of appellant's presence. The cases relied upon by appellant are therefore not in point.

[5] We find no merit in appellant's contention that respondent, not being the owner of said premises, may not invoke the rule available to an owner against bare licensees. The evidence shows that respondent was the lawful occupant and in the legal possession of that portion of the premises where the accident occurred. It was therefore using the same by right as against appellant's use thereof by sufferance, and consequently, so far as the question of negligence is concerned, was clothed with the rights of the owner and must be treated as such. McLaughlin v. Bardsen, 50 Mont. 177, 145 P. 954; Downes v. Elmira Bridge Co., 179 N. Y. 136, 71 N. E. 743. The rule of the cases referred to by appellant on this point applies only where the status of the person seeking to invoke the doctrine which is available to an owner is no greater than that of the person against whom he endeavors to enforce such doctrine.

For the foregoing reasons, we are of the opinion that the nonsuit was properly granted. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

79 Cal. App. 45

MITCHELL v. CALIFORNIA-PACIFIC TITLE INS. CO. et al. (Civ. 5294.)

(District Court of Appeal, First District, Division 1, California. July 28, 1926. Rehearing Denied August 27, 1926.)

1. Mortgages ⚷372(1).

Where grantor in trust deed and trustee at time of sale of trust property erroneously believed title was in grantor in trust deed, measure of their liability to purchaser, in an action not based on covenants of deed, is benefit received by them.

2. Abstracts of title ⚷3.

Under Civ. Code, § 3300, abstract company erroneously certifying title to land is liable in an amount, which will compensate purchaser for all detriment proximately caused thereby.

3. Equity ⚷8—Person ignorant or mistaken with respect to rights, contracting with respect thereto, may have equitable relief, as for mistake of fact.

Where person ignorant or mistaken with respect to his own antecedent and private legal rights, interests, estates, or other relations enters into transaction for purpose of affecting such assumed right or relation, or of carrying out assumed duty, equity will grant relief, as for mistake of fact.

4. Vendor and purchaser ⚷31, 334(5).

Purchaser may rescind a contract, even though executed, and recover price for mutual mistake as to vendor's title.

5. Vendor and purchaser ⚷339.

Mutual mistake as to vendor's title is one within Civ. Code, § 1577, subd. 2, and no interest having been conveyed, reconveyance or tender thereof before suit to recover purchase price is unnecessary.

6. Mortgages ⚷**372(1).**

Purchaser of land sold by trustee, suing trustee and grantor named in trust deed to recover purchase price on ground of mutual mistake as to title of grantor in trust deed, should allege a demand for restitution.

7. Equity ⚷**6.**

Right of one conferring benefit in misreliance on a right or duty is equitable, and arises only when recipient of benefit is notified or learns of mistake necessitating restitution.

8. Statutes ⚷**85(2)—Two-year statute of limitation, containing exception where cause of action based on certificate of title, is not invalid special legislation (Code Civ. Proc. § 339, subd. 1; Const. art. 4, § 25, subd. 32).**

Code Civ. Proc. § 339, subd. 1, declaring two-year period of limitation, affecting actions on contracts not founded on instrument in writing, but containing an exception of causes of action on contracts evidenced by certificates of title, *held* not violative of Const. art. 4, § 25, subd. 32, prohibiting local or special laws.

9. Abstracts of title ⚷**3—Land purchaser, suing company that erroneously certified title, must allege reliance on certificate, and allegation that purchaser caused price to be paid on receipt of certificate held insufficient.**

Purchaser of land, suing abstract company, which had certified the title for damages after failure of title, must allege a reliance on certificate of title in making purchase or paying price, and allegation that, on receipt of certificate, purchaser caused purchase price "to be paid over for such property," *held* insufficient.

10. Pleading ⚷**17.**

An averment necessarily implying a fact essential to statement of cause of action is sufficient, as against a general demurrer.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by S. Mitchell against the California-Pacific Title Insurance Company and others. Judgment on demurrer for defendants, and plaintiff appeals. Affirmed.

W. W. Middlecoff, of Los Angeles, and Power & McFadzean, of Visalia, for appellant.

J. W. Wiley, of Bakersfield, and Manson & Allan, Harding & Monroe, and R. H. Borland, all of San Francisco, for respondents.

CASHIN, J. An action to recover sums paid by appellant for certain real property sold by California-Pacific Title Insurance Company, a corporation, as trustee under a deed of trust executed by one Howard to secure the payment of a promissory note to respondent Frederica Meyerstein, title to the property at the time of the sale being vested in another, and for the recovery of damages against respondent Bakersfield Abstract Company.

The complaint, which was filed on December 6, 1922, alleged that, at the time of the execution of the note and deed of trust, there was prepared and delivered to respondent Meyerstein by Bakersfield Abstract Company a certificate of title showing the title to the property to be vested in Howard, subject only to the deed of trust and certain taxes a lien thereon; that in fact the property was also subject to the lien of an attachment issued in an action then pending in the superior court of the county of Kings, in which action Howard was the defendant; that, subsequent to the execution and recording of the deed of trust, judgment was entered against Howard in the action mentioned, upon which execution was issued and the property sold to one Saulsbury, subject to redemption; that thereafter, the property not having been redeemed, the sheriff of Kern county executed his deed to the purchaser conveying to the latter all the interest therein of Howard and respondent California-Pacific Title Insurance Company; that Howard subsequently made default in the payment of the note to respondent Meyerstein, upon whose demand the trustee, pursuant to the provisions of the deed of trust, gave notice that it would sell at public auction to the highest bidder the land described therein; that at the time and place of sale appellant, believing that he was purchasing the land described and would receive a good title thereto, bought the same at the auction sale for the sum of $2,386 "then and there paid by him to the trustee for said lands"; and thereupon the trustee executed to appellant a grant, bargain, and sale deed to the property, the deed being dated January 8, 1920. It was further alleged that on January 30, 1920, appellant through his agent delivered the deed to respondent Bakersfield Abstract Company, to be recorded when the latter should ascertain that the deed, when recorded, would show title to the property to be vested in appellant free of incumbrances, whereupon the latter should issue its certificate of title accordingly; that respondent Abstract Company subsequently recorded the deed and issued its certificate to appellant, showing the title to be vested in the latter free of incumbrances, and that "upon receipt of said certificate said respondent Mitchell caused the amount of money which had been paid by him at said sale for said property to be paid over for said property"; that thereafter one Hall, the successor in interest of Saulsbury, brought suit to quiet title to the property as against appellant, who notified respondent Abstract Company of the fact and requested its assistance in defending the title; that a decree was subsequently entered therein adjudging Hall to be the owner thereof and that appellant had no title thereto; that in addition to the amount paid to the trustee, as stated, appellant expended sums for taxes and in defense of the title, all of which, with interest thereon, he seeks to recover from respondents. It was further alleged:

> "That at the time said plaintiff made his said bid to said California-Pacific Title Insurance Company, said trustee for said property, said plaintiff believed, and plaintiff is informed and believes and therefore alleged the fact to be, that said trustee believed and said Frederica Meyerstein believed that said trustee was selling and would convey to said S. Mitchell the title to said real estate clear of incumbrances, and that they were all mutually mistaken in that regard, and were all at said time ignorant of the fact that there was an incumbrance on said property prior to said deed of trust, and that said sale would not have been made by said trustee, and said purchase would not have been made by plaintiff, except by reason of said mutual mistake. * * *"

The demurrers of respondents having been sustained, appellant declined to amend, whereupon judgment was entered, from which the appeal was taken.

[1] The action, as against respondents Meyerstein and California-Pacific Title Insurance Company, is not one to recover damages for a breach of the covenants of the deed executed to appellant, but to recover benefits alleged to have been conferred in reliance upon the erroneous belief of these parties that the title to the land, at the time of the sale by the trustee and the execution of its deed, was vested in the latter. The obligation to make restitution under such circumstances not being contractual, but one imposed by law, the benefit conferred would be the measure of appellant's right in relief.

[2] As against respondent Bakersfield Abstract Company, whose obligation was contractual (1 Corp. Jur. p. 368; Russell & Co. v. Polk County Abstract Co., 87 Iowa, 233, 54 N. W. 212, 43 Am. St. Rep. 381; Equitable B. & L. Ass'n v. Bank of Commerce, etc., 118 Tenn. 678, 102 S. W. 901, 904, 12 L. R. A. [N. S.], 449, 12 Ann. Cas. 407; Bremerton Development Co. v. Title Trust Co., 67 Wash. 268, 121 P. 69), the relief to which appellant would be entitled, a breach of duty under the contract being shown, is the amount which would compensate for all the detriment proximately caused thereby (Civ. Code, § 3300). While the point is not raised by the demurrers of the respondents, it is apparent that two distinct causes of action were sought to be stated against different defendants, the ultimate facts of one having no connection with those of the other except so far as they tend evidentially to their support. The pleading sufficiently shows that at the time of the execution of the deed to appellant the title was not vested in the trustee. It is contended by respondents Meyerstein and California-Pacific Title Insurance Company that a sale of the character described is analogous to a judicial sale, to which the rule of caveat emptor applies; and that if a party takes a conveyance without covenants he is without remedy in case of failure of title, and if with covenants his remedy upon such failure is confined to the covenants. Such was the view as to conveyances without covenants in the earlier decisions in California, following the rule at common law, fraud or mistake in the transaction being absent. Fowler v. Smith, 2 Cal. 39; Salmon v. Hoffman. 2 Cal. 138, 56 Am. Dec. 322; Peabody v. Phelps, 9 Cal. 213; Bryan v. Swain, 56 Cal. 616. This rule also applies to judicial sales. Estate of Verwoert, 177 Cal. 488, 171 P. 105; Miller & Lux v. Gray, 136 Cal. 261, 68 P. 770. But, as held in the Estate of Backesto, 63 Cal. App. 265, 218 P. 597, a sale is not properly speaking a judicial sale unless it is made upon express order of court having jurisdiction of the subject-matter of the sale, and which it directs to be made for the purpose of carrying its judgment into effect or directing a disposition of its proceeds; and where, as in the case last cited, a sale of property is made under express and mandatory directions contained in a will which has been admitted to probate, such is not a judicial sale, and the transaction as between the executor and the vendee is attended with the same incidents as similar contracts between any other vendor and vendee.

[3] "Wherever a person is ignorant or mistaken with respect to his own antecedent and private legal rights, interests, estates, duties, liabilities, or other relations, either of property or of contract or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous, if not identical, with a mistake of fact." Pomeroy's Eq. Jur. (4th Ed.) vol. 2, § 849, p. 1734.

[4, 5] As affected by the question of a mistake as to title, it is the general rule that, where there is a mutual mistake as to the vendor's title, the vendee may rescind the contract, even where executed, and recover the price (Houston v. N. P. R. R. Co., 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325; Goettel v. Sage, 117 Pa. 298, 10 A. 889; Strothers v. Leigh, 151 Iowa, 214, 130 N. W. 1019; 36 A. L. R. 482, note), or plead the failure of consideration as a defense to an action for the purchase price (Rice v. Goddard, 14 Pick. [Mass.] 293; Frisbee v. Hoffnagle, 11 Johns. [N. Y.] 50). And where it is alleged that a purchase of real property was induced by a mistake, all the parties to the transaction believing the title to be vested in the grantor, who was without title, as held in Horne v. Hughes, 19 Cal. App. 6, 124 P. 736, the mistake is one within the provisions of subdivision 2 of section 1577, Civil Code, and,

no interest in the premises having been conveyed, no necessity exists for reconveyance or tender thereof before suit.

[6] Respondents Meyerstein and California-Pacific Title Insurance Company further contend that the complaint fails to state a cause of action against them in that no demand for restitution is alleged. It is averred that the mistake as to title was mutual; and no facts are alleged from which it may be inferred that respondents mentioned had knowledge or notice of the mistake prior to the filing of the complaint.

[7] The right of one who confers a benefit in misreliance on a right or duty is equitable in character, and should be held to arise only when the recipient of the benefit is notified or learns that a mistake has been made in consequence of which he ought to make restitution. Woodward Quasi Contracts, § 32; 17 Cal. Jur. "Money received," § 19, p. 624. As said in Dunham v. McDonald, 34 Cal. App. 744, 748, 168 P. 1063, 1064:

> "In the ordinary action for money had and received by one party for the use of another demand is unnecessary to be made before suit brought. * * * This rule applies generally * * * where by reason of a contract, express or implied, the obligation of the debtor is fully liquidated and the duty rests upon him at all times to pay. * * * We apprehend that this duty to pay does not arise until the debtor has knowledge, or should have knoweldge by reason of the circumstances, that he actually owes the claimant money. If he does not know and under the circumstances is excused from inquiring to ascertain the fact, then it would seem that he should be entitled to have demand made upon him and the opportunity to settle before suit."

And in Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161:

> "Where the mistake is mutual, both parties are innocent, and neither is in the wrong. The party honestly receiving the money through a common mistake owes no duty to return it until at least informed of the error. It is just that he should have an opportunity to correct the mistake, innocently committed on both sides, before being subjected to the risks and expenses of a litigation."

In the cases cited the distinction between the duty to perform without demand a true contract, express or implied, and the obligation imposed by law to make restitution, where the recipient of the benefit conferred through mistake remains in ignorance of the fact, is observed, this distinction being recognized and the latter rule applied in the following cases: Bledsoe v. Stuckey, 47 Cal. App. 95, 190 P. 217; Thresher v. Lopez, 52 Cal. App. 219, 198 P. 419. The rule is applicable to the instant case, and consequently the fact of a demand should have been alleged.

[8] It is further urged that the action as against respondent Bakersfield Abstract Company, being upon contract not founded on an instrument in writing (Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am. St. Rep. 115), the two-year limitation provided by subdivision 1 of section 339 of the Code of Civil Procedure applies, and that the proviso therein, that causes of action upon contracts evidenced by certificates of title shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party, is in contravention of subdivision 32, section 25, of article 4 of the Constitution, which provides that the Legislature shall not pass local or special laws for the limitation of civil or criminal actions; and that, in the absence of an allegation that appellant relied on the certificate in making the purchase and payment, no cause of action is stated.

In view of the character of the service rendered by those engaged in the business of examining and certifying titles, the reliance necessarily placed on their reports, and the effect of such reliance in preventing independent investigation, the classification contained in the section is based on intrinsic differences between such contracts and others which reasonably justify a different regulation as to the time when a cause of action thereon shall accrue, and is not in conflict with the constitutional provision mentioned. Rode v. Siebe, 119 Cal. 518, 51 P. 869, 39 L. R. A. 342; Ruperich v. Baehr, 142 Cal. 190, 75 P. 782.

[9] The complaint alleges that the deed from the trustee was executed prior to the issuance of the certificate of title, and contains no allegation that appellant relied on the certificate either in making the purchase or paying the price. It is essential to the statement of a cause of action that the plaintiff relied and acted upon the abstract or certificate furnished (1 Corp. Jur. 371), this rule being recognized in all the cases involving actions on similar contracts which have been brought to our attention (Batty v. Fout, 54 Ind. 482; Hershiser v. Ward, 29 Nev. 228, 87 P. 171; Equitable B. & L. Ass'n v. Bank of Commerce, etc., 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. [N. S.] 449, 12 Ann. Cas. 407); and in the analogous case of misreliance upon a representation untrue in fact, whether wilfully false or not warranted by the information of the party making it, though believed by him to be true, the fact of reliance upon such representation is a necessary allegation (Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; Stern v. McDonald, 47 Cal. App. 79, 190 P. 221; 12 Cal. Jur. "Fraud and Deceit," § 68, p. 812).

[10] It is alleged that upon the receipt of the certificate appellant "caused the amount of money which had been bid by him at said sale for such property to be paid over for such property." If an averment can be held clearly to imply a fact essential to the statement of a cause of action, it will be held sufficient as against a general demurrer; but where, as

here, the fact of reliance upon the certificate does not follow as a necessary implication from the allegation of payment, the latter not being inconsistent with nonreliance, the facts essential to the statement of a cause of action are wanting, and the demurrer was properly sustained.

It being our conclusion that the complaint failed to state a cause of action against the respondents, it is unnecessary to consider other grounds of objection thereto presented by the demurrers.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 69

MURRAY v. GUARANTEE TRUST & SAVINGS BANK et al. (Civ. 5203.)*

(District Court of Appeal, First District, Division 1, California. July 30, 1926.)

1. Lost instruments 🔑8(3).

Evidence *held* to sustain findings that deceased executed deed to wife, that deed was lost, and that she was owner of certain properties conveyed thereby.

2. Executors and administrators 🔑187.

That a widow has sufficient property of her own does not affect her right to such a family allowance as is reasonably necessary for her support.

3. Executors and administrators 🔑194(5)—Evidence held to sustain finding that widow making misstatements in petition for family allowance was not estopped to claim title to property conveyed to her by deceased husband.

Evidence *held* to sustain finding that widow, making misstatements in petition for family allowance that she had no property of her own other than property not in dispute, was not estopped to claim title to properties conveyed to her by her deceased husband, in view of absence of detriment other than reduction of estate by amount of the allowance.

4. Equity 🔑67.

Question of laches is addressed to sound discretion of trial court in first instance.

5. Witnesses 🔑149(2)—Statute as to incompetency of witnesses against executor held not to apply to actions to quiet title to real property, brought by surviving spouse against the estate (Code Civ. Proc. § 1880, subd. 3).

Code Civ. Proc. § 1880, subd. 3, making incompetent as witnesses parties to action against executor on demand against the estate as to any matter occurring before death of deceased, does not apply to actions to quiet title to real property, brought by surviving spouse against the estate.

6. Appeal and error 🔑1050(1)—Admitting testimony that printed portion of deed shown witness was same as lost instrument held not prejudicial error, in view of previous testimony.

In action to quiet title to land, where plaintiff had testified with sufficient certainty that lost instrument was a grant, bargain, and sale deed, and as to its contents, admitting her testimony that the printed portion of lost instrument was the same as that of a grant deed shown to her was not prejudicial error.

7. Lost instruments 🔑8(3).

To establish execution and contents of a lost instrument, evidence must be clear, satisfactory, and convincing, but trial court's determination, thereon, supported by substantial evidence, is conclusive.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action to quiet title by Lucy E. W. Murray against the Guarantee Trust & Savings Bank, as executor of the last will and testament of John E. Murray, deceased, and others. From the judgment, defendants Emmet Y. Murray and wife appeal. Affirmed.

Leo V. Youngworth, Harry J. McClean, Arthur W. Eckman, and Jerry H. Powell, all of Los Angeles, for appellants.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

CASHIN, J. An action by respondent Lucy E. W. Murray, the surviving wife of John E. Murray, to establish her claim to certain real property. The complaint, which consists of two counts, alleges a cause of action to quiet title, and the execution by John E. Murray of a deed conveying the property to respondent, and the loss of the deed. Appellants Emmet Y. Murray and Jane Doe Murray, his wife, were joined as defendants with Guarantee Trust & Savings Bank, a corporation, as executor of the last will and testament of John E. Murray, deceased, and Security Trust & Savings Bank, a corporation, the successor to the business of the corporation first named. Judgment was entered for respondent quieting her title to two of the parcels of real property which are hereinafter described, together with a personal judgment against the corporations named for the amounts received by the latter as the income therefrom. The defendants Murray have appealed, the appeal being presented on the judgment roll and a bill of exceptions.

Appellants urge as grounds for reversal rulings of the trial court in admitting evidence over objection, an insufficiency of the evidence to sustain the findings, laches on the part of respondent, and that the latter is estopped by her conduct from maintaining the action.

Respondent and John E. Murray intermarried on September 8, 1910, and the latter died

---

*Hearing denied by Supreme Court September 27, 1926.

testate on August 2, 1919, leaving surviving him the respondent and Emmet Y. Murray, his son, the latter being the issue of a previous marriage. The action involves the title to three parcels of real property situate in the county of Los Angeles, described as an undivided one-half interest in lots 10 and 11, block 33, of West End University addition, lots 22 and 23, subdivision of lot 1 of block 37 in Hancock's survey, and lots 4 and 5, block 22, and lot 4, block 25, in Alamitos Bay tract. The parcels described were known to the parties and referred to in the proceedings as the "Westmoreland," "Murray apartment," and the "Alamitos" properties, respectively.

The complaint alleged that John E. Murray on or about July 16, 1915, executed to respondent a grant, bargain, and sale deed to the parcels mentioned, and that the deed (which was not recorded) was subsequently lost. The court found these allegations to be true, and further found respondent to be the owner of the Murray apartment and Alamitos properties, and that defendants and the estate of the deceased had no right, title, or interest therein. It was also found that respondent was without title to the Westmoreland property, the finding stating that "the court makes no finding as to who is the owner of said property." The court further found against defendants' special defenses, which included the allegations of laches on the part of respondent, and that she by her conduct was estopped to claim title to the property.

The record shows that the proposed marriage between respondent and John E. Murray caused friction between the latter and his son, to allay which the father, shortly before the event, agreed in writing to convey to his son portions of his property, the latter agreeing as provided therein "to let his father alone and allow him to pursue his own plans of life without annoyance or molestation and to endeavor to be pleasant, agreeable and harmonious in every respect"; and it further appears that the relations between the respondent and the son were never cordial; that pursuant to the agreement a deed dated August 12, 1911, was executed by Murray to his son, conveying an undivided one-half interest in and to the Westmoreland property, this deed being followed by a second dated June 17, 1914, likewise conveying an undivided one-half interest therein. According to the testimony respondent was not apprised of the latter conveyance until after the execution of the deed here in question. It was shown that at the time of the execution of the second deed mentioned above appellant Murray was the owner of an undivided one-half interest in the Murray apartment property. This interest was acquired by the deceased about the date of the deed last mentioned, and the apartments were subsequently erected on the property.

[1] The evidence adduced in support of respondent's claim consisted of her testimony, that of Amy Wheeler, her sister, and a notary public. Respondent and the notary testified that on the date alleged a conveyance, in form a grant, bargain, and sale deed, of the three parcels mentioned was signed by deceased, acknowledged before the notary public, and, in the presence of the latter, delivered to respondent. Respondent testified that the deed was not recorded, but was inclosed in an envelope, upon which was indorsed the name of respondent with a note thereon of its contents; that she, accompanied by her husband, then visited the Commercial National Bank of Los Angeles and placed it in a safe deposit box to which both had access; that following the death of Murray it was found that the envelope with the deed had been removed therefrom. These witnesses, both of whom were familiar with documents of this character, testified with sufficient certainty to the contents of the instrument. According to the testimony of Amy Wheeler, the deceased, subsequent to the date of the alleged deed, stated to her that a conveyance of the property had been made to respondent. Respondent further testified that her husband did not request that the deed be withheld from record, and stated that her reasons for not recording it were as follows:

> "I was afraid that if I recorded that deed it might hurt Mr. Murray's credit. Mr. Murray and I were very much involved in debt; Mr. Murray had very good friends who had extended large credit to him, and I was afraid that if these people knew that Mr. Murray had deeded his property to me, they, not knowing the circumstances, might not be willing to continue giving him credit. It was entirely my own idea not to record it."

The deceased on two occasions following the dates of the alleged conveyance to his wife and the conveyances to his son included the properties described therein in lists of his assets furnished the Commercial National Bank for the purpose of obtaining credit. After his death the executor in the course of administration collected the rents from the apartment house, and, with the approval of respondent, let the property for a term, although respondent, as testified by an officer of the executor corporation, on more than one occasion made claim of ownership of the property; and the court found in this connection that the executor at all times was aware of respondent's claim thereto. Before the instant action was commenced respondent obtained an order for the payment of a family allowance from the estate in the sum of $350 per month. In her petition therefor it was alleged that the property of the estate consisted almost wholly of an apartment house and its furnishings; that petitioner had no property of her own, either real or personal, other than a parcel of land (which is not involved in this action) and the proceeds of an insurance policy paid after the death of her husband. Respondent testified that the petition was prepared and submitted for her signature by her attorney at a time when she was suffering from an attack of typhoid fever; that she read the document, but that in signing it she understood from the fact that the record title stood in the deceased that until she could bring suit to prove her claim "the property would be handled by the administrator." Respondent's testimony that her husband had access to the safe deposit box was corroborated by an employee of the depositary; and it appears from that of a witness who occupied a portion of the office maintained by the deceased that on the morning following the death of the latter appellant Murray took from the office desk of his father certain papers the character of which was unknown to the witness.

The evidence adduced in support of the allegations of the execution and loss of the deed was believed by the trial court; and while the failure to place the deed of record, together with the statements by respondent in the petition for a family allowance, were facts from which inferences favorable to appellants' contentions might have been drawn, respondent's explanation of her reasons therefor satisfied the court, and we cannot say that its conclusions do not find substantial support in the evidence.

[2] It is urged by appellants that the statements in the petition mentioned and the acceptance of the family allowance estop respondent from asserting a claim to the property. The law is well settled that the fact that a widow has sufficient property of her own does not affect her right to such an allowance as is reasonably necessary for her support. Estate of Lux, 114 Cal. 73, 45 P. 1023; Estate of Bump, 152 Cal. 274, 92 P. 643; Estate of Cowell, 164 Cal. 636, 130 P. 209; Estate of Finch, 173 Cal. 462, 160 P. 556.

[3] The value of the estate, excluding the property involved in this action and including the furniture in the Murray apartments, the title to which appears to be in dispute, was about $18,000, in addition to which the executor in the course of administration received as income from the personal property the sum of approximately $10,000. Had respondent's claim been then established the fact would not have precluded the making of a suitable allowance, and it is not contended that the sum allowed exceeded that reasonably necessary for her support. As shown, the executor was then in possession and collecting the income with knowledge, as found, of respondent's claim. The explanation by the latter of the apparent misstatement in the petition, in view of these circumstances, as stated, satisfied the trial court; and, it not being shown that the executor or appellants were misled to their injury or suffered detriment other than to the extent that the value of the estate was reduced by the payment of the allowance, the conclusion of the court, which is one of fact (Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; Parke v. Franciscus, 194 Cal. 284, 228 P. 435), that respondent was not estopped is fairly sustained by the evidence.

[4] The finding against the defense of laches involves the determination of a question which in the first instance is addressed to the sound discretion of the trial court. In view of the circumstances shown, it cannot be said that the delay was of such duration as to render inequitable an inquiry as to the validity of the respondent's claim, and the conclusions of the court find support from the evidence. Akley v. Bassett, 189 Cal. 625, 209 P. 576; Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; Suhr et al. v. Lauterbach, 164 Cal. 591, 130 P. 2.

[5] Appellants contend that, as to matters which occurred before the death of her husband, respondent was not a competent witness, and that the court erred in permitting her to testify to facts in connection with the execution of the deed and in admitting her testimony that the printed portion thereof was the same as that of a grant deed shown the witness which had been admitted in evidence for another purpose. That the provisions of subdivision 3 of section 1880, Code of Civil Procedure, have no application to actions by a surviving husband or wife to quiet the title of real property against the estate of a deceased spouse is a rule established by numerous decisions (Booth v. Pendola, 88 Cal. 36, 23 P. 200, 25 P. 1101; Poulson v. Stanley, 122 Cal. 655, 55 P. 605, 68 Am St. Rep. 73; Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838), and in the instant case the personal judgment entered against the executor was based so far as shown on the record and facts proved by the accounts kept by the latter and the testimony of its employees.

[6] Respondent testified that the lost instrument was a grant, bargain, and sale deed, and stated its contents with sufficient certainty. The apparent purpose of the question referring to the instrument shown the witness was to further refresh her recollection as to the character of the deed in question. Such testimony was impliedly held to be admissible in Kenniff v. Caulfield, 140 Cal. 34, 43, 73 P. 803, and its admission, if erroneous, was not, in view of respondent's previous testimony, prejudicial.

[7] It is the rule that in order to establish the execution and contents of a lost instrument it is necessary that the evidence be clear, satisfactory, and convincing; but, as in actions to prove a trust by parol, whether the evidence in any particular case is of that character must be left largely to the trial court, and where there is substantial evidence supporting its finding its determination thereon must be accepted as conclusive on appeal. Sherman v. Sandell, 106 Cal. 373, 39 P. 797;

Harris v. Harris, 136 Cal. 379, 69 P. 23; Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196.

It is our conclusion that the evidence was sufficient to support the findings, and, no prejudicial error being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 160

PEOPLE v. BELLAMY. (Cr. 889.)

(District Court of Appeal, Third District, California. Aug. 9, 1926.)

1. Criminal law 🔑1159(3).

Where the evidence is conflicting, conviction of pimping cannot be disturbed on appeal.

2. Indictment and information 🔑159(2)—Insertions in indictment relating to form only held authorized by Pen. Code, § 1008.

Inserting, in indictment for pimping, words "a female person" after name of prostitute, and words "of the prostitution" after word "proceeds" in phrase "did derive support from the proceeds of said prostitute," related to form only, and was authorized by Pen. Code, § 1008.

3. Criminal law 🔑371(9).

In prosecution for pimping, under St. 1911, p. 10, testimony of other offenses of the same nature is admissible as corroborative, to show defendant's disposition, and to support the offense charged.

4. Criminal law 🔑722½.

In prosecution for pimping, arguing evidence of alleged prior offenses of the same nature, and commenting on failure to produce witnesses to rebut testimony as to them, was not ground for reversal, where testimony was admissible.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Frank Bellamy was convicted of pimping, and he appeals. Affirmed.

Wallace Shepard, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

NEEDHAM, Justice pro tem. The defendant was charged by an indictment of the grand jury of the county of Sacramento with the crime of pimping, as defined by the Statutes of 1911, page 10, which reads as follows:

> "Section 1. Any male person who, knowing a female person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of the prostitution of such prostitute, or from moneys loaned, or advanced to or charged against such prostitute by any keeper, or manager, or inmate of a house or other place where prostitution is practiced or allowed, or who shall solicit or receive compensation for soliciting for such prostitute, shall be guilty of a felony, to wit: pimping, and upon conviction for an offense under this act shall be punished by imprisonment in the state prison for a period of not less than one year nor more than three years.
>
> "Sec. 2. Any such female person referred to in the foregoing section shall be a competent witness in any prosecution under this act to testify for or against the accused as to any transaction or as to any conversation with the accused or by him with another person or persons in her presence, notwithstanding her having married the accused before or after the violation of any of the provisions of this act, whether called as a witness during the existence of the marriage or after its dissolution."

The defendant was convicted by the jury; thereupon he moved for a new trial, which was denied, and he was sentenced to imprisonment in the state prison. He prosecutes this appeal from the judgment and the order denying him a new trial.

[1] The appellant in his brief refers at length to the evidence in the case, but a careful examination of the record discloses that the evidence against the defendant is overwhelming. The appellant in his brief states:

> "The evidence given at the trial is conflicting. If the prosecutrix can be believed, there can be no question but that during the month of May, 1925, she was a prostitute, practiced prostitution, and received money therefor, which money she gave to the defendant, Bellamy, and upon which he subsisted during that month."

The counsel for defendant thereupon devotes many pages of his brief to a discussion of the testimony and states in effect that it is so improbable, involved, contradictory, and confused that it cannot be believed. However, it is fundamental that, where the evidence is conflicting, the verdict of the jury cannot be disturbed upon appeal, and we are satisfied that the testimony overwhelmingly supports the verdict of the jury. Therefore we are not called upon to review the evidence; it is of sordid nature, and no good purpose can be served in doing so.

[2] The indictment found by the grand jury was amended by the court. It seems that the defendant had pleaded not guilty to the original indictment and the defendant was permitted to withdraw his plea and interpose a demurrer, which was sustained. Thereupon the court permitted certain amendments to the indictment by the insertion upon its face of certain words by the clerk with a pen. The charging part of the indictment as amended reads as follows:

> "The said Frank Bellamy on the —— day of May, A. D. 1925, at the county of Sacramento, in the state of California, and before the finding of this amended indictment, being then and there a male person and then and there knowing Laura Belle Matson, *a female person*, to be a prostitute, did then and there knowingly, will-

fully, unlawfully, and feloniously live and derive support and maintenance from the earnings and proceeds *of the prostitution* of said prostitute, contrary to the form," etc.

We have italicized the words which were added by the clerk upon the direction of the court by way of amendment. The defendant claims error was committed by permitting the indictment to be so amended, and takes the position that the original indictment was fatally defective, and that the purported amendment was without effect. There is no merit in this contention. It is plain that the amendment was authorized by section 1008 of the Penal Code. The amendment did not change the offense charged, as it related to matters of form only, and not to matters of substance. The right of the court to permit such an amendment has been upheld many times by our courts. See People v. Anthony, 20 Cal. App. 586, 129 P. 968; Ex parte Chambers, 32 Cal. App. 476, 163 P. 223, People v. Wilhite, 49 Cal. App. 246, 193 P. 151; People v. Cockrill, 62 Cal. App. 22, 216 P. 78.

[3] The defendant next complains that error was committed in allowing certain testimony to be received of alleged prior offenses of the same nature upon the theory that the same could be received to show guilty knowledge, intent, plan, or system. The crime charged was in its nature a continuing crime. The language of the indictment to the effect that the defendant "did then and there knowingly, willfully, unlawfully, and feloniously live and derive support and maintenance from the earnings and proceeds of the prostitution of said prostitute" would necessarily inform the defendant that, notwithstanding that the date of the alleged crime was charged in the indictment to be "the ——— day of May, A. D. 1925," evidence of similar offenses to that with which the defendant was charged would, if not too remote, be introduced. This rule has been applied to prosecutions for adultery, incest, seduction under promise of marriage, statutory rape upon a child under the age of consent, infamous crime against nature, and sexual crimes against children. See section 176, 8 Cal. Jur. p. 74, and cases cited. Such evidence is admitted not as proof of independent substantive offenses. Such evidence is admitted as corroborative evidence to show the disposition on the part of the defendant and tending to support the one specific offense for which the defendant is being tried. See People v. Troutman, 187 Cal. 313, 201 P. 928, and the cases set forth in note 14, § 176, p. 74, 8 Cal. Jur. We are of the opinion that the crime denounced in the present prosecution and known as pimping comes within the same rule as the offenses above herein set forth, and we are constrained to hold that the evidence introduced and permitted by the court was not too remote, and that the admission of the same was not error.

[4] The next ground urged by the appellant for reversal is that the court committed error in allowing the district attorney to argue to the jury the evidence received as to the offenses alleged to have been committed prior to the crime laid in the indictment, and to comment upon the failure of defendant to produce witnesses to rebut the testimony as to these prior offenses.

We do not think it necessary to examine in detail the language used by the district attorney. Our holding that the testimony received of prior offenses was not error necessarily authorized the district attorney to argue and comment upon such testimony and the failure of the defendant to produce witnesses to rebut the same.

The appellant finally argues that the defendant was denied a fair trial and that the judgment should be reversed. We have carefully examined the whole record, including the evidence, and we are irresistibly brought to the conclusion that the defendant was fairly tried and justly convicted.

It is therefore ordered that the judgment and order be and the same are hereby affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

79 Cal. App. 98

PEOPLE v. SCHWARZ et al. (Cr. 1372.)

(District Court of Appeal, Second District. Division 1, California. Aug. 4, 1926.)

Bail ⚷49.

Petitioner's statements concerning condition of health and inconveniences incident to detention in jail, supported only by her affidavit, *held* not to show abuse of discretion in denying application for admission to bail, pending appeal.

F. Amy Wallington and another were prosecuted for violating Pen. Code, § 95, and after conviction the named defendant applies for leave to renew application for admission to bail, pending appeal from two orders of the superior court. Application denied.

Max Schleimer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CONREY, P. J. Appellant has filed herein her petition for leave to renew application to admit defendant to bail pending appeal. A statement of the previous record on appeal will aid in understanding this application.

On April 7, 1926, and prior to the filing of any transcript on appeal, petitioner filed an application for stay of execution of the judgment. Disposition of this application was

---

made by the Second District Court of Appeal, in Division 2, in a short opinion (People v. Wallington, 246 P. 815), which reads as follows:

> "By the Court: It appears from the face of the application for a stay of execution of the judgment, under section 1243 of the Penal Code, that the appeal from the judgment is abortive and that the order made after judgment necessarily must be affirmed. The appeal from the judgment was not taken in time. Pen. Code, § 1239; Starr v. Superior Court, 23 Cal. App. 670 [139 P. 241]. The sufficiency of the indictment could not be questioned on the motion made in the lower court to set aside the judgment after it had become final. People v. Mooney, 178 Cal. 525 [174 P. 325]; People v. Reid [195 Cal. 249], 232 P. 457 [36 A. L. R. 1435]. The application for stay of execution is denied."

The clerk's transcript on appeal was filed on April 20th, and the reporter's transcript on May 10th. On April 23d the case was assigned to Division 1. On May 3d, in this division, a certificate of probable cause was granted, after denial of such certificate by the judge of the superior court. On May 17th appellant filed herein an application for release on bail pending appeal. Responding to that application, on May 19th, we entered an order as follows:

> "It appearing to the court that said petition is insufficient and that abuse of discretion has not been shown in the denial of bail by the superior court, it is ordered that the application be and the same is hereby denied."

Appellant's opening brief on her appeal was filed on June 17th. The present application "for leave to renew application to admit defendant to bail pending appeal" adds nothing of substance to the former application, except that appellant calls attention to her opening brief on appeal, and argues therefrom that, in all probability, this court will reverse the orders appealed from. As the appeal from the judgment must be disregarded because not made within the period allowed by law, there remain in this court only the appeal from an order of April 5, 1926, denying appellant's motion to set aside judgment and sentence, and the appeal from the order of April 9, 1926, denying her application to set aside the sentence, and to vacate the judgment, and for permission to withdraw the plea of guilty, and plead not guilty to the indictment.

Assuming, but not deciding, that the grounds of appeal stated and argued in appellant's opening brief present propositions of such debatable character that they might lead the court to reverse the orders appealed from, nevertheless we do not consider that there is sufficient reason for admitting defendant to bail pending appeal. The statements made by petitioner concerning the condition of her health, and the inconveniences incident to her detention in jail (set forth in her former petition for admission to bail), were not supported by any evidence other than her own affidavit, and the record thereon is not sufficient to prove that there was any abuse of discretion in the denial by the superior court of appellant's application for admission to bail pending appeal.

For the foregoing reasons, the present application is denied.

We concur: HOUSER, J.; YORK, J.

---

79 Cal. App. 64

Ex parte MURPHY. (Cr. 943.)

(District Court of Appeal, Third District, California. July 30, 1926.)

1. Habeas corpus ⚷92(1)—Upon petition for habeas corpus, inquiry is limited to questions affecting jurisdiction, legality of proceedings, and validity of commitment.

Upon petition for habeas corpus, the scope of inquiry is limited to questions affecting jurisdiction of court, sufficiency in point of law of proceedings, and validity of judgment or commitment under which prisoner is restrained.

2. Holidays ⚷5—Where court took testimony on a nonjudicial day, but rendered final judgment of conviction on judicial day, judgment was valid.

Where a portion of the evidence was taken without objection on a Saturday afternoon, but final judgment of court entered upon a judicial day, judgment of conviction was valid.

3. Habeas corpus ⚷30(1).

Where court had jurisdiction to pronounce judgment, whatever infirmities crept into trial preceding judgment cannot be considered on application for habeas corpus.

Application by Edmund J. Murphy for a writ of habeas corpus, to be directed to the Sheriff of Sacramento County. Writ denied.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for petitioner.

PER CURIAM. This matter is before the court upon application for a writ of habeas corpus after judgment of conviction, and only one point is presented for our consideration. The petition alleges that on Saturday afternoon, December 18, 1920, a portion of the testimony of one Fred A. Smith and the whole of the testimony of one Henry Heidelberg was taken as a part of the trial of the defendant. It appears that on said day when the hour of noon arrived the court mentioned such fact, and petitioner's counsel stated: "We make no objection to finishing with this witness." At that particular time the witness, Fred Smith, was being examined. After the conclusion of the testimony of Fred Smith it appears that Henry Heidelberg, a witness for the defense, was examined; that no objection was made to the examination of the witness Heidelberg, but that petitioner's counsel did examine said witness. The verdict of the jury and the judgment of the court were entered upon a judicial day. The contention, however, here is made that because the court took testimony or a portion of the testimony during a nonjudicial day that the whole proceeding is void.

[1] The law appears to be well settled that upon a petition for a writ of habeas corpus the scope of the inquiry is limited to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. This inquiry is limited to the face of the proceedings. In other words, the alleged invalidity must appear upon the face of the judgment attacked by this method. 12 R. C. L. 1185, § 8, page 1240, § 59; 13 Cal. Jur. 217, § 4, and cases there cited. In Ex parte Long, 114 Cal. 159, 45 P. 1057, it is stated:

> "The inquiry to be had thereunder [on habeas corpus proceedings] does not extend beyond the question of jurisdiction and the validity of the process on its face." People ex rel. Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 111.

See, also, Ex parte Bracklis, 52 Cal. App. 274, 198 P. 659, as to what question cannot be inquired into upon habeas corpus proceedings.

[2] The petition relies upon the case of Ex parte Dal Porte (Cal. Sup.) 244 P. 355. In that case the defendant was tried, convicted, and judgment pronounced on a holiday. It appears, of course, upon the face of the proceedings that the trial and the judgment were had and entered at a time when the court was without jurisdiction to enter judgment. It follows the case of In re Smith, 152 Cal. 566, 93 P. 191, where the judgment was entered upon a nonjudicial day and held void. The facts in the case at bar are similar to those considered in People v. Maljan, 34 Cal. App. 384, 167 P. 547. In that case it was held a defendant cannot complain that his trial was finished on a Saturday afternoon in violation of sections 133 and 134 of the Code of Civil Procedure, where his attorney in open court waived the right to object to the trial proceeding upon his attention being called to the fact that the hour of noon had arrived. A petition for hearing in the Supreme Court was denied in that case. In the case of State ex rel. Walter v. Superior Court, 49 Wash. 1, 94 P. 665, 17 L. R. A. (N. S.) 257, the Supreme Court of Washington had before it a case where the circumstances were identical with those at bar. It was there held that a judgment entered on a judicial day will not be declared void because evidence was taken and arguments heard without objection on a day which had, without knowledge of the court, been proclaimed by the Governor to be a holiday. The court in the consideration of that case reviews the different decisions having to do with proceedings had upon holidays where judgments have been held void, and pointed out the distinction between the case then being considered and the cases where the judgments were held void—that is, where evidence is taken on a nonjudicial day and the final judgment of the court is entered upon a judicial day. It is held that under such circumstances the judgment is valid. The language of the court is pertinent here:

> "The only question presented is whether the final judgment entered on a judicial day became void by reason of prior judicial proceedings conducted on the holidays, to which the relator at the time failed to object, or to which, in other words, he impliedly assented. There is much conflict of authority as to the validity of judicial proceedings conducted on holidays. The relator contends that the evidence admitted and the arguments made on the holidays were considered by the trial court in reaching the final judgment; that the hearing and consideration of such evidence and arguments were void judicial proceedings, which entered into the final judgment and avoided it also. In support of this position he cites, with others, the following authorities upon which he bases his principal arguments: Davidson v. Munsey, 27 Utah, 87, 74 P. 431; Lampe v. Manning, 38 Wis. 673; State v. Green, 37 Mo. 466; Merchants' Nat. Bank v. Jaffray, 36 Neb. 218, 19 L. R. A. 316, 54 N. W. 258; Poor v. Beatty, 78 Me. 580, 7 A. 541; Hemmens v. Bentley, 32 Mich. 89; Ex parte Tice, 32 Or. 179, 49 P. 1038. We have carefully examined these and all other cases cited by the relator, and find that in no one of them, except Davidson v. Munsey, supra, was the final judgment or order, alleged to be void, entered or made upon a judicial day, as in this case. In Lampe v. Manning, supra, relator's leading case, the cause was tried and the judgment was entered on a legal holiday. In State v. Green, supra, the giving of instructions to the jury in a criminal case was commenced on Saturday night, but completed after midnight, thus running into Sunday. Objection thereto was urged in the lower court by motion for a new trial, and the Supreme Court of Missouri with much reluctance held that the final judgment of conviction was erroneous. In Merchants' Nat. Bank v. Jaffray and Poor v. Beatty, supra, the orders claimed to be void were made and entered on holidays. In Hemmens v. Bentley, supra, a magistrate heard evidence on a judicial day, but made and entered the judgment on a holiday. In Ex parte Tice, supra, the Supreme Court of Oregon held that the act of a trial judge in discharging a jury on Sunday when they had failed to agree entitled the prisoner to be discharged, as he could not again be placed in jeopardy. This court in State v. Lewis, 31 Wash. 515, 72 P. 121, on a similar state of facts, after discussing the Tice Case, made a contrary ruling. With the exception of Davidson v. Munsey, supra, which by reason of our views hereinafter stated we disapprove, we have been unable to find any case based on statutes similar to our own, in which a judgment entered on a judicial day, after a portion of the trial had been con

ducted without objection on a holiday, was declared void."

[3] There is no question but that at the time the court entered judgment in this case it had jurisdiction over both the cause and the petitioner, which gives to the judgment full vitality when questioned upon habeas corpus proceedings. In the Dal Porte Case the records showed that the judgment was entered upon a holiday, which, of course, presented before the court the fact of the invalidity of the court's procedure. It was not held in that case that the court could go behind the face of the record. It simply held upon the face of the record it was apparent that the trial court had proceeded to pronounce judgment at a time when it had no authority so to do. Upon the record presented to us it appears that the trial court had jurisdiction to pronounce judgment, and whatever infirmities there may be that crept into the trial preceding the judgment cannot be considered.

The petition is denied.

---

78 Cal. App. 794

Ex parte GIBSON. (Cr. 1408.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1926.)

1. Habeas corpus 🔑25(1)—On habeas corpus, for release while waiting trial on criminal charge, defense of insanity held unavailable.

On habeas corpus to secure petitioner's release from custody while awaiting trial on criminal charge, defense of insanity *held* unavailable, but a matter of defense to be urged at trial.

2. Criminal law 🔑100(3) — Superior court might try defendant on charge there pending against him, without waiting until after trial under charge pending against him in another superior court, which had first acquired jurisdiction.

Superior court *held* entitled to try defendant on charge pending against him in that jurisdiction, without waiting until after a trial had occurred under a charge pending in superior court for another jurisdiction, though latter court had first acquired jurisdiction of defendant, and had committed defendant to state hospital as insane, from which institution he had escaped.

Application for writ of habeas corpus by Donald Gibson, directed to the sheriff of Los Angeles county, to secure petitioner's release from custody. Writ discharged. Petitioner remanded.

Fred H. Thompson, of Los Angeles, for petitioner.

Ernest R. Utley, Dist. Atty., of El Centro, for respondent.

WORKS, J. Petitioner, while under a criminal charge pending in the superior court in and for the county of Los Angeles, was adjudged insane and was committed to a state hospital; the commitment reciting that he was to be returned to that tribunal upon his discharge from the hospital. After his commitment to the institution petitioner effected an escape and found his way to the county of Imperial. He is now in the custody of the sheriff of the last-named county awaiting trial in the superior court there upon a criminal charge arising from acts alleged to have been committed by him after his arrival in that jurisdiction.

[1] Petitioner contends for his release from his present custody, and for an order requiring the sheriff to deliver him to the state hospital, on the ground that he is now insane. Under the return an issue is made as to petitioner's present condition of mind; but we find it unnecessary to decide that question, although evidence has been submitted to us upon it. If petitioner's present insanity is admitted as a basis for argument, we think he is not entitled to a release from the custody of the sheriff on that ground.

Respondent contends that the fact that petitioner is insane, if in truth he be so, cannot be availed of him in this proceeding. It is insisted that his alleged insanity is merely a matter of defense, to be urged at the trial of the charge pending against him in Imperial county. The soundness of this contention seems to be well established. "When a person is charged with crime by information or indictment, if the defense of insanity exists, it must be presented to the court having jurisdiction of the cause, and the decision of that court is final against any collateral attack. If an appeal is taken, the appellate court may consider the question. Its decision thereon, when it becomes final, if it affirms the judgment, puts the case beyond further consideration by any court. So far as the legality of the sentence for the crime charged is concerned, habeas corpus does not lie, unless the lack of jurisdiction appears on the face of the record of conviction. If it does not so appear, the jurisdiction will be presumed. These propositions also apply to the question whether the court had authority to proceed with the trial of the criminal charge upon the claim that he was at that time of unsound mind." In re Stevenson, 187 Cal. 773, 204 P. 216. Some of the reasons for the rule thus announced are to be found in the opinion of the court in the case of People v. Prosser, 56 Cal. App. 454, 205 P. 869.

[2] Petitioner says that the state hospital, while he was confined therein, retained the custody of his person as the agent, in effect, of the superior court in and for the county of Los Angeles, and that we must now order

his return to the institution, so that the agent may redeliver him to the principal upon his restoration to capacity. It is said that the superior court of the county of Imperial may not try petitioner on the charge pending against him in that jurisdiction, until after a trial has occurred under the charge pending in the superior court in and for the county of Los Angeles. In other words, it is said that for the present the last-named court, and that court alone, at least under the conditions shown in the present proceeding to exist, has jurisdiction to try a criminal charge against petitioner.

Questions similar to the one thus suggested by petitioner, and stated in these various forms, have arisen most frequently under claims of conflicting jurisdiction between state and federal courts. In a proceeding decided in a state court it appeared that one Mackin had been convicted by one of the trial courts of the jurisdiction, and that he was under confinement in a state prison pursuant to sentence imposed upon the conviction. At the time when the charge was preferred against him which brought about these results, he was under indictment in a federal court and had been released on bail. Pending his confinement in the state prison he sued out a writ of habeas corpus in the state court. In passing upon the merits of his claim for a release from custody the court said:

> "There is no pretense in the petition that the time for which Mackin was sentenced to the penitentiary has expired. The period was five years. It appears from the record of this court, and the petition and papers before us, that Mackin was tried in the circuit court of Cook county for the crime of perjury. The court that tried him had unquestioned jurisdiction of the offense. It is not claimed in the argument for this petition that that is not the fact. The record also affirmatively shows that Mackin was present in court during the trial from day to day; that he there was present, and received the judgment of the court, so that there was jurisdiction over his person; and that alone would seem to be sufficient to answer the prayer of this writ. He is convicted by a court of competent jurisdiction, sentenced to the penitentiary for a term of years. There is jurisdiction of his person, and he is now there under the judgment of the court. * * * It is claimed, however, on the part of the petitioner, that although Mackin was personally present in court during the trial of the cause, although there was actual control of his person, still that the fact that he had been previously arrested, and had previously given bail for his appearance in the United States Circuit Court, rendered that presence, as to him and as to the conviction which followed, a fraud upon the law and a nullity, so that, in construction of law, there was no jurisdiction of the person. We are not able to coincide in this view. We concede the position, established by the numerous authorities that are referred to in the petition, that, where a party commits offenses against two or more jurisdictions, the jurisdiction first obtaining custody of the defendant is entitled to proceed and try him. That, however, is a matter more of comity, and in order to avoid unseeming strife between conflicting jurisdictions, than as a matter of right to the defendant. We do not recognize that a defendant who is guilty of crime has a constitutional, statutory, or common-law right absolutely to be tried for one offense before he is tried for another offense." Mackin v. People [Ill.] 8 N. E. 178, not reported in state reports.

Under a state of facts exactly similar to those shown in Mackin v. People, supra, the same question arose upon a petition for the writ of habeas corpus in a federal court. It was said in deciding the point:

> "Has the accused, whose alleged malefactions have brought him within the range of two jurisdictions, the right to select the one to which he will first respond? When the questions involved in this case were argued by counsel representing the accused and his sureties on one side, and opposed by counsel representing the state authorities on the other, the United States attorney was in court, but made no suggestion that the United States desired the presence of the accused in this court in advance of the hearing in the state court. There is therefore no actual present conflict of judicial action, except such as the accused and his sureties seek to create by the present proceedings. * * * When the United States attorney desires the presence of the defendant in this court, the latter may be able to respond in person, or, if he still be detained in prison, he may be surrendered to the United States marshal by the state authorities, upon notice that the defendant is required in this court to answer the indictment. If, at that stage of the proceedings, any actual conflict of jurisdiction arises, it will be time enough then to consider what action should be taken to secure a proper enforcement of the law, bearing in mind the declaration of the Supreme Court of the United States in Covell v. Heyman, 111 U. S. 176, 182, 4 S. Ct. 355 [28 L. Ed. 390], 'that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord, but between the state courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' The writ will be discharged, and Fox remanded to the custody of the chief of police of Oakland." In re Fox (D. C.) 51 F. 427.

In a later habeas corpus proceeding, under a similar state of facts, a federal court said:

> "In the present application no motion is made by the United States. The physical custody of the defendant has been given up, and a contract on the part of the defendant to appear, and on the part of his surety to produce him, at a certain time, has been accepted with the approval of the United States court in the Pennsylvania district. No rights would seem to be violated by the exercise of the jurisdiction which the state courts of Kings county have exercised over the subject-matter of the case

and over the person of the defendant, and all questions which may arise in Philadelphia, in the event of a trial in Kings county, and sentence (if conviction should result), can then be satisfactorily disposed of. If the presence of the defendant in Philadelphia were demanded by the United States, and if the ends of justice seemed so to require, it is believed that this court, in the exercise of its discretion, could enforce the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, and compel the return of the defendant for such further proceedings as might there be proper; but under the existing conditions of the case the exercise of this discretion is unnecessary, and the defendant or petitioner is not entitled to ask as a right what does not seem to be proper as a matter even of discretion." Ex parte Marrin (D. C.) 164 F. 631.

The effect of a later decision is stated in a syllabus prepared by the court, thus:

"A party, charged with a criminal offense under the state laws and admitted to bail, may, while out on bail, be arrested by the federal authorities without violating the comity existing between the two jurisdictions; but the state court, if it so desires, may insist upon the jurisdiction previously obtained and procure the principal from the possession of the federal authorities for the purpose of trial. The principal and his sureties, however, do not enjoy this same privilege; they cannot elect that the principal be tried by the state courts and thereby oust the federal court of its jurisdiction." Metcalf v. State, 57 Okl. 64, 156 P. 305, L. R. A. 1916E, 595.

We quote from the syllabus of a still later case as stating fairly the purport of the court's opinion:

"That a person is under sentence of imprisonment in the state of New York, but has been paroled within the state, under the state statute by which he is still subject to imprisonment for the remainder of his term for violation of his parole, does not exempt him from being arrested and taken to another state to serve a sentence imposed on him by a federal court there, where no objection is made by the court or authorities of New York; the question of priority of jurisdiction being one of comity, and not one of personal right in the defendant." U. S. v. Marrin (D. C.) 227 F. 314.

The point presented by petitioner has sometimes arisen in cases involving an asserted claim of conflicting jurisdiction between counties in the same state. In one of these the question arose, somewhat indirectly, it is true, between the two courts; but the higher tribunal, to which the question was carried, used language in its opinion which tends to indicate that the point is one which may not be resorted to by the individual whose custody is involved, thus:

"If the principle be once admitted that for some misdemeanor another court may take away, even temporarily, the right of the first court to proceed against a person charged with felony, the result will be a most disastrous interference with the orderly administration of justice. Persons charged with a felony will readily avail themselves of the principle to obtain continuances and vexatious delays in their trials. A man under indictment for a felony in one county would step over into an adjoining county and commit some insignificant offense, and be incarcerated in the jail of that county until the term at which he was to be tried for the felony had passed. A departure from the rule of according to the court having the jurisdiction of a criminal the right to proceed to try him, and the adoption of the contrary principle, that this jurisdiction, though first acquired, may be interfered with until divers and sundry minor offenses be disposed of, would indeed be injurious to the proper administration of the criminal law." Boone v. Riddle (Ky.) 86 S. W. 978, not reported in state reports.

In another case, involving a conflict between the jurisdiction of courts in different counties of the same state, we make an extract from the syllabus prepared by the court:

"A person in the custody of one authority or court has no legal interest in the question as to whether another authority or court has the right to arrest him. Such a question concerns only the two opposing authorities or courts." Ex parte Bustillos, 26 N. M. 449, 194 P. 886.

We conclude that petitioner is in no position to rely upon the point which he presents. It would be strange, indeed, reflecting for a moment upon the language of the court in Boone v. Riddle, supra, if petitioner were under a charge of murder in Imperial county and could nevertheless insist upon the trial of a minor charge pending against him in Los Angeles county, before he could be tried in the former jurisdiction for the more serious crime alleged to have been committed there; yet that is a contention to which his argument legitimately leads. It is plain, under the authorities, that petitioner has not the slightest interest in such a question.

Writ discharged. Petitioner remanded to the custody from which he comes.

We concur: FINLAYSON, P. J.; CRAIG, J.

79 Cal. App. 1

McDONALD et al. v. RICHARDS, County Auditor. (Civ. 3091.)

(District Court of Appeal, Third District, California. July 24, 1926.)

1. Schools and school districts 🔑103(4)—Budget presented by school trustees of high school district constitutes basis for levy of special tax by board of supervisors, who must levy tax at rate sufficient to meet legal requirements set forth in budget (Const. art. 9, § 6, as amended in 1920; article 3, § 1; article 11, § 12).

Under Const. art. 9, § 6, as amended in 1920, article 3, § 1, and article 11, § 12, budget presented by school trustees of a high school district constitutes basis for levy of a special tax by board of supervisors of county in which high school district is situated, and board of supervisors must levy tax at such rate as will meet all legal requirements set forth in budget.

2. Schools and school districts 🔑103(4)—Legislature may prescribe method of collecting data on which tax levy to maintain high school is to be based by board of supervisors, who, in levying such tax, are limited to determining legality of different items of expenditure, legality of purposes for which made, and necessary rate of taxation to raise required amount (Const. art. 9, § 6, as amended in 1920).

By express language of Const. art. 9, § 6, as amended in 1920, Legislature may prescribe method of collecting data on which tax levy to maintain high school by board of supervisors is to be based, which board is limited, in levying such tax to determination of legality of different items of expenditures, legality of purposes for which money is sought to be raised, and necessary rate of taxation on property within district, in order to raise required amount, which includes determination of value of assessable property in the district in order to fix a rate that will raise required sum to maintain high school involved.

3. Schools and school districts 🔑108(3)—Question of policy and wisdom of incurring expenses in conduct and maintenance of high school is vested in school trustees and not board of supervisors (Const. art. 9, § 6, as amended in 1920, article 3, § 1, article 11, § 12; Pol. Code, § 1612a).

Under Const. art. 9, § 6, as amended in 1920, article 3, § 1, article 11, § 12, and Pol. Code, § 1612a, legislative discretion vested in board of supervisors in levying special tax for high school does not extend to determination of either the policy, wisdom, or expense of maintaining a high school, which matters devolve upon board of school trustees.

4. Mandamus 🔑16(1)—Application for mandate requiring county auditor to levy special tax for high school purposes will be denied where writ, if granted, would be unavailing.

Application for writ of mandate requiring county auditor to levy special tax for high school purposes, on ground that rate made was too low, will be denied, where power to direct any other assessment than made had ceased to exist, and any other levy, if ordered, would but lead to confusion.

5. Judgment 🔑243—On application for writ of mandate to require county auditor to levy special tax for high school purposes, court held unauthorized to order relief against board of supervisors, where it was not made a party to proceeding.

On application for writ of mandate to compel county auditor to levy special tax for high school purposes, court *held* unauthorized to order county board of supervisors to include within tax rate to be levied for present year a sufficient increase in rate to cover deficit caused by improper exercise of its legal duties in making tax levy for preceding year, where it was not made a party to proceeding.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Application for writ of mandate by John R. McDonald and others, as trustees of Biggs Union High School District, and John R. McDonald against Lucy A. Richards, as Auditor of the County of Butte. From judgment denying application, petitioners appeal. Affirmed.

Orville C. Pratt, Jr., of San Francisco, and George F. Jones, of Oroville, for appellants.

Hill, Morgan & Bledsoe, of Los Angeles, amici curiæ.

W. E. Rothe, Dist. Atty., and Bond & Deirup, all of Chico, for respondent.

PER CURIAM. Appellants, as the board of trustees of Biggs union high school in the county of Butte, filed their petition herein praying for a writ of mandate directed to the respondent as the auditor of the county of Butte to levy a tax upon the property of the union high school district sufficient in amount to produce the sum hereinafter stated. The petition sets forth the fact of the organization and existence of the Biggs union high school district; the official capacity of the petitioners and also of the respondent; the fact that during the year 1925 and at the time specified in the code for taking such action the petitioners prepared and submitted a budget of the amount of money required for maintaining said high school district for the year beginning June 30, 1925, and ending on June 30, 1926; that said budget was submitted to the superintendent of schools; by him, after the performance of certain duties required by law, approved, and thereafter said budget was duly submitted to the board of supervisors of said county; that by the budget so submitted it was ascertained and set forth that the sum of $25,502.50 was the amount necessary to maintain said high school district during the period of time just herein mentioned; that, after said budget was submitted to the board of supervisors of the county of Butte, said board of supervisors failed and refused to levy a tax sufficient to raise the amount set forth in the budget so submitted by the board of trustees of said high school district as the amount necessary to be raised for the uses and purposes of said high school district and eliminated from said budget certain items, and thereafter said board of supervisors of Butte county levied a tax on the assessable property of said Union High School District sufficient only to raise the sum of $22,102.50. This action is prosecuted against the respondent as the auditor of said county to compel said auditor to immediately make a special tax levy against the taxable property located within said district sufficient to raise the sum set forth in the budget submitted by the trustees of said district as necessary for the maintenance of said union high school during the year referred to. The respondent had judgment, and the petitioners appeal.

It is not necessary for the purposes of this appeal to consider the particular items eliminated by the board of supervisors from the budget submitted by the trustees of the district further than to state that the legality of the expenditures deemed necessary by the trustees of the district appears to be unquestioned.

This action involves directly the consideration of section 1612a of the Political Code and section 6 of article 9 of the Constitution, as amended in 1920, and indirectly section 1 of article 3 and section 12 of article 11 of the Constitution.

It is insisted on the part of respondent that section 1612a is unconstitutional in that there is a delegation of legislative power to a ministerial officer, to wit, to the superintendent of schools, and, further, that if said section is not unconstitutional it is simply directory in its provisions and not mandatory as to the sum of money to be raised by taxes levied by the board of supervisors. On the part of the appellants it is insisted that the section of the Code is constitutional and that its requirements, so far as accepting the amount of the budget as submitted by the trustees is concerned, is mandatory upon the board of supervisors and that it is the bounden duty of the board of supervisors to levy a tax sufficient to raise the amount of money set forth in the budget as necessary for the maintenance of the high school in question. It may be stated that the amount of money to be raised by the budget so submitted and the tax levied upon the property of the district constitutes a special tax, as the budget sets forth the money needed by the district that will not be derived from the ordinary sources of revenue under the general tax levies provided for in the Codes.

The section under consideration requires that the school board shall annually, in the month of June, make a budget showing all the purposes for which the school district will need money and the amount of money that will be needed for each of the purposes set forth in the budget. This budget is submitted first to the county school superintendent for his examination and for such changes as may be found necessary. After these changes are made, if any, the budget is resubmitted to the trustees of the district, who may either accept or reject the recommendations of the school superintendent. Thereupon the budget is again resubmitted to the county school superintendent, whose duty it is to approve the budget so made by the school trustees, and then calculate and determine the amount of money necessary to be raised by taxation, as shown by the budget, by deducting from the total sum of money necessary to be raised for the uses and purposes of the district the amount of revenue that will be obtained by the high school district during the current year from the sources otherwise provided for by general taxation and the laws of the state raising revenue for high schools, which we need not consider further than to state that it involves a calculation based upon the school attendance and matters of that kind which may be determined with reasonable accuracy by mathematical calculation, and is the method provided for determining the amount of money that will be apportioned to the several high school districts from sources other than money raised by a special tax which we are considering.

As amended in 1920, section 6 of article 9 of the Constitution requires first that the Legislature provide a state high school fund from the revenues of the state for the support of day and evening secondary and technical schools and shall provide for the distribution of such fund. It is further set forth that the amount shall not be less than $30 per pupil in average daily attendance in the day and evening secondary and technical schools, etc. It is then further specified that the Legislature shall provide for the levying of a county and city and county elementary school tax by the board of supervisors of each county, etc., sufficient in amount to produce a sum of money not less than the amount of money to be received during the current school year from the state for the support of such schools and not less than $30 per pupil in average daily attendance. It is then further set forth that the Legislature shall provide for the levying of a county and city and county high school tax by the board of supervisors sufficient in amount to produce a sum of money not less than twice the amount of money to be received during the current school year from the state for the support of public day and evening secondary and technical schools, etc., provided that the high school tax levied by the board of supervisors shall produce not less than $60 per pupil in average daily attendance. Then follows the further requirement:

"The Legislature shall provide for the levying of school district taxes by the board of supervisors of each county, and city and county, for the support of public elementary schools, secondary schools, technical schools, and kindergarten schools, or for any other public school purpose authorized by the Legislature."

Section 1 of article 3 of the Constitution relates to the distribution of powers between the legislative, executive, and judicial branches of the government, but for the reasons hereinafter stated we do not think it necessary to comment at length upon the application of this section, as our determination is controlled by other sections of the Constitution and code provisions.

Section 12 of article 11 of the Constitution reads as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

It will be observed that section 6 of article 9 of the Constitution, as amended, enlarges the power of the Legislature in relation to taxation and constitutionally fixes a sum of money to be raised by taxation upon the property in the state for school purposes, and while it does not directly levy a tax in so many words, it does fix a minimum amount which must be raised by the corporate bodies of counties and cities and counties for school purposes, and it also authorizes the Legislature to increase the minimum amount stated in the Constitution, and when the minimum amount raised by the state exceeds the sum of $30 per pupil it is mandatory upon the board of supervisors or corporate authorities of counties and cities and counties to raise a like sum and in certain instances twice the amount received from the state. These are mandatory provisions of the state Constitution and eliminate entirely the legislative discretion theretofore vested in the board of supervisors as to the amount of money to be raised for school purposes in the particulars mentioned.

Basing her argument upon the paragraph of section 6 of article 9 of the Constitution which we have quoted, the respondent argues that the third paragraph of section 1612a of the Political Code is unconstitutional in that it delegates to the superintendent of schools the power to fix the minimum sum which must be raised by a special tax levy, and, therefore, that the legislative discretion ordinarily vested in the board of supervisors as a tax levying power is transferred to the school superintendent. The third paragraph of the section of the Code referred to, after directing the superintendent to make certain calculations, estimates, etc., of the amount of money that will come to the school district from other sources, to deduct the same from the budget submitted by the school trustees and that the remainder so obtained by such deduction "shall be the minimum amount of the school district tax to be levied by the board of supervisors for the particular school district." Based upon this language, it is argued that the whole section is unconstitutional in that a ministerial officer is clothed with legislative powers contrary to the provisions of the Constitution which we have cited.

In 36 C. J. 1032, we find that the word "levy," as applied to taxation, is given a variety of meanings, according to how it is used. It may be used in reference to either the legislative or administrative functions of taxation. It is used to denote the legislative function of charging the collective body of taxpayers with the sum to be raised and also to the ministerial function of estimating the taxes upon the assessment roll showing the amount charged to each individual taxpayer. As applied to the determination of the amount or rate of taxes to be charged to the collective body of taxpayers, it is a legislative function to be exercised only by the state or by some inferior political subdivision thereof. The duty of the other officers in relation to the tax appears to be purely ministerial, and, when used in relation to their duties, it would seem to be used with that meaning.

In the case of McCabe v. Carpenter, 102 Cal. 469, 36 P. 836, we find the following language used:

> "But, since the power to levy a tax is purely legislative, it would seem to follow, that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation. At all events, it could not vest such power in an executive officer of such corporation."

Based upon the case of McCabe v. Carpenter, supra, and others cited, we find the statement in 24 California Jurisprudence, 54, that:

> "The Legislature may not vest power to determine the rate of levy or amount of tax in an executive officer of a public corporation; and an act by which the amount of a tax is left wholly to the discretion of an executive officer, there being no discretion in the local board, is invalid. If a board of education is regarded as a purely executive or administrative body, it is incapable of imposing taxes."

In the case of City of Coronado v. San Diego, 97 Cal. 440, 32 P. 518, in considering the issuance of a writ of prohibition, we find the following statement:

> "It is recognized as a universal rule that the writ of mandate will issue to compel the levy of a tax, and it will issue for the reason that the act of making the levy is purely ministerial."

This language does not appear to have been commented upon in any of the later California cases and is not referred to in the opinion in the McCabe Case. We think, however, the two expressions may be differentiated. One refers to the ascertainment, the consideration or the reasoning exercised by the body charged with the duty of levying the tax which is the subject of consideration in the McCabe Case and the act, by which we mean the physical act of stating the amount or auditing the amount or naming the amount, is what is referred to in the Coronado Case. The Coronado Case refers to the authority of the court to compel by mandamus the exercise of the ministerial act of levying a tax by the party charged with that duty and not to the discretion exercised by that body in determining either the amount or the rate. We refer to this case because we think it enunciates a principle applicable to the questions hereinafter considered.

Whether a high school district is considered a quasi public corporation, or an agency of the state, or is a corporation coming within the terms used in section 12 of article 11 of the Constitution, and may be charged under that section with the power of levying taxes is wholly immaterial, in view of the language found in section 6 of article 9 of the Constitution, as amended in 1920. It is therein specified that the Legislature shall provide for the levying of school district taxes by the board of supervisors of each county, etc. This language takes away from the school trustees of the school district the power of levying taxes and vests that power irrevocably in the board of supervisors. But it does not vest that power arbitrarily in the board of supervisors. The language of the section is that the Legislature shall provide for such levy, that is, it shall outline a method or procedure to be followed in determining the tax levy and the amount thereof to be made by the board of supervisors of each county. If this were not true the section would simply read that the board of supervisors of each county shall levy a school district tax, etc. The providing for the levy being vested in the Legislature, the Legislature has a right, we think, to direct in what manner the board of supervisors shall be advised as to the amount of money to be raised for the support of any particular high school district, and as to the necessities and requirements of such district, and that the necessities and requirements of such district may be inquired into by the trustees of a high school district and set forth in the budget submitted by them.

In the case of McCabe v. Carpenter, supra, the court had under consideration the act of March 20, 1891 (St. 1891, p. 182) entitled "An act to provide for the establishment of high schools," which, after setting forth the manner in which the amount of the tax should be ascertained, contained the following language:

> "And it shall be the duty of such authorities to levy such rate as will produce the amount estimated to be necessary for such purpose."

It was there contended that this language in the statute was violative of section 1 of article 3 of the state Constitution and it was so adjudged. This case refers to Hughes v. Ewing, 93 Cal. 414, 28 P. 1067, where it was held, in considering section 12 of article 11 of the Constitution, that the Legislature cannot impose a tax upon the property or the inhabitants but must vest the power in the local authorities, and, that if the Legislature cannot impose a tax upon the property or inhabitants of the school district, it would seem to follow that it cannot prescribe a procedure through which such tax would inevitably be levied without leaving some discretion in regard to it in the local authorities. The Legislature imposes a tax when it requires an officer to make certain computations, the result of which must fix the amount to be levied. Such a process enjoined upon local authorities does not vest in such authorities the power to tax as required by section 12 of article 11. At the time this decision was rendered section 6 of article 9 of the Constitution read:

> "The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools as may be established by the Legislature, or by municipal or district authority; but the entire revenue derived from the state school fund, and the state school tax, shall be applied exclusively to the support of primary and grammar schools."

Section 12 of article 11 of the Constitution was given full force and effect in its broadest application in the case of McCabe v. Carpenter, but it will be seen that such application must be materially limited when we consider section 6 of article 9 as it now appears in the Constitution. The original section did not permit the Legislature to do just what it is now permitted to do, to wit, provide for the levying, which means to direct and set forth how the tax shall be levied. If the Legislature is to provide for the levying we do not very well understand why such language does not authorize the Legislature to prescribe the procedure for the levying of such tax. We do not mean by this to state that the entire legislative function of the board of supervisors is taken away, but we do mean that it is circumscribed and limited and applied to the legislative function hereinafter stated, and that the case of McCabe v. Carpenter is in its broad language no longer applicable by reason of the change in the state Constitution.

In People v. Lodi High School District, 124 Cal. 694, 57 P. 660, the court had under consideration the act of 1895 (St. 1895, p. 293) where it was contended that legislative power was vested in the county school superintendent. That case refers to the McCabe Case and notes the change by the Legislature in relation to the amount of money to be raised by taxation. The act of 1895, after setting forth that an annual tax shall be levied, the amount of said tax being estimated by the county superintendent of schools, provides that the board of supervisors shall "levy such rate as will produce the amount estimated to be necessary for such purposes." It was there held that the estimate of the county school superintendent was only advisory and that the legislative power of the board of supervisors was not necessarily limited to the budget submitted by the school superintendent, but that they had the discretion to ascertain and determine the amount which the board would or might consider necessary to maintain the high school and fix a rate which would result in the raising of the money deemed by the board necessary for the maintenance of the school. It was further said in the Lodi High School Case, however, that no reason appeared why a special tax might not be levied without a previous election authorizing such tax and that the court knew—

> "of no limitation upon the powers of the Legislature to authorize by general law a tax for a special purpose without first submitting the proposition to a vote of the electors. Having voted that they will organize a high school under the law which gives to the supervisors the power to levy a special tax to support the school, there would seem to be no occasion for submitting the question to a vote of the people a second time, except it might be to determine the rate. But that is a function within the powers of the supervisors, which we think the Legislature could confer and has conferred upon them."

The questions which we are considering here were also before the Supreme Court in the case of the Board of Education of City of Woodland v. Board of Trustees, 129 Cal. 599, 62 P. 173. The McCabe Case and the Lodi High School Case are both considered in the Woodland Case, and the distinction pointed out between school districts organized under the law relating to muncipalities and what are ordinarily termed code districts. The Municipal Corporations Act (St. 1891, p. 28) there under consideration provided that the school board should submit to the city trustees an estimate of the amount of money required for conducting a school for the school year and made it the duty of the city trustees to whom the estimate was submitted to levy a special tax sufficient in amount to maintain the high school. It was there held that the discretionary power was vested in the city trustees as the taxing body of the city to determine what amount would be sufficient for the purpose, and that the city trustees possessed the authority to fix such amount and was not concluded by the estimate made by the high school board. There is this difference to be noted between the Woodland Case and the case at bar: In the Woodland Case the school district and the city of Woodland were territorially one and the same. The city trustees constituted the tax-levying body of the city which took into consideration all of the needs and requirements of the entire city, including as well the educational department thereof and other departments constituting the city government. In the case at bar the board of supervisors of the county of Butte have jurisdiction over a separate and distinct municipality territorially different and are not necessarily charged with the same knowledge, duties, and responsibilities as pertain to the trustees of a city. While it is true that a school district, though situated within a city and having territorial limits coincident with the territorial limits of the city, is for certain purposes a distinct entity, yet the trustees of a city and the high school board of such a high school district are responsible to the same electorate, which we think differentiates to some extent the powers and duties and responsibilities of city trustees under such circumstances acting under the Municipal Corporations Act and those of supervisors limited and circumscribed in the performance of their duties as provided for by the state Legislature under the powers granted by section 6 of article 9 of the Constitution. As stated in the case of Board of Education v. Trustees, supra, under the Municipal Corporations Act a school district is not in fact a separate corporate body, but is merged in the city and the board of education is but a department of the general city government. Thus for governmental purposes under the Municipal Corporations Act the district is a department. This differentiation from high school districts provided for under the Codes must be borne in mind in considering the relative powers and duties of trustees of school districts and boards of supervisors, and cases which are applicable under the Municipal Corporations Act are not controlling where the legal status or relations are not the same. A somewhat similar case to the Woodland Case which we have been considering is that of Board of Education v. Trustees, 96 Cal. 42, 30 P. 838, where section 2 of the act under consideration read as follows:

> "Upon receiving the estimate of moneys needed, as provided in section 1, the board of trustees shall, at the time of levying other city taxes, levy a direct special school tax, which, after making proper allowance for delinquencies, will produce a sum that will make the amount required by the board of education; provided, however, that in no case shall such special school tax exceed 25 cents on the $100."

Section 1 of the act there under consideration provided that the school board should furnish the city trustees with a detailed statement of the probable amount of money required for the current year and also an estimate of the amount that would be received from the state and county for school purposes, leaving the difference between the estimated necessities and the amount to be received from the state and county as the sum to be raised by a special tax. It was there held that the detailed statement by the board of education was only directory or advisory, and that it was not mandatory upon the city trustees to levy a tax which would raise the exact amount named in the estimate or report or detailed statement submitted by the board of education. This case, however, was governed by the statute to which we have referred and the subject-matter there pertained to a school district within a municipality as a department of the municipality and not to a code school district coming under the terms of section 1612a of the Political Code and section 6 of article 9 of the state Constitution.

The next case elucidating the principle governing taxation in school districts and the relative duties of the different boards is that of MacMillan v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A. L. R. 288. The immediate subject of controversy was the levying of a tax to repay an indebtedness incurred for supplying pupils with free text-books. This case refers to section 12 of article 11 in relation to the levying of taxes by the Legislature and also refers to the cases which we have heretofore cited. Sections 1756 and 1757 of the Political Code under review in the case of MacMillan v. Clarke provided, first, that the high school board should make and file with the superintendent of schools an estimate of the amount of money required for maintaining the high school, setting forth in detail the different items; that such estimate should be submitted to the board of supervisors; and then further provided that the board of supervisors at the time of making the tax levy for the year for county purposes should levy a special tax on the property of the high school district "sufficient in amount to carry out the purposes legally specified in the said estimate." The constitutionality of such a levy was upheld and the cases referred to supporting the ruling adopted by the court in that case. Attention was also called to the fact that the statute under which the case of McCabe v. Carpenter was decided has been amended, and amended for the purpose of obviating the objections urged in the McCabe Case. Replying to the argument that section 2 of the act under consideration in the MacMillan Case rendered the act unconstitutional, when providing for reimbursement of a high school district for the cost of text-books supplied pupils residing outside such district upon an estimate furnished by the superintendent of schools and providing that the supervisors shall include such amount in levying the high school tax, the court said:

> "It is argued that this provision leaves no legislative discretion to the supervisors, but requires them to increase their tax levy by the precise sum included in the superintendent's estimate. It, however, signifies no more than a direction to the supervisors to include in their tax levy a sufficient amount to cover this extra cost. It merely happens, this being a liquidated claim, that the estimate of the superintendent, if his figures are correctly compiled, must of necessity correspond with the 'sufficient amount' covering the legislative discretion of the supervisors. If there is a debt of $1,000 to be provided for, there can be little difference in meaning between a direction to the supervisors to add the amount to the tax levy, or a direction to make the levy sufficient to cover the indebtedness. The element of discretion only exists in the fact that the taxing power is not bound to accept the superintendent's figures as correct and final any more than in the matter of estimates for teachers' salaries or other school expenses."

The opinion in the MacMillan Case also calls attention to the further fact that schools such as we are here dealing with are matters of state and not of local jurisdiction in that the board of supervisors is not given power to arbitrarily determine whether a high school district shall or shall not exist, or shall or shall not be supplied with funds sufficient to enable it to function, but exercises power subject to the Codes providing for the raising of revenue. The opinion says:

> "The public schools are state schools, and it is within the discretion of the Legislature whether to make them a charge upon the state at large, or to do as has been done in the matter of elementary schools, make them partly a charge upon the state at large and partly upon local districts, or, as in the case of high schools, place practically the entire burden for the local school upon a district organized for that purpose."

And then, referring to the McCabe Case, disposes of it as follows:

> "But conceding the rule as recognized in McCabe v. Carpenter, 102 Cal. 469 [36 P. 836], its application goes no further than to place the constitutional inhibition upon the power of the legislature to assess and collect the tax."

It must be borne in mind that the case of MacMillan v. Clarke was also decided prior to the adoption of the amendment to section 6 of article 9 of the Constitution, or at least before that amendment became effective.

We do not find any special difference in the language used in section 1612a of the Political Code, where it is stated that the amount of the budget submitted by the school trustees, less the amount ascertained that the district will receive from other sources, shall be the minimum amount of the school district tax to be levied, and the language used in section 1757 of the Political Code upheld in the MacMillan Case, which reads, shall levy a tax on the property of the high school district "sufficient in amount to carry out the purposes legally specified in the said estimate." It is hardly necessary to state that the items included in the budget to be presented by the board of school trustees of the union high school district must, necessarily, be legal items in order to be binding upon anybody, as the board of supervisors could not be called upon to approve or levy a tax for any illegal purpose. It, therefore, follows that the language used in the different sections is practically of the same legal meaning and effect; i. e., that whenever such a budget so prepared is presented to a board of supervisors it is the legal duty of the board of supervisors to levy a tax upon the assessable property of the high school district involved sufficient to meet all the purposes legally specified in the budget. The board of school trustees of the high school is charged with the legal duty of presenting such a budget as the basis for the tax levy to be made by the board of supervisors. The board of supervisors, we think, possesses the legislative discretion to determine whether the different items making up the budget presented by the school trustees are for items of expenditure which the board of trustees may legally make or incur during the school year. The policy or wisdom of making the expenditures in the maintenance of a high school is, we think, a matter which the Legislature intended to refer to the trustees of the high school district as being the representative or governing body of the high school district to which the electors have intrusted such responsibility in the conduct and supervision of the high school district for which they have been elected. This leaves to the board of supervisors the legislative discretion of determining the legality of the several requirements of the budget and also the amount of the levy necessary to meet such requirements. If such is not the case then the constitutional provision which authorizes the Legislature to provide for the levying of school district taxes by the board of supervisors has no meaning whatever further than to say the board of supervisors may levy a tax without any direction or control or supervision of the Legislature whatsoever, and we think the determination of the question here presented comes back to the language of the section which says that the Legislature shall provide for the levying of the school district tax and means that the manner and method of levying the tax and collecting the data which shall constitute the basis for the levying of the tax may be set down in explicit language by the Legislature and the procedure to be followed set forth in detail. As further bearing on the same subject, we may call attention to one of the subdivisions of section 1764 of the Political Code relating to county high school taxes as it now reads, as amended in 1921 (St. 1921, p. 779):

> "The board of supervisors of such county, or city and county, must, annually, at the time and in the manner of levying other county taxes, levy and cause to be collected for the county, or city and county, high school fund, a tax to be known as the county high school tax, the minimum rate of which shall not be less than sufficient to raise the minimum amount estimated to be raised by the county superintendent as hereinbefore provided."

And also one of the subdivisions of section 1891 of the Political Code relating to school districts in different counties, which reads:

> "The board of supervisors of each county shall thereupon determine the rate of taxation necessary to be levied upon the property in said district situated in the county, such rate to be sufficient to meet the proportion of taxes necessary to be raised in the county for the purpose of paying the principal and interest of the bonds of the district and all other expenses of the district as shown by the estimate of the county superintendent of schools having jurisdiction over such district."

In these subdivisions the minimum amount to be raised is set forth in almost identical language with that used in section 1612a of the Political Code.

[1-3] The conclusion to be drawn from the foregoing résumé of the cases and constitutional sections considered is that the budget presented by the school trustees of a high school district constitutes the basis for the levying of a special tax by the board of supervisors of the county in which the high school district is situated; that it is the legal duty of the board of supervisors to levy a tax at such a rate upon all the taxable property situated within the high school district sufficient in amount to meet all the legal requirements set forth in the budget; that the express language of section 6 of article 9, as amended, authorizes the Legislature to prescribe the method of collecting the data upon which the tax levy is to be based, and that the board of supervisors is limited in levying the taxes which are to be raised by such special assessment to the determination of the legality of the different items of expenditure proposed to be made, the legality of the purposes for which the money is sought to be raised and the necessary rate of taxation upon the property within the district in order to raise such amount. This includes as well the determination of the value of the assessable property in the district in order to fix a rate that will raise the required sum to maintain the high school involved. We think that the constitutional provisions which we have been considering and section 1612a of the Political Code place the duty of levying a special tax upon boards of supervisors in about the same situation as when a special tax will be directed by mandamus to be levied for the purpose of meeting interest upon bonds or similar obligations; that the legislative discretion vested in the board of supervisors is limited in the manner in which we have herein set forth and does not extend to the determination of either the policy, the wisdom or the expense of maintaining a high school, but that such matters devolve upon

the board of school trustees; and that it was the purpose both of the amendment to the Constitution and of the act of the Legislature to vest in the school trustees of district high schools both the policy and the wisdom of incurring expenses in the conduct and maintenance of high schools.

[4, 5] The conclusions which we have reached do not, however, authorize a reversal of the judgment entered herein. The board of supervisors has levied a special high school tax upon the assessable property within the territorial limits of the Biggs union high school district. The objection is that the rate was too low. But this objection comes too late. A somewhat similar situation is presented in the case of Bell v. Fee Title Co., 69 Cal. App. 437, 231 P. 598. In this case a petition to have the cause heard in the Supreme Court after judgment in the appellate court was denied. The court in that case, considering the tax which was levied at a rate insufficient to raise the minimum sum set forth in the budget, disposed of the opposition to its legality as follows:

> "Section 1764 of the Political Code requires the county superintendent of schools to furnish the board of supervisors of the county embracing his school district with an estimate of the minimum amount of the school funds to be required for the current school year; and it is further provided that the board of supervisors must annually levy and cause to be collected a tax to be known as the county school tax, the minimum rate of which shall not be less than sufficient to raise the minimum amount so estimated. It is insisted by appellant that the levy in question was much less than the minimum called for by the school superintendent, and was therefore illegal and void, but respondent argues that this procedure would result in delegating legislative powers to the county superintendent, which would render section 1764 of the Political Code unconstitutional. Appellant's complaint in this behalf appears to be that because the board did not require as great an amount in taxes from its property as might have or should have been done, it should escape from paying any taxes. Unless it can be shown that some part of the tax in question was illegally levied, the fact that an additional sum might have been required does not invalidate the assessment."

Section 6 of article 9 of the Constitution limits the Legislature in providing for the levying of taxes to the board of supervisors, while without this provision it might be argued that some other portion of the county machinery might be seized upon for the purposes of levying a special high school tax. The people of the state have seen fit to adopt the amendment in such form as to limit the Legislature in making provision for the levying of taxes to the boards of supervisors of the respective counties and such function cannot, therefore, be exercised by some administrative officer.

The facts before us show that the time has long since gone by when any authority exists to order any change in the tax levy already made. The different sections of the Political Code relating to the levying of county taxes, the making out of the assessment rolls by the different ministerial officers having to do therewith show that the power to direct any other assessment has ceased to exist, and that any levy, if it were possible in this proceeding for this court to so order, would but lead to confusion and that, under such circumstances, mandamus will not issue. As stated in the case of Board of Education v. Common Council, 128 Cal. 369, 60 P. 976, it is apparent that the writ if granted could not be enforced and would be unavailing. In such cases mandamus will not issue. To the same effect is the case of Board of Education v. Common Council, 1 Cal. App. 311, 82 P. 89. If this case were against the board of supervisors of the county of Butte, mandamus would not now lie for the reasons stated in the two cases just cited. Nor can we order the board of supervisors of the county of Butte to include within the tax rate to be levied for the present year a sufficient increase in rate to cover the deficit caused by the improper exercise of their legal duties in making the tax levy for the year beginning June 30, 1925, and ending June 30, 1926, for the simple reason, if for no other, that the board of supervisors of the county of Butte is not a party to this proceeding.

We are, therefore, limited simply to affirming the judgment; and it so ordered.

---

79 Cal. App. 793

C. W. THRESHER, F. A. Little, E. T. Woodward, W. G. Coppernoll, and Chas. Edson, as Trustees of Gridley Union High School District, and F. A. Little, Plaintiffs and Appellants, v. Lucy A. RICHARDS, as Auditor of the County of Butte, State of California, Defendant and Respondent. (Civ. 3092.)

(District Court of Appeal, Third District, California. July 24, 1926.)

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Orville C. Pratt, Jr., of San Francisco, and George F. Jones, of Oroville, for appellants.

Hill, Morgan & Bledsoe, of Los Angeles, amici curiæ.

W. E. Rothe, Dist. Atty. and Bond & Deirup, all of Chico, for respondent.

PER CURIAM. For the reasons stated in the opinion in the case of John R. McDonald et al. v. Lucy A. Richards, as Auditor, etc. (Civil No. 3091) 248 P. 1049, filed this day, the judgment appealed from is affirmed.

79 Cal. App. 793

C. H. THURMAN, R. S. Kitrick, R. P. McCune, J. M. Williams, and R. S. Powers, as Trustees of Oroville Union High School District, and C. H. Thurman, Plaintiffs and Appellants, v. Lucy A. RICHARDS, as Auditor of the County of Butte, State of California, Defendant and Respondent. (Civ. 3093.)

(District Court of Appeal, Third District, California. July 24, 1926.)

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Orville C. Pratt, Jr., of San Francisco, and George F. Jones, of Oroville, for appellants.

Hill, Morgan & Bledsoe, of Los Angeles, amici curiæ.

W. E. Rothe, Dist. Atty. and Bond & Deirup, all of Chico, for respondent.

PER CURIAM. For the reasons stated in the opinion in the case of John R. McDonald et al. v. Lucy A. Richards, as Auditor, etc. (Civil No. 3091) 248 P. 1049, led this day, the judgment appealed from is affirmed.

---

79 Cal. App. 149

FALLOON v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 5326.) *

(District Court of Appeal, Second District, Division 2, California. Aug. 9, 1926.)

1. Receivers 🔑51—Appointment of receiver upon application ex parte as to some defendants without requiring statutory undertaking held void as to them (Code Civ. Proc. § 566).

Where appointment of receiver in quiet-title action was made without service on certain defendants, and court failed to require undertaking made essential by Code Civ. Proc. § 566, where appointment is upon ex parte application, the order was void as to them.

2. Contempt 🔑7—Interference in pending action to frustrate order which may be made therein to establish a right constitutes a contempt (Code Civ. Proc. § 1209, subd. 9).

A person may be found guilty of contempt if he actively interferes in a pending action to frustrate any order which may be made therein to establish or secure an asserted estate or right, since such conduct constitutes an "unlawful interference with the * * * proceedings of a court," under Code Civ. Proc. § 1209, subd. 9.

3. Attorney and client 🔑14—Lawyer is officer of court, and must act in good faith toward court.

The lawyer is an officer of the court, and owes the duty of good faith and honorable dealing to the court.

4. Contempt 🔑58(1).

Allegations in initiatory affidavit in contempt proceeding which were not denied in the answer are deemed admitted.

5. Contempt 🔑7—Attorney's failure, in procuring order permitting withdrawal of money, to inform court of appointment of receiver held a contempt (Code Civ. Proc. § 1209, subds. 3, 9).

Attorney's failure, in procuring order permitting withdrawal of money deposited in condemnation action, to inform judge that in another department appointment of receiver to take possession of funds had been sought and ordered in quiet title action, *held* a contempt, under Code Civ. Proc. § 1209, subds. 3, 9, even though appointment was invalid.

Application by Frank G. Falloon for certiorari to review a judgment of the Superior Court of Los Angeles County, Hartley Shaw, Judge, adjudging petitioner guilty of contempt. Judgment affirmed.

M. B. Silberberg, C. C. Towner, and Frank G. Falloon, all of Los Angeles, for petitioner.

Edward T. Bishop, County Counsel, of Los Angeles, for respondents.

FINLAYSON, P. J. This is a proceeding in certiorari to review a judgment of the respondent court adjudging petitioner guilty of contempt.

The material facts, as disclosed by the record certified to us, may be briefly stated thus:

Petitioner is an attorney and counsellor at law, admitted to practice in the courts of this state. On March 30, 1925, the city of Los Angeles brought an action in the respondent court to condemn a certain parcel of real property. This action will be referred to as the condemnation action. The complaint alleged that the land was the property of Chandler D. Phillips and his wife, Della M. Phillips, both of whom were defendants in the action. On July 13th Christine M. Phillips, through the petitioner here as her attorney, filed an answer in the condemnation action alleging that she owned the property. The issues raised by this answer seem not to have been tried prior to the entry of the first interlocutory decree, which was made and entered by the court on July 20th. In that decree it is adjudged that Chandler D. Phillips and his wife, Della M. Phillips, are the owners of the property; that its value is $6,600; that this sum, less certain designated amounts, is the total compensation to be paid to Chandler D. and Della M. Phillips; and that "upon the payments of the amounts * * * to the persons entitled thereto as hereinbefore set out, or into court for their benefit," the land will be condemned to the use of the city of Los Angeles. On August 10th the court, on motion of Christine M. Phillips, undertook to amend its interlocutory decree by causing to be entered what it denominated a "modified interlocutory judgment of condemnation." This modified decree, after reciting that

---

*Hearing denied by Supreme Court October 7, 1926.

Chandler D. Phillips and his wife are the owners of the property, that its value is $6,600, that this amount, less certain designated sums, is the compensation to be paid to Chandler D. and Della M. Phillips for the taking of their property, adjudges that upon the payment into court of $4,546.09 "for the benefit of such persons as may be adjudged to be the owners of said lands" the property will be condemned to the use of the city. In due time the money was paid into court by the city.

Meanwhile a suit to quiet title to the property was brought in the respondent court by one Marion A. McAllister against Christine M. Phillips, Chandler D. Phillips, his wife, Della, the city of Los Angeles, and others. This action will be referred to as the quiet-title action. It was commenced July 2, 1925. The plaintiff in that action was not a party to, nor did she appear in, the condemnation action. Chandler D. and Della M. Phillips were not served with process in the quiet-title action and never appeared therein. Christine M. Phillips, one of the defendants in the quiet-title action, and who, as we already have stated, had filed an answer in the condemnation action, appeared in the quiet-title action through the petitioner here as her attorney. On August 3d she filed an answer in that action. She also filed therein a cross-complaint. In her cross-complaint she alleged facts to show that she owned the equitable title to the real property which the city was seeking to condemn in the other action, and that an interlocutory decree of condemnation already had been made and entered therein. By this cross-complaint Christine M. Phillips prayed for the appointment of a receiver in the quiet-title action to take charge of the money which the city had deposited in court in the condemnation action, and that the court, by its judgment in the quiet-title action, determine what portion of that money should be paid to her as the owner of the equitable title to the land. On August 7th petitioner, as attorney for Christine M. Phillips, served and filed in the quiet-title action a notice of motion for the appointment of a receiver as prayed for in his client's cross-complaint. The motion was noticed for August 14th. A notice of motion to appoint a receiver was also served and filed on behalf of Marion A. McAllister, the plaintiff in the quiet-title action. She served and filed her notice on August 12th. It was served upon all the defendants in that action except the defendants Chandler D. and Della M. Phillips. Her motion was noticed for hearing on the same day as that of the cross-complainant, Christine M. Phillips. The hearing of both motions was continued by the court to August 17th.

Plaintiff's notice omitted all reference to any property or res to be taken into the possession of the receiver whom she asked to have appointed. However, on the day when the court made the appointment, August 17th (but whether before or after the appointment does not appear), Marion Amy McAllister filed an amended complaint in her quiet-title action wherein she prayed the court to appoint a receiver for the money which had been deposited in the condemnation action, to hold the same pending the outcome of the quiet-title action. The indorsements on this amended complaint show that on August 12th it was served on petitioner as attorney for Christine M. Phillips. On August 17th the two motions for the appointment of a receiver in the quiet-title action came on for hearing, and on that day the court entered a minute order as follows:

> "Order to show cause in re appointment of receiver comes on for hearing, A. C. Webb representing plaintiff, and F. G. Falloon representing intervener [the cross-complainant, Christine M. Phillips], J. Everett Brown representing defendants. After argument by respective counsel, application for appointment of receiver is by the court granted. Roy E. Allen is appointed receiver, with bond in the sum of $5,000 required. Plaintiff and intervener ordered to pay equally the cost of premium on bond of receiver."

[1] Neither motion for the appointment of a receiver was served upon Chandler D. or Della M. Phillips. Notwithstanding the appointment was ex parte as to both of the last-mentioned defendants, the court failed to require the undertaking made essential by section 566 of the Code of Civil Procedure where the appointment is upon ex parte application. As a consequence, the order was void as to Chandler D. and Della M. Phillips at least. Both the original and the amended interlocutory decrees in the condemnation action were given and made in department 22 of the respondent court by the judge presiding in that department; the order appointing the receiver in the quiet-title action was given and made in department 25 by the judge presiding therein; and the order presently to be mentioned, permitting the withdrawal of the money which had been deposited by the city in the condemnation action, was made in department 10 by Hon. Frank M. Willis, sitting as presiding judge of the respondent court.

On August 18, 1925, the attorneys for the city of Los Angeles, the attorney for Chandler D. and Della M. Phillips, and the petitioner here, as attorney for Christine M. Phillips, entered into a written stipulation in the condemnation action whereby they agreed that, of the sum of money which the city had deposited in that action, $750 should be paid to petitioner as attorney for Christine M. Phillips, $4,393.43 to the attorney for Chandler D. and Della M. Phillips, and the balance to certain other parties named in the stipulation. The plaintiff in the quiet-title action was not a party to the stipulation and knew nothing of it until all of the money had been withdrawn under the terms of the order about to be mentioned. On the same day the attorney who had signed this stipulation appeared before Judge Willis, informed him of the terms of their agreement, and requested him to make an order for the withdrawal of the money from the court's custody. Whereupon Judge Willis made such order. The petitioner here and the other parties referred to in the stipulation thereupon withdrew the money from the custody of the court, pursuant to the terms of Judge Willis' order. As a consequence, the money was not in the custody of the clerk when the receiver appointed in the quiet-title action sought to take it into his possession, as he did on the day following.

The attorney for the plaintiff in the quiet-title action instituted the contempt proceedings now under review by filing in the respondent court a complaint, in the form of an affidavit, in which he alleges, among other things, the following: (1) that on August 17th petitioner had actual notice of the order made by the court on that day for the appointment of a receiver; (2) that on August 18th petitioner, together with counsel for other parties in the condemnation action, entered into the stipulation already mentioned for the withdrawal of the money; (3) that petitioner knew at the time that the plaintiff in the quiet-title action was claiming the award; (4) that on the same day, August 18th, petitioner and the counsel who had joined with him in the stipulation appeared before Judge Willlis in department 10 of respondent court, represented to that judge that the condemnaton action had been settled, and procured from him the order for the withdrawal of the money; and (5) that petitioner and the counsel accompanying him did not inform Judge Willis that the quiet-title action was pending and that the order appointing a receiver in that action had been made on the preceding day. Petitioner was adjudged guilty of contempt, and thereupon he instituted the present proceeding in this court, seeking to annul the judgment against him.

The affidavit initiating the contempt proceeding was sufficient to give the respondent court jurisdiction. The principal argument presented by petitioner in support of his contention that the order adjudging him guilty of contempt is a nullity may be epitomized thus: The amended interlocutory decree of condemnation was an attempt by the court to correct a judicial error. It therefore is a nullity, and the original interlocutory decree stands as the sole valid judicial pronouncement in the condemnation action. The order of August 17th in the quiet-title action appointing a receiver is void, not only as to Chandler D. Phillips and his wife, Della, but as to all the parties, for the reason that it failed to mention the res which was sought to be made the subject-matter of the receivership, and is likewise fatally uncertain in other particulars. Wherefore, so it is argued, Chandler D. Phillips and his wife, Della, were free to do as they pleased with the compensation which the court awarded to them in the original interlocutory decree of condemnation, and petitioner's participation in the distribution of that award, under a stipulation to which Chandler D. and Della M. Phillips were parties, was not contempt of the court's authority. Under the view we take of the case this argument is quite beside the mark.

[2] Even if the original interlocutory decree in the condemnation action were at all times the only valid decree in that action, and even if the money deposited by the city of Los Angeles were in custodia legis for the sole benefit of Chandler D. and Della M. Phillips, nevertheless the plaintiff in the quiet-title action, by the amended complaint which, on August 12th, she caused to be served upon petitioner as the attorney for Christine M. Phillips, and which she caused to be filed on the 17th of that month, sought to change the character of the court's custody of the money by causing it to be held thereafter by the court, through a receiver in the quiet-title action, for the benefit of herself and of all the other claimants thereto. Therefore, even if the order of August 17th appointing a receiver were a nullity, the fact remains that the plaintiff in the quiet-title action, as petitioner well knew from the time the amended complaint was served upon him, was seeking to have the character of the court's custody of the award changed in the manner just indicated. If the order for the appointment of a receiver were a nullity, the plaintiff in the quiet-title action was free, nevertheless, to renew her application for a receiver and to procure from the court a valid order therefor in compliance with the prayer of her amended complaint. But the attainment of that relief was frustrated by the withdrawal of the money from the court's custody on the 18th of August. A person may be found guilty of contempt if he actively interferes in a pending action to frustrate any order which may be made therein to establish or secure an asserted estate or right. Such conduct constitutes an "unlawful interference with the * * * proceedings of a court," within the meaning of subdivision 9 of section 1209 of the Code of Civil Procedure. See Ex parte Kellogg, 64 Cal. 343, 30 P. 1030; Derryberry v. Derryberry, 8 Tenn. Civ. App. 401; In re Rice (C. C.) 181 F. 217; Bartholomay Brewery Co. v. O'Brien, 172 App. Div. 784, 159 N. Y. S. 126. In the Matter of Rice, supra, the court says:

> "Ordinarily, it is true that one who anticipates the bringing of a suit against him may absent himself from the jurisdiction, and continue in hiding after he returns, for the purpose of avoiding service of the usual process to compel

his appearance when suit is brought, without offending the dignity of the court or invading the legal rights of the plaintiff. When, however, the intention so to evade service, formed before the suit is brought, is put into execution after suit brought, not only to avoid appearance in the tribunals of justice, but to frustrate any orders which may be issued to establish the proper status of an estate or right, pending a controversy, and to preserve it from invasion by a defendant who purposes to act and does act while in hiding, so that he may thwart any orders which may be issued to that end, whatever they may be, such conduct is both illegal and immoral, and the courts will compel submission to the jurisdiction and process by attachment against the recusant party, or sequestration of his property."

In Derryberry v. Derryberry, supra, the complainant in a divorce action who intercepted the defendant and by false statements caused her to refrain from making a valid defense was held to be guilty of contempt under a statutory provision of Tennessee similar to subdivision 9 of section 1209 of our Code of Civil Procedure.

[3] It follows from what we have said that if Judge Willis had not made the order which he was induced to sign on August 18th, petitioner's participation in the withdrawal of the award deposited in the condemnation action would have constituted an unlawful interference with the proceedings of the court in the quiet-title action, quite irrespective of whether the order for the appointment of a receiver was or was not a valid order. Wherefore it must follow that petitioner, as the attorney for a client who was a party to both actions, owed a duty to the court to disclose to Judge Willis, freely and frankly, the proceedings previously had in the quiet-title action, including the order of August 17th appointing a receiver. Petitioner's failure to notify Judge Willis that the plaintiff in the quiet-title action had filed an amended complaint asking for the appointment of a receiver to take possession of the fund, and that an order appointing a receiver had been made the day previously in another department of the respondent court, was not consistent with that good faith and fair dealing which is required to be observed by members of the bar towards the courts in which they practice. See People ex rel. v. Case, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; People v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384; and In re Jones, 70 Vt. 71, 39 A. 1087. Attorneys who appear in court as counsel for parties to litigated controversies are "engaged in the service of the court, assisting in the exercise of its jurisdiction, and in the performance of its functions. They are actually or potentially officers of the court. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons." Matter of Shay, 160 Cal. 399, 406, 117 P. 442, 445. The nature of the lawyer's duty is well stated in People v. Beattie, supra, where the court says:

> "The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions."

For these reasons we are of the opinion that the matters set forth in the affidavit which inaugurated the contempt proceedings disclose the willful neglect of a duty owing by petitioner to the court, and that therefore the affidavit gave the court jurisdiction under subdivision 3 of section 1209 of the Code of Civil Procedure, which specifically declares that a "willful neglect or violation of duty by an attorney" is a contempt of the authority of the court.

[4] The evidence was sufficient to support such of the essential averments of the affidavit as were denied by petitioner's answer. It is claimed that no evidence was introduced to show that petitioner concealed any information from Judge Willis when applying for the order permitting the withdrawal of the award. Because of certain admissions in the answer, no such evidence was necessary. In the affidavit initiating the contempt proceedings it is alleged that Judge Willis was not notified or informed "that the present action [the quiet-title action] was existing and that an order had been granted therein" appointing a receiver. In his answering affidavit petitioner denied that he had not informed Judge Willis that the quiet-title action was existing, but failed to deny the averment that Judge Willis was not informed of the order appointing a receiver. Allegations in the initiatory affidavit which are not denied in the answer are deemed to be admitted. 5 Cal. Jur. 945. See, also, Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127. It is true that petitioner's answer denies that he had any knowledge of the order for the appointment of a receiver when he sought from Judge Willis the order for the withdrawal of the money. But the lower court found in the contempt proceeding, upon evidence which, though conflicting, was sufficient to support the finding, that on the afternoon of August 17th petitioner was notified by the courtroom clerk of the making of the order and of the terms thereof. If, then, petitioner had knowledge of the order for the appointment of a receiver when he appeared before Judge Willis on the afternoon of August 18th—and in view of the finding just mentioned we must accept it as a fact that he did possess such knowledge—then his admission of the averment that he failed to

notify Judge Willis of the order appointing a receiver was sufficient to warrant the judgment of the court adjudging him guilty of contempt.

[5] We may say in conclusion that practically all of petitioner's contentions are based upon a false premise. He was properly adjudged guilty of contempt, not because he violated an order of the court—he acted under an order permitting a withdrawal of the fund—but because he willfully neglected a duty which he owed the court as an attorney and counsellor at law, in that he failed to inform Judge Willis of the order appointing a receiver. It may be that even if he had advised Judge Willis of the making of the order, that judge, nevertheless, would have granted the order permitting the money to be withdrawn. But it was Hon. Frank R. Willis, and not this petitioner, whose duty it was to pass upon the question as to whether the proceedings had in the quiet-title action, including the order for a receiver, were of such a character that it would not be improper to order the withdrawal of the fund deposited with the court in the condemnation action. The case against petitioner is clearly within the purview of subdivision 3 of section 1209 of the Code of Civil Procedure.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

78 Cal. App. 442

PEOPLE v. JACKSON. (Cr. 1256.)

(District Court of Appeal, Second District, Division 1, California. June 18, 1926.)

1. Criminal law 🔑1159(3).

Dispute as to facts between witnesses for defense and prosecution is for sound discretion of jury.

2. Criminal law 🔑829(1).

Refusal of instructions fully covered by instructions given, so far as applicable to facts in evidence, is not error.

3. Criminal law 🔑814(2)—Instruction held not objectionable on ground that defendant was guilty of no unlawful act before killing, in view of evidence of his gambling (Pen. Code, § 330).

Objection to instruction on ground that defendant was guilty of no unlawful act before killing *held* without merit in view of undisputed evidence that he was gambling with dice, declared unlawful by Pen. Code, § 330.

4. Homicide 🔑269.

Whether deceased was engaged in unlawful act before killing *held* for jury.

5. Homicide 🔑297—Instruction that prior attack on defendant, commission of act suddenly after forming intent, or passion would not mitigate or excuse homicide, held proper under evidence.

Instruction that fact that defendant had been attacked, acted suddenly after forming intent to kill, or was in a passion would not mitigate or excuse homicide, *held* proper under evidence.

6. Criminal law 🔑808½.

In murder trial, instruction in exact words of Pen. Code, § 197, *held* not error.

7. Homicide 🔑300(3)—Instruction that, to justify homicide, necessity of killing to avoid injury must appear to defendant's comprehension as reasonable man, held proper.

Instruction, that to justify homicide it must appear to defendant's comprehension as reasonable man that it was necessary to take deceased's life to avoid danger, *held* proper.

8. Homicide 🔑300(7)—Instruction that necessity of killing to avoid danger must reasonably appear to justify homicide held competent under facts.

Where it appeared that deceased had retreated and put down gun when defendant opened fire, instruction that, to justify homicide, it must appear to his comprehension as reasonable man that it was necessary to take deceased's life to avoid danger was competent.

9. Homicide 🔑300(3)—Instruction that necessity of killing to avoid danger must reasonably appear to justify homicide held not error, as telling jury that defendant must have gone to extreme lengths to retreat.

Instruction that, to justify homicide, it must reasonably appear necessary to take deceased's life to avoid danger, *held* not erroneous, as telling jury that defendant must have gone to extreme lengths to retreat from danger, and was bound to retreat, if possible.

10. Criminal law 🔑829(4)—Refusal of instruction as to insufficiency of profane and vulgar language to justify pulling pistol held not error, in view of instruction given.

Refusal of instruction that calling one a bad name or use of profane and vulgar language is not excuse or justification for pulling pistol *held* not error, in view of instruction that provocation by words only or insulting actions or gestures without assault is insufficient to reduce offense for murder to manslaughter.

11. Criminal law 🔑829(5)—Refusal of instruction to consider defendant's state of mind, if he knew deceased was dangerous character, held not error, in view of instruction given.

In murder trial refusal of instruction to consider defendant's state of mind, if he knew that deceased was dangerous character, *held* not error, in view of instruction that he had right to consider deceased's bad reputation in forming belief of imminence of danger and necessity of killing.

12. Criminal law ⚷829(5)—Refusal of instruction that one need not exercise care in manner of killing in self-defense, where appearances justify belief in necessity of killing to avoid danger, held not error, in view of instructions given.

Refusal of instruction that one need not exercise due care as to manner of killing in self-defense, where appearances reasonably justify belief that it is necessary to kill to save himself from death or great bodily harm, *held* not error, in view of instructions given.

13. Homicide ⚷300(3)—Instruction that defendant could consider what he knew of deceased's bad reputation, in forming belief of imminence of danger, held to include reputation as dangerous character.

Instruction that defendant, in forming belief of imminence of danger or necessity of taking deceased's life, could consider what he knew of deceased's "bad reputation," *held* broad enough to include her reputation as a "dangerous character."

14. Homicide ⚷300(7)—Refused instruction that absolute necessity for self-defense exists, when one is placed in jeopardy by sudden murderous attack, held not warranted by evidence.

Instruction that absolute necessity for self-defense exists, when one who has not brought on assault is placed in such jeopardy by sudden attack in murderous manner, *held* properly refused as not warranted by sufficient evidence.

15. Homicide ⚷300(7)—Instruction that, in self-defense, one may pursue adversary until he finds himself out of danger, held properly refused as not supported by evidence.

In murder trial, instruction that one forced to necessity of self-defense may pursue adversary until he finds himself out of danger *held* properly refused as not warranted by evidence.

16. Criminal law ⚷822(1).

Part of instruction must be construed with other portions and immediately preceding and following instructions as to same matter.

17. Criminal law ⚷823(17)—Instruction that intentional killing without adequate provocation is murder, though done on sudden quarrel or heat of passion, held proper, when considered with other instructions.

Instruction that intentional unlawful killing is murder, though done on sudden quarrel or heat of passion, in absence of adequate provocation, *held* not error when considered with other portions of instruction and immediately preceding and following instructions, as to what constitutes first and second degree murder and manslaughter.

18. Criminal law ⚷1158(2)—Denial of instructed verdict may be reviewed only to determine absence of substantial evidence of fact prosecution was bound to prove.

Denial of instructed verdict may be reviewed in appellate court only to extent of determining whether there was absence of any substantial evidence of some fact that prosecution was bound to prove.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Charles G. Jackson was convicted of murder, and he appeals. Affirmed.

Guy Eddie, of Los Angeles, for appellant.

U. S. Webb, Atty Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

YORK, J. The evidence very clearly exhibits the case as one of cold-blooded murder. The evidence, as we view it, shows that the threats of the deceased were merely that, if the defendant laid hands upon her, she would use the gun which she had drawn. That, thereafter, after the defendant had left the room, he returned with a gun, and, as one of the witnesses puts it, fired as he jumped into the room, and followed this with another shot.

There occurred in this case the usual small discrepancies between the testimony of the witnesses. There is a direct conflict between the testimony of the defendant and some of the other witnesses as to whether he fired from the hallway, or whether he fired after he entered the room, and there is a conflict in the testimony of the defendant and most of the other witnesses as to whether or not the deceased pointed her pistol in his direction immediately prior to his firing the first shot.

[1] On an examination of the entire case we cannot consider that there has been any miscarriage of justice herein. As we view it, in the light of the facts shown in evidence, the theory of self-defense has no reasonable relation to the case. The dispute between the witnesses for the defense and the prosecution as to the facts is a matter that is left to the sound discretion of the jury. They are the final arbiters of the facts.

[2] The objections of the defendant to the instructions given, and to the refusal of requested instructions, lose much of their force by reason of the fact that the instructions given, taken as a whole, very fully and fairly state the law of the case. We do not find any errors therein of such serious or prejudicial nature that they require much discussion. This applies definitely to appellant's assignments of error in relation to instructions given. Concerning the nine refusals of requested instructions, all discussed in the brief for appellant, we are also of the opinion, after an examination which we have made of the evidence introduced herein, that there is no evidence which in any way tends to mitigate defendant's crime, and even his own testimony hardly substantiates the claim of justifiable self-defense. This will necessarily limit somewhat our discussion of the rejected instructions. An examination of the refused instructions and a comparison of the same with all of the instructions given clearly shows that, in so far as the refused instructions are applicable to the facts in evidence herein, they are fully covered by the instruc-

tions given. The instructions fully set forth to the jury in clear and concise language what constituted adequate provocation. It is therefore manifest to the court that counsel for appellant has not succeeded in showing that by such refusals—when considered in connection with the instructions actually given to the jury—his client was deprived of any element of a fair trial. In so far as the offered instructions are in themselves free from objection, they are fairly covered, in substance if not in form, by the instructions given.

[3, 4] Appellant's point 1 is apparently based upon a claim that the defendant was guilty of no unlawful act preceding the killing, yet there is undisputed evidence that the defendant was gambling with dice, declared to be unlawful by section 330 of the Penal Code. Therefore, the instruction objected to is correct. The court, in this instruction objected to, made no declaration of fact as to whether or not the deceased was engaged in the performance of an unlawful act. The instruction properly left that question to the sole determination of the jury.

[5] That part of the instruction which informed the jury that the fact, if established, that the defendant had been attacked would not mitigate or excuse the homicide, nor would the fact that the act of defendant was done suddenly after the intent to commit the homicide is formed, was a proper instruction under the facts shown in the transcript; as also was that part of the instruction which declared that the fact that the defendant was in a passion would not mitigate or excuse homicide, that the crime would be murder in spite of the fact that the act was done suddenly after the intent to commit the homicide was formed. This statement of the law is, in substance, laid down in the case of People v. Hunt, 59 Cal. 430, and particularly at page 435 of said decision. Under the facts in this case the first nine lines of the instruction given were unnecessary and not particularly applicable to the case, but when taken with all of the other instructions we cannot say that the rights of the defendant were thereby prejudiced, but we hold that that portion of the instruction objected to was proper under the facts in evidence in this case. See People v. Ye Foo, 4 Cal. App. 730, particularly at page 738, 89 P. 450.

[6] In point 2 appellant assigns as error the giving of an instruction in the exact words of section 197 of the Penal Code. The facts in the case at bar are in no manner identical with the case of People v. McDonnell, 32 Cal. App. 694, 703, 163 P. 1046, and in the McDonnell case the holding was particularly limited to the facts in that case. In People v. Glover, 141 Cal. 233, 74 P. 745, and in People v. Fowler, 178 Cal. 657, 670, 174 P. 892, the court has held that error cannot be predicated upon an instruction which states the law as the Legislature has fixed it by statute, if the same is applicable to the case in which the instruction is given.

[7-9] The objection of the appellant to that part of the instruction appearing on page 43 of the clerk's transcript:

> "But it must also appear to his comprehension as a reasonable man, that, to avoid such danger, it was necessary for him to take the life of the deceased."

However, this instruction, taken as a whole, properly states the law. It informed the jury that mere apprehension of danger is insufficient to justify a homicide, and that fear sufficient to justify a killing must be such as would excite the fears of a reasonable person. People v. Westlake, 62 Cal. 303. In the case of People v. Maughs, 149 Cal. 253, 259, 86 P. 187, the instruction was different in form from that before the court in the case at bar. In this case the deceased had retreated and put down her gun, and the defendant had left the room. The gun was still down by her side when the defendant emerged from the bedroom, came down the hall, and re-entered the gambling room and opened fire upon the deceased. Such facts being before the jury this instruction was competent. People v. Burns, 27 Cal. App. 227, 149 P. 605. Appellant's contention that this instruction in effect told the jury that the defendant must have gone to extreme lengths to retreat from the danger and that he was bound to retreat, if retreat were possible, is not a reasonable interpretation of the instruction given.

[10] The appellant complains of the court's refusal to give an instruction as follows:

> "You are instructed that the calling of a person a bad name, or the use of profane and vulgar language to a person, is no excuse or justification by itself for the person against whom such bad language is used to pull a pistol or even to use any force whatsoever in defense against this bad language."

The question for the jury in this case was whether the bad language of deceased was a justification for the act of the defendant. On this point the court correctly instructed the jury:

> "But if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation. In considering what is regarded as such adequate provocation, it is a settled rule in law that neither provocation by words only, however opprobrious, nor contemptuous, or insulting actions, or gestures without an assault upon the person, nor any trespass against lands or goods, are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter."

[11] Appellant's point 5 is a claim that the court erred in refusing to give his proposed instruction appearing on page 29 of the

clerk's transcript, in which he asked the jury to take into consideration the state of mind of the defendant at the time of shooting, if they believed from the evidence that the defendant knew that the party attacking him was a dangerous character. However, this identical point was covered in one of the instructions given, to wit:

> "You are instructed that the defendant in this case had the right, as a reasonable person, in forming his belief of the imminence of the danger and the necessity to take the life of the deceased, to take into consideration what he knew of the bad reputation of the deceased."

[12] Point 6 of the appellant is an objection to the refusal to give the following instruction:

> "You are instructed that a person is not required to exercise any due care or circumspection as to the manner of killing in self-defense, where the appearances are such as to justify a reasonable man in believing that it is necessary to kill another in order to save himself from death or great bodily harm."

In the case of People v. Thomson, 145 Cal. 717, 79 P. 435, cited by appellant, the facts were quite dissimilar from the facts in the case at bar, and the instruction in the Thomson Case was by no means as broad as the one requested here. The jury here were instructed as follows:

> "You are instructed that a person acting under the law of self-defense may act upon appearances and will be justified in acting upon them even though they happen to be false, providing he was influenced by said appearances as any reasonable person would be, and believed from the appearances that he was in actual danger of death or serious bodily harm."

The jury were also instructed:

> "You are instructed that if you find from the evidence that the defendant was suddenly and dangerously attacked by the deceased and was at the time in imminent danger of great bodily harm at the hands of the deceased, the defendant would be justified in taking the life of the deceased, even though it be proved that he might have easily gained safety by flight."

[13] Point 7 made by the appellant is the refusal to give an instruction to the effect that defendant, in forming the belief as to the imminence of danger and the necessity of taking the life of his adversary, had the right to take into consideration the bad reputation of the deceased for being a dangerous person. He contends that the instruction already cited by us is not broad enough to fully protect the defendant's rights. The instruction plainly shows that the phrase "bad reputation," therein contained, referred to the matter of the danger in which the defendant stood, and her bad reputation was to be considered as a part of that danger. This, of course, included her reputation as a "dangerous character," if she had such reputation.

[14] The next error claimed by appellant is the refusal to give an instruction that absolute necessity for self-defense exists when a person who has not brought on the assault is placed in "such jeopardy by the sudden attack of the assaulting person in a murderous manner." There was not before the court sufficient evidence to make this instruction applicable to the case.

The appellant's point 9 is answered by the instruction shown in the clerk's transcript, pages 44 and 45, wherein the court stated the law on the point raised in the proposed instruction, in that he informed the jury that defendant might be justified in taking the life of the deceased even though it later proved that he might have gained safety in flight.

[15] Point 12, wherein appellant alleges as error the refusal to give the following instruction:

> "You are instructed that where a person is forced to the necessity of self-defense he may pursue his adversary until he finds himself out of danger."

To support this point appellant cites the case of People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L. R. A. 403. In that case the court said that one had the right to pursue and slay in order to secure safety, but the pursuit must not be in revenge nor after the necessity for defense had ceased, but it must be prosecuted in good faith to the sole end of winning his safety and securing his life. See page 463; People v. Robertson, 67 Cal. 647, 8 P. 600. In the case at bar there was no evidence of pursuit of the defendant by the deceased. He merely claimed that, if she had so desired, she might have rushed to the top of the stairs and fired down the stairs as he was leaving. There is nothing in evidence in this case which could give him any possible reason to believe that she was attempting to do anything of that kind.

[16, 17] Appellant's point 13 is a claim that it was improper to instruct the jury as follows:

> "But if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation."

This part quoted is but part of an instruction and is to be construed, of course, with the other portions of the instructions given, and especially with the immediately preceding and the immediately following instructions given by the court as to what constitutes first and second degree murder, and what constitutes manslaughter, and so considered, is not erroneous.

[18] The ruling denying the motion for an instructed verdict was entirely correct. Such ruling may not be reviewed here, beyond the point of determining "whether there was an absence of any substantial evidence as to some fact that the prosecution was bound to

prove." People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L. R. A. 783.

The judgment and order are affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

79 Cal. App. 55

COLE v. MANNING. (Civ. 5477.)*

(District Court of Appeal, First District, Division 1, California. July 29, 1926.)

1. Appeal and error 🔑1011(1).

Plaintiff's testimony, accepted as true by trial court, is sufficient to sustain findings for him, though there is evidence warranting contrary inference.

2. Appeal and error 🔑1011(1).

Trial court's findings on conflicting evidence are controlling.

3. Appeal and error 🔑994(3), 1012(1).

Weight of plaintiff's testimony and his credibility as witness are exclusively within trial court's province to determine.

4. Appeal and error 🔑1009(3)—Decree for plaintiff on conflicting evidence, in suit for cancellation of deeds and reconveyance of land, must be affirmed.

Decree adjudging plaintiff to be owner of land and ordering cancellation of deeds and reconveyance thereof must be affirmed, where record discloses conflict of evidence as to whether grantee promised to hold property in trust, or transfer was made to defraud plaintiff's creditors, and for certain monetary consideration.

5. Contracts 🔑138(1).

Any contract violating morality and public policy is illegal and cannot be sued on, whether executed or executory.

6. Appeal and error 🔑846(6)—Where pleadings and findings reveal no meretricious relations between parties to suit for cancellation of deeds, case must be treated as if no such relations existed, as regards judgment roll.

Where neither pleadings nor findings, in man's action against woman to cancel deeds to and compel reconveyance by her, reveal any meretricious relations between them, case must be treated on appeal as if no such relations existed, so far as judgment roll is concerned.

7. Trusts 🔑373—Findings and judgment in man's action to cancel deeds to woman held to sustain enforceable trust, in absence of intimation of meretricious relations in pleadings or findings.

Court's findings and judgment in man's action against woman to cancel deeds and compel reconveyance *held* sufficient in form and substance to sustain enforceable trust in defendant, in absence of any intimation of meretricious relations between parties in pleadings or findings.

8. Trusts 🔑102(1)—One availing himself of influence, arising from confidence naturally reposed in him by another to obtain advantage of latter, will not be allowed to retain it.

One availing himself of influence, growing out of confidence naturally reposed in him by another, to obtain advantage at latter's expense, will not be allowed to retain it.

9. Trusts 🔑96—Trust arises in favor of grantor or third person, for whose benefit property is held on parol promise by grantee, between whom and grantee confidential relations exist.

Where one of two parties, between whom confidential relations exist, conveys land to other on parol promise to hold it for benefit of grantor or third person, in whom grantor is interested, without other consideration, trust arises in favor of grantor or such third person, and violation of such promise constitutes fraud on which trust arises.

10. Trusts 🔑365(5)—Suit to cancel deeds, executed in consideration of promise to marry, was not barred by laches or statute, where trust was not repudiated until plaintiff discovered, only few months before commencing suit, that defendant was married (Code Civ. Proc. § 338, subd. 4).

Cause of action for cancellation of deeds from man to woman in consideration of promise to marry was not barred by laches and Code Civ. Proc. § 338, subd. 4, where trust was not repudiated, until plaintiff discovered, only a few months before commencing suit, that defendant was married.

11. Limitation of actions 🔑103(4).

Statute of limitations against enforcement of trust does not begin to run until repudiation of trust with beneficiary's knowledge.

12. Courts 🔑18—Court may direct conveyance of land outside state, though neither decree nor conveyance thereunder, except by title holder, is effective beyond jurisdiction.

Court may adjudicate ownership of land in another state, and direct conveyance thereof to plaintiff by defendant as trustee, though neither decree nor any conveyance thereunder, except by party in whom title is vested, is effective beyond court's jurisdiction, and alternative direction to clerk to execute deed does not invalidate decree or that part of it.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Suit by John R. Cole against Effie T. Manning. Decree for plaintiff, and defendant appeals. Affirmed.

Wallace L. Ware, of Santa Rosa, for appellant.

W. F. Cowan, and A. W. Hollingsworth, both of Santa Rosa, for respondent.

KNIGHT, J. The plaintiff, John R. Cole, obtained a decree herein against the defendant, Effie T. Manning, adjudging him to be the owner of an undivided one-half interest in a ranch in Sonoma county, Cal., and sole owner of two parcels of land situate in the

---

*Hearing denied by Supreme Court September 27, 1926.

state of Idaho. Said decree furthermore ordered the cancellation of certain deeds theretofore executed by plaintiff to defendant conveying to the latter said Idaho property, and directed defendant to execute and deliver to plaintiff instruments of conveyance to all property of which he was by said decree declared to be the owner, or in the event of defendant's failure so to do, that the clerk of the court execute and deliver the same. It was further adjudged that plaintiff was entitled to his share of the income from said properties subsequent to the entry of said decree. Defendant appeals, and, as first ground for reversal, urges that the evidence is insufficient to support the findings.

It appears from the evidence that during the year 1910 plaintiff, an unmarried man, residing in Inchelium, Wash., began corresponding with defendant through the medium of an advertisement inserted in a Los Angeles matrimonial publication by defendant at the request of her sister, Mrs. Taylor, with whom defendant was then living near Los Angeles. About 6 months later, in October, 1910, defendant went to Washington for the purpose of meeting plaintiff, the latter having sent her $50 to defray traveling expenses. Upon her arrival there the parties were not married, but began and for three months thereafter continued an illicit cohabitation, at the end of which period defendant returned to her home near Los Angeles. About a month later, in February, 1911, plaintiff went to Los Angeles, where he resumed the cohabitation with defendant while she was living at her sister's home, the defendant having advanced plaintiff $50 for traveling expenses. They continued to live in that relationship near Los Angeles until May 7, 1911, and during that time, to wit, on February 25, 1911, plaintiff conveyed to defendant his interest in the Idaho property, valued at about $6,500, and assigned to her a contract for the sale of land in Canada, calling for the payment to him of a balance of $600. He also made a bill of sale transferring to her title to personal property worth about $500.

During the early part of May, 1911, they moved to San Francisco, where they entered into an installment agreement for the purchase of the Sonoma county ranch for the sum of $2,550, Mrs. Manning making an initial payment thereon of $250. Cole and Mrs. Manning took possession of the property about May 11, 1911, and Cole immediately began building a house thereon, into which they moved as soon as it was completed, and occupied until the year 1922, representing themselves to be brother and sister, but in fact maintaining a meretricious relationship. During these years the place was cultivated, fenced, and set out to orchard. Cole constructed a barn, windmill, and other improvements thereon, and also worked for various employers in the vicinity, earning approximately $2,658, which was turned over to Mrs. Manning and by her applied to the payment of the purchase price and the improvement of the ranch. Besides his earnings, Cole turned over to Mrs. Manning various sums which he received on a life insurance policy, from loans, sales of land in Canada and other sources, which sums were also put into the property. Mrs. Manning contributed toward the purchase price and improvements a sum not exceeding $2,500. In 1913 the installment contract was extinguished, and the property was deeded to Mrs. Manning as sole grantee, subject to a mortgage of $2,000. In 1920 the ranch was leased and the equipment thereon sold to a tenant for the aggregate sum of $3,590, or thereabouts, and this money was used to discharge the mortgage, amounting to $2,110.83, including interest. In October, 1922, Mrs. Manning, upon Cole's application, was committed to the state hospital for the insane, but was shortly afterwards released on parole, given into the custody of relatives, and subsequently legally restored to competency.

At the time plaintiff conveyed the Idaho property to Mrs. Manning he owned only a half interest therein, his brother owning the remaining interest, but the property was subsequently partitioned, and title to the separate share plaintiff was entitled to was conveyed to Mrs. Manning. This property brought in a rental of between $15 and $25 a month, and the Sonoma ranch at the time of the trial was valued at about $12,000.

Plaintiff's complaint is in one count, his cause of action being based upon an alleged trust relationship. In this respect it was, in substance, alleged in the complaint and found by the trial court that a relation of confidence and trust existed between plaintiff and defendant arising out of exchange of promises to marry, which were made and accepted for the first time during defendant's visit to Washington, and which were afterwards renewed from time to time during the following years; that, reyling upon said promises of marriage, plaintiff, at the solicitation of defendant, was induced to convey to defendant said Idaho property, to contribute toward the purchase price, and the improvement of the Sonoma county ranch, and to allow title thereto to be taken in defendant's name with the understanding and agreement, and pursuant to representations made by defendant to the effect that she would hold the same in trust for the use and benefit of plaintiff and herself until the marriage was consummated, and that in the meantime she would preserve and protect the property so that when married they might enjoy the ownership of the same as husband and wife; that shortly before the commencement of this suit plaintiff learned that defendant was not a single person, and therefore had no intention of fulfilling her repeated promises to marry; that upon learning of her marital status he demanded a reconveyance of the Idaho property and the conveyance to him of a half interest in the ranch in Sonoma county, whereupon defendant repudiated her agreements as to her trusteeship, claimed to be the exclusive owner of all of said property, and excluded him from said ranch. Plaintiff then commenced this suit.

Defendant's contention that the findings are not supported by the evidence is based mainly upon the claim that the evidence proved that the transactions involving the conveyance of the Idaho property and the acquisition of the Sonoma county ranch were consummated principally in consideration of defendant's consent to maintain meretricious relations with plaintiff; that there never was any promise or any intention on the part of either to enter into the marital relation, but that they agreed from the outset not to marry; that, therefore, the parties being in pari delicto, the court, in the exercise of its jurisdiction in equity, may not intervene in the settlement of property rights acquired as a result of such relationship, but must leave the parties where it finds them.

[1-3] Assuming, as defendant contends, that the record reveals evidence from which this inference might be fairly drawn, still the testimony given by plaintiff was wholly to the contrary, and his testimony, having been accepted as true by the trial court, is legally sufficient to sustain the findings on this essential issue. At best, therefore, the proof relied upon by defendant raises but a mere conflict, and in that state of the record the trial court's findings must be held as controlling. Defendant argues strongly against the probability of the truth of plaintiff's testimony, claiming, for instance, among other things, that his explanation as to why the marriage was not consummated during the number of years they were living together, namely, because defendant pretended that she was in ill health, is absurd. But it is apparent that this and like reasons urged by her against the truth of plaintiff's testimony relate entirely to the amount of weight that shall be given to such testimony and to plaintiff's credibility as a witness, and these are questions exclusively within the province of the trial court to determine.

[4] The rule to be applied on appeal in a situation of this kind, as it is stated in California Jurisprudence, is as follows:

> "Assuming that the presumption is, primarily, that the holder of the legal title is also the owner of the beneficial interest in the property, it would seem that the plaintiff must assume the burden of showing by a preponderance of evidence that the transaction was not a gift or sale, or—what is the same thing—that the consideration for the conveyance was the defendant's alleged promise. While this rule may be invoked in the trial court, it is to be borne in mind that the appellate courts assert a limitation upon their authority to reach conclusions which contradict the findings of the trial court. Hence, if the record discloses a conflict of evidence as to whether the grantee promised to hold the property in trust, the judgment must be affirmed. Within the rule, a conflict of evidence may be produced in some cases by the testimony of the plaintiff." 25 Cal. Jur. p. 168, citing cases.

What has been said regarding the conflict of evidence upon the issue already discussed applies with equal force to the further contention of defendant that the transfer of the Idaho property was made by plaintiff for the purpose of defrauding his creditors, and also for a certain monetary consideration, for as to those issues the evidence is also conflicting, plaintiff having denied both assertions.

[5-7] Neither are we able to sustain defendant's contention that the findings and the judgment are against law. Admittedly any contract which violates morality and public policy is illegal and void, and whether it be executed or executory no action can be maintained thereon (6 Cal. Jur. 168; 6 R. C. L. 716; Vincent v. Moriarty, 31 App. Div. 484, 52 N. Y. S. 519); and if in the instant case the findings disclosed that plaintiff's right of recovery was predicated upon transactions of an immoral nature, the validity of the decree could not be maintained; but the decision of the trial court in plaintiff's favor is placed upon an entirely different ground, that is, upon the ground of a trust relationship arising out of promises of marriage.

[8] Neither the pleadings nor the findings reveal any intimation of the existence of meretricious relations between the parties, that element having appeared in the case only through the introduction of evidence; consequently the case, so far as the judgment roll is concerned, must be treated as if such relations never existed. That being so, the terms of the findings and judgment are, in our opinion, legally sufficient in form and substance to sustain an enforceable trust.

> "Where a person takes advantage of a confidential relation which he sustains toward another, or of the confidence reposed in him by another to gain property by fraud, the court will declare a constructive trust." 1 Beach on Trusts and Trustees, § 105.
>
> "Whenever two persons stand in such relation that confidence is naturally reposed by one, and the influence growing out of that fact is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be allowed to retain his advantage." Perry on Trusts and Trustees, § 209.

[9] The law in this state is to the same effect, it being held generally that where confidential relations exist between two parties, and one conveys land to the other upon a parol promise that he will hold it for the benefit of the grantor or of a third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises in favor of the person for whose benefit the property is held, and it is the violation of the parol promise which con-

stitutes the fraud upon which the trust arises. Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Taylor v. Morris, 163 Cal. 717, 127 P. 66. A number of cases are cited and discussed in the briefs herein as to the rule prevailing in cases where parties have acquired property while cohabiting under a void marriage, but we deem it unnecessary to inquire into the rule of those cases, for we believe that the situation here is governed by the law of trusts as announced in the authorities hereinabove referred to.

[10, 11] There is no merit in defendant's contention that plaintiff's cause of action is barred by laches and by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure, for it appears from the evidence and the findings that the trust was not repudiated until plaintiff discovered that defendant was not a single person, which discovery was made only a few months prior to the commencement of the action; and the statute of limitations does not begin to run until after a repudiation of the trust with knowledge of the repudiation brought home to the beneficiary. Taylor v. Morris, supra.

[12] Finally, defendant contends that the trial court exceeded its jurisdiction in attempting a disposition of the real property situate in Idaho, and that the portion of the decree authorizing the clerk of the court to execute the deed of conveyance upon the failure of defendant to do so is void, citing, among others, the case of Fall v. Eastin, 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853. The effect of the decision in that case was discussed in Redwood Investment Co. v. Exley, 64 Cal. App. 455, 221 P. 973, the court saying in reference thereto:

> "It was held that while a court of equity acting upon the person of the defendant may decree a conveyance of land in another jurisdiction and enforce the execution of the decree by process against the defendant, neither the decree nor any conveyance under it except by the party in whom title is vested is of any efficacy beyond the jurisdiction of the court; that to concede such power would be to attribute to such a decree the force and effect of a judgment in rem by a court having no jurisdiction of the res. It was there further held that the full faith and credit clause of the Constitution does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment conclusive on the merits of the claim, or subject-matter of the suit; and the courts of the state in such a case do not deny full faith and credit to a decree of courts of another state by holding that it does not operate directly upon and transfer the property."

And then, after pointing out that the rule stated in Taylor v. Taylor, 192 Cal. 71, 218 P. 756, is to the same effect, the court continued:

> "There can be no question that real property is exclusively subject to the laws and jurisdiction of the state where located, and that no other laws or courts can effect it by an attempt to create, transfer, or vest title thereto. Judgments or decrees, therefore, which are rendered in one state cannot of themselves affect title to lands in another. From the very nature of the property land must be governed by the lex loci rei sitæ. But this does not mean that a decree directing a conveyance is without its effect per se. It may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated, and is entitled in such a court to the force and effect of record evidence of the equities therein determined unless it be impeached for fraud. 2 Black on Judgments, sec. 872; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621."

It would therefore appear in the instant case that while "neither the decree nor any conveyance under it except by the party in whom title is vested is of any efficacy beyond the jurisdiction of the court," and will not operate to change or directly affect the title to property in another state, nevertheless it was within the power of the court to direct a conveyance to be made by the defendant, and for that purpose it became necessary to first adjudicate ownership. The fact that an alternative direction to the clerk of the court to execute the deed was made a part of the decree does not, in our opinion, so far as this appeal is concerned, render the decree or that portion of it void, but, as held in Fall v. Eastin, supra, if executed, such deed will have no efficacy beyond the territorial limits of the court's jurisdiction.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

78 Cal. App. 759

Ex parte WASHER. (Cr. 1346.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1926.)

1. Usury ⚷6—Usury Act held not to create an exception in cases of individual loans, secured by deposits of corporate or municipal bonds, but rather in cases of loans to corporations issuing bonds (Usury Act, § 3; Civ. Code, § 2986).

Usury Act (St. 1919, p. lxxxiii) § 3, prohibiting the exaction of more than 12 per cent. interest per annum for the use of money, when repayment "shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, receipt or other evidence of debt, except corporation bonds and municipal or other public bonds," does not create an exception in cases of individual loans secured by deposits of corporation, municipal, or other public bonds, but rather in cases of loans to corporations issuing bond not in need of the protection of such statute, in view of Civ. Code, § 2986.

2. Constitutional law 🔑210—Usury 🔑5—Usury Act, making exception in cases of loans to corporations, held not to discriminate against maker of individual loans in violation of state and federal Constitutions (Usury Act, Const. Cal. art. 1, §§ 11, 21; Const. U. S. Amend. 14).

Usury Act (St. 1919, p. lxxxiii), prohibiting the exaction of more than 12 per cent. interest for the use of money, but creating an exception in cases of loans to corporations issuing bonds and not situated as necessitous borrower, *held* not to discriminate against makers of individual loans, in violation of Const. Cal. art. 1, §§ 11, 21, and Const. U. S. Amend. 14.

3. Usury 🔑6.

Laws enacted to guard against unreasonable rates of interest should be favorably regarded.

4. Usury 🔑5.

Usury laws are within police power.

5. Constitutional law 🔑70(3).

Necessity of usury laws is primarily question for Legislature.

6. Constitutional law 🔑48.

Constitutionality of a statute is presumed.

7. Constitutional law 🔑48.

Where statute is susceptible of two constructions, one consistent and the other inconsistent with provisions of Constitution, that construction harmonious with Constitution will be adopted.

8. Constitutional law 🔑242—Usury 🔑5—Provision of Usury Act limiting charge for appraisals, etc., held not to result in unlawful discrimination, invalidating prior provision against taking excessive rate of interest Usury Act, Const. Cal. art. 1, §§ 11, 21; Const. U. S. Amend. 14).

Usury Act (St. 1919, p. lxxxiii), prohibiting the asking of more than 5 per cent. of all sums loaned less than $1,000, and 3 per cent. of all sums loaned over $1,000, for examinations, appraisals, commissions, etc., *held* not to result in an unlawful discrimination violative of Const. Cal. art. 1, §§ 11, 21, Const. U. S. Amend. 14, affecting validity also of prior provision prohibiting taking of excessive rate of interest.

9. Constitutional law 🔑42.

A person whose rights are affected by one portion of statute may not question constitutionality of another portion, operation of which will not affect him.

10. Constitutional law 🔑42.

One convicted of taking excessive interest, in violation of Usury Act, § 3, *held* not entitled to question constitutionality of portion of section relating to acceptance of any fee or commission for procuring loan for short period (St. 1919, p. lxxxiii).

Application by W. Washer for a writ of habeas corpus, to be directed to the Chief of Police of the City of Los Angeles, to secure the release of petitioner from custody after conviction of violation of the Usury Act. Writ discharged, and petitioner remanded to custody.

Charles Greenberg, Laurence W. Beilenson, Schweitzer & Hutton, and Henry Haves, all of Los Angeles, for petitioner.

J. M. Friedlander, City Prosecutor, and A. T. Folsom, Deputy City Prosecutor, both of Los Angeles, for respondent.

J. M. Jefferson, Davis & Thorne, W. A. Alderson, and George L. Sanders, all of Los Angeles, amici curiæ.

WORKS, J. An application for the writ of habeas corpus.

At the time of the filing of the petition in this proceeding, petitioner was under imprisonment pursuant to conviction upon a charge of having violated the provisions of a statute of the state known as the Usury Act. The complaint under which he was convicted alleges:

> That he "did willfully and unlawfully ask, demand, receive, take, accept, and charge of and from" certain individuals more than 12 per centum per annum for the sum of $7,000 loaned to the individuals, "for the forbearance, use and loan of said sum of money; payment of said sum of money being secured by an evidence of debt, to wit, a trust deed upon real property," describing it, "and by a promissory note executed" by the individuals in favor of petitioner, and bearing a certain date.

Upon the filing of petition therefor the writ issued, petitioner was released on bail, and we are now to determine whether his punishment is lawful.

Petitioner contends for his release from durance on the ground that the Usury Act is unconstitutional. The statute, which was enacted by the people under the initiative provisions of the Constitution, is to be found in Stats. 1919, p. lxxxiii. It also appears in Deering, General Laws, as Act No. 3757. For convenience in discussing the various constitutional questions argued in the briefs, the entire enactment, with the exception of a few lines, which clearly are not involved in the points presented, is below set forth. For further convenience in dealing with the questions presented to us the quotation from the statute is divided into two parts. The first of these reads:

> "Section 1. The rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or a shorter time; but it shall be competent for parties to contract for the payment and receipt of a rate of interest not exceeding twelve dollars on the one hundred dollars for one year and not exceeding that rate for a greater or less sum or for a longer or shorter time, in which case such rate exceeding

seven dollars on one hundred dollars shall be clearly expressed in writing.

"Sec. 2. No person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest, and no action at law to recover interest in any sum shall be maintained, and the debt cannot be declared due until the full period of time it was contracted for has elapsed.

"Sec. 3. Every person, company, association, or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, 1 and 2, may either in person or his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

The second portion of the statute follows immediately the first part as above set forth and will be referred to hereafter in this opinion as the latter part of section 3. It reads:

"And any person, company, association, or corporation, who shall ask, demand, receive, take, accept or charge more than twelve per centum per annum upon the sum of money actually loaned for the forbearance, use, or loan thereof, when the repayment of the money loaned shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, receipt or other evidence of debt, except corporation bonds, and municipal and other public bonds, upon property, real or personal or by assignment of wages, or ask, demand, receive, take, accept or charge more than an amount equal to five per cent. so actually loaned and secured in all sums of one thousand dollars or less, and three per cent. on all sums over one thousand dollars in full for all examinations, views, fees, appraisals, commissions, renewals made within one year from date of loan and charges of any kind or description whatsoever, except abstracts or certificates of title charges made under the Torrens land law or otherwise, in the procuring, making and transacting of the business connected with such loans, or who shall ask, demand, receive, take, accept or charge any fee, bonus, or commission whatsoever for the use or loan or the procuring of such loan of any sum of money for a shorter period than six months when said loan is not secured by a mortgage or pledge upon real estate, or shall violate the provisions of sections one and two of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished for the first offense by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment not more than six months, or by both such fine and imprisonment, and for each subsequent offense and conviction shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars and by imprisonment not less than six months nor more than one year."

The points urged by petitioner for his release from custody depend for their solution almost wholly, if not altogether, upon the language of the latter part of section 3, and in presenting them petitioner relies upon the following guaranties contained in the organic law of state and nation, respectively:

"All laws of a general nature shall have a uniform operation." Const. Cal. art. 1, § 11.

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Const. Cal. art. 1, § 21.

No state shall "deny to any person within its jurisdiction the equal protection of the laws." Const. U. S. Amend. 14.

These various constitutional provisions, generally speaking and having in mind the situation exhibited in the present controversy, look to the accomplishment of one object, the protection of the individual against unjust discrimination in the enactment of laws, and in relying upon them petitioner contends that this object would be frustrated if the Usury Act were permitted to stand, or if, under certain conditions, certain portions of it were permitted to stand. The first point made by petitioner is that he is discriminated against by the language of the latter part of section 3 making a certain exception in the case of loans with which "corporation bonds, and municipal and other public bonds" are connected, and we state thus generally, for the present, the nature of the exception, for the parties are not in accord as to its import. The meaning of the exception must therefore be ascertained before a conclusion may be reached upon the claim of discrimination suggested by petitioner.

[1] The point in which the parties are in disagreement as to its meaning may be shown by the propounding of two questions, in the alternative: (1) Does the exception contemplate loans to corporations, to take one kind of entity to which it is made to apply, which loans are made, through "sale" in the open market, by investors in corporate bonds and upon the security afforded by them? or (2) Does it relate to loans made to private individuals, who may be hard pressed and needy borrowers, and upon the security of corporate bonds of which they may be possessed and which they pledge as collateral security for such loans? Whether the first or the second

of these questions is to be answered in the affirmative is an important matter. The exact point made by petitioner, under his claim of an unjust discrimination against him and against those situated like him, is that because of the alleged discrimination either the Usury Act is unconstitutional in its entirety, or, if a certain construction, which it is not now necessary to specify, may be placed upon sections 1 and 2, then section 3 alone is unconstitutional. Otherwise stated, his point is that the entire act may be obnoxious to the organic law, but that section 3, at least, is surely so. Under well-established principles of constitutional law, however, all doubt as to the validity of the Usury Act, or of any of its parts, upon the ground now taken, is dispelled if it may be discovered that the exception now under the glass is based upon a classification which the Legislature, proceeding with due regard to constitutional mandate or inhibition, had authority to make—if it can be said that those coming within the exception belong to a properly ascertained and declared class to which petitioner and those circumstanced like him do not belong. Upon these suggestions the importance of the two questions above propounded at once becomes manifest. If the exception relates to loans made to corporations, or to the other entities contemplated by it, through a sale of bonds upon the open market, we shall have no difficulty in reaching the conclusion that the exception is based upon a constitutional scheme of classification. If the exception deals with loans made to individuals—to possibly necessitous borrowers—upon a deposit of their corporate bonds as collateral security the discovery of a proper scheme of classification may not be so easy. Obviously, we can say no more at present upon the question of classification, proper or improper. The first question for solution is, what is the import of the exception which we have extracted, in such general terms, from the latter part of section 3?

It now becomes necessary to state the terms of the exception with exactness. This may be done by a quotation from the statute, omitting alternating words and all expressions which are immaterial to a construction of the clause in which the exception is contained, and which may tend to make construction difficult. Thus shortened the clause reads:

> "And any person who shall ask more than twelve per centum upon the money actually loaned for the use thereof, when repayment shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, receipt or other evidence of debt, except corporation bonds, and municipal and other public bonds, upon property, real or personal, shall be guilty," etc.

A mere reading of this language demonstrates that its meaning is far from clear. The clause "or other evidence of debt" would seem to furnish the principal guide to a construction of the entire passage, but the import of that guiding expression is determinable only after a consideration of the language which accompanies it. The meaning of the words "or other evidence of debt" is obscured by the fact that they are preceded by the language "when repayment shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, [or] receipt." Not only under the language of the statute are these instruments said to be those by which repayment shall be *secured*, but under the law it is quite possible that not one of them is, in strictness, to be considered as an "evidence of debt." That part of the clause which refers to loans, the repayment of which is secured by a "pledge," does not necessarily contemplate an evidence of debt as security. While promissory notes and other indubitable evidences of debt may be the subject of pledge, so also may ordinary articles of personal property (Civ. Code, § 2986; 21 Cal. Jur. p. 311, § 21)—articles which in the highest flight of the imagination could not be designated as evidences of debt. A mere receipt is plainly not an evidence of debt (England v. Hughes, 141 Ark. 235, 217 S. W. 13). Of course, as recognized by the case cited, a "receipt" may be so drawn as to contain a promise to pay, but it then becomes both a receipt and a promissory note or an I O U. The paper is then an evidence of debt, but it is so in its promise to pay and not in its character as a receipt. It is obvious that neither a bill of sale nor an assignment strictly so called, is an evidence of debt. It has been determined that under certain circumstances a mortgage is an evidence of debt, once in a case in which the instrument involved was the old conveyance of mortgage with defeasance clause (Chase v. Ewing, 51 Barb. [N. Y.] 597), and once in a case in which a modern mortgage securing the payment of a promissory note was in question (Kaiser v. Idleman, 57 Or. 224, 108 P. 193, 28 L. R. A. [N. S.] 169), the latter decision citing the first as authority; but there is a well-considered declaration to the contrary, and that, too, in an instance of the modern form of mortgage with promissory note (Littlefield v. Clary, 66 Ga. 322). In the latter case the court said:

> "A mortgage is 'a security for debt,' according to our Code, and not, strictly speaking, a mere evidence of indebtedness."

On the whole it is to be doubted whether the word "mortgage," as employed by the people in the clause of the Usury Act now under scrutiny, can be considered as referring to an evidence of indebtedness, even though, along with the other terms with which it is in company, it is so characterized. We have not yet mentioned "trust deeds," another of the terms included in the clause. It is extremely doubtful whether such an instrument is an evidence of indebtedness. Certainly, if a mortgage is not, there is the more reason for determining that a trust deed is not.

It is not necessary for us here to decide whether each and every one of the words which immediately precede the expression "evidences of debt" is truly descriptive of and was intended to designate actual evidences of debt. It is enough to say that some of them plainly cannot belong to that classification, for such a conclusion answers the purpose of our discussion. It is now manifest that the expression which, after the word "except," follows the phrase, "evidence of debt"; that is to say, the expression "corporation bonds, and municipal and other public bonds," need not be construed as referring to evidences of debt, as that expression is understood in the strict nomenclature of the law. To put it differently, as the expression "*other* evidence of debt" follows words which do not refer to strict evidences of debt, the words which follow that expression, "corporation bonds and municipal and other public bonds," are not necessarily to be construed as referring to strict evidences of debt. To state the situation differently, again: If we attempt to follow the rule ejusdem generis, and under that rule essay to consider "corporation bonds and municipal and other public bonds" in such a manner as to place them in the same genus with the terms which precede the word "except," we need not consider such bonds as strict evidences of debt for the very good reason that most of the instruments named just before the term "except" are not themselves evidences of debt, although they are inferentially so named by the three words which immediately follow the term "except." The names of the instruments or securities which precede that word in strictness do not establish such a genus. Therefore, the words which follow it need not belong to that genus. We should make it plain here that in what we say we have in mind a rule of construction, based upon an admeasurement of context, and do not deal with the matter of the usual and ordinary import of the terms corporation bonds, municipal bonds or public bonds. That ordinary meaning is, of course, well understood. Such bonds, beyond a doubt, are in strictness evidences of debt. We only say that if there is room to consider them in any other light, as they are referred to in the Usury Act, the rule ejusdem generis does not prevent.

It will be observed that a discussion of the clause of the Usury Act now under consideration, especially in connection with the argument thus advanced, involves us in a maze of words. If we have made ourselves clear, notwithstanding this great difficulty, we may now say that up to the point at which we have arrived—and we pause to remark that we must yet go further—the result of our discussion supports the argument of petitioner as to the import of the exception embodied in the Usury Act and now under consideration, and in saying this we have in mind a certain specific point made by petitioner within the general proposition already stated and which is embraced in the two questions which we have above propounded as to the meaning of the exception. This specific point must now be stated. Petitioner contends that the words which precede the term "except" in the statute do not designate evidences of debt, but that they, under the terms of the clause in which the exception is contained and under the law, are descriptive of various kinds of *security* for the payment of debt. Upon this premise he then asserts that the expression, "corporation bonds, and municipal and other public bonds," which follows the word "except," must be construed in such manner as to make them refer to security for the payment of debt, also. The next step in his argument is that the expression can be so construed if it is held to relate to the repayment of loans to individuals who may privately own such bonds and who may deposit them as collateral with the persons who may make such loans to them and as security for repayment. As an accompaniment to this assertion petitioner says that corporate, municipal and other public bonds, being evidences of debt of the entities which issue them, cannot be considered as security for the repayment of the debts of those entities, incurred on the faith of advances made to them by investors in bonds, and that trust deeds issued by such entities in connection with bond issues are the security for repayment in such instances and not the bonds themselves. It will now be perceived how the argument of petitioner is supported, as far as we have proceeded, by the conclusion which we have above expressed as to the rule ejusdem generis. But, as we have observed, we must go further.

We have already concluded that the rule ejusdem generis does not *compel* us to consider the expression "corporation bonds and municipal and other public bonds" as intended by the people, in the enactment of the Usury Act, to refer to those instruments as evidences of debt. These questions are now to be determined: Are we bound to consider the expression as referring, strictly, to security for the payment of debt? Are we bound to adopt completely the contention of petitioner? To put the problem conversely: May we give to the expression the meaning which it ordinarily imports and hold that the exception in the statute refers to loans made to corporations, municipalities and other public entities upon the faith of bonds issued by them? We shall discuss the problem before us—and it is to be conceded that it is an extremely difficult one—in the terms of the question last put, for we shall be able to answer it in the affirmative.

In the first place, as we have so often remarked, the bonds referred to in the exception are actually evidences of debt. They are, in effect, the promissory notes of the entities which issue them. Not only so, but they are called evidences of debt by the presence of that very expression immediately preceding the word "except" in the statute, although the expression is largely if not altogether a misnomer as applied to the names of instruments which precede the word "except." These considerations are far from controlling, but they are worthy of mention in assembling the arguments in opposition to the contention of petitioner. There are other considerations which are vastly more potent against him. It will be noted, for instance, that the statute undoubtedly intends, in that part of it immediately preceding the word "except," to refer to loans the repayment of which is to be "secured" by instruments executed by the borrower. To be more specific, it is evidently intended by the statute that the denouncement of a charge of more than 12 per centum interest on loans the repayment of which is secured by "a mortgage, trust deed, bill of sale, assignment, * * * [or] receipt" contemplates loans in connection with which the instruments mentioned, or any of them, are executed by the borrower as security. This patent fact argues that the people intended that the exception in favor of loans "secured" by "corporation bonds, and municipal and other public bonds" should apply to loans made to those entities which execute the bonds, although technically such bonds do not "secure" payment, but are evidences of the debt. We find here a genus established by the terms preceding the word "except," omitting the word "pledge," to which genus corporate, municipal and other public bonds may be made to belong only upon the considerations just mentioned.

We must now turn to the word "pledge," as affecting the import of the clause immediately following the word "except." By the use of the word "pledge" the people plainly intended, if we forget for the moment the expression which follows the word "except," that the inhibition against an excessive rate of interest was to apply to all loans to secure the repayment of which personal property might be deposited in pledge, whether such personal property consisted of promissory notes, corporate bonds, municipal bonds, other public bonds, or of specific articles of personal property, as that term is ordinarily understood, such as watches, jewelry, musical instruments and the like. It will thus appear that by the use of the word "pledge" the people made the inhibition of the statute apply to that very character of loan to which petitioner would now apply the exception of the statute. We can see no reason for so construing the exception. The inhibition of the statute plainly applies to loans the payment of which is secured by a deposit with the lender of promissory notes, certificates of deposit, warehouse receipts and certificates of shares of corporate stock. Why should an exception be made in the case of loans secured by a deposit of "corporation bonds or municipal or other public bonds"? We repeat that there is no apparent reason for such an exception. It would appear to us as witless, being a departure, without sensible warrant, from the evident purpose of the entire enactment in which the exception is contained. Under a line of authority which we shall cite below, and which announces what is practically a self-evident proposition, usury laws are enacted for the protection of borrowers. Such laws are intended as a bulwark to protect the needy from the greed of the rapacious. It is the theory of such enactments that those in distress might be plunged into deeper distress if the law did not come to their relief and protect them from the money lender, who would prey upon misfortune and wring from the needy borrower, in his endeavor to tide over present difficulty, the utmost farthing as compensation for what is often an evanescent benefit—merely the putting off of an evil day. If we turn again to our statute, what reason can there be for an attempt to lift borrowers who deposit "corporation bonds and municipal and other public bonds" as a "pledge" for the payment of their debts from the necessitous class in which the people have placed borrowers who pledge promissory notes and certificates of corporate stock as security? It is obvious that there is none. When we come to consider, which we shall do immediately, the claim of petitioner that he is discriminated against by the exception in the statute we shall endeavor to show that corporations, municipalities, etc., which borrow money upon bond issues do not belong to the necessitous class we have mentioned and are, therefore, a proper subject of classification, as we think the statute intended to classify them, under the Constitution.

[2] As a basis for further argument in refutation of the contention of petitioner as to the import of the exception embodied in the statute, we turn now to a consideration of his claim that the exception puts him under the ban of an unjust, and therefore unconstitutional discrimination. Undoubtedly this contention were well-founded if the exception were conceded to mean what petitioner insists that it means. We have already seen that if the exception were so construed it would operate upon those who are situated similarly with petitioner. Upon such a construction, then, it would result that the classification attempted to be made by the exception would not be based upon a natural or just scheme of classification, and that the statute, or some parts of it, at least, would be unconstitutional and therefore void. A directly opposite result flows from the view that the exception in the statute was intended to apply to loans to those corporate entities which borrow money upon bond issues. They are, from the very

nature of the transactions incident to the issue and sale of their bonds, in a class entirely different from that occupied by the necessitous borrower. They are not brought in contact with the individual money lender, they are not subject to the pressure exerted by him upon the victims whom it is the purpose of the law to protect, they cannot fall under his wiles. Such entities are under the pressure only, in the ascertainment of the rate of interest they are to pay, of the demands of the money market.

[3-5] There is no necessity for a further development of this theme. It is too obvious for argument that the exception in the statute, where applied to such borrowers, is based upon a scheme of classification that is wholly just and equitable. It is obvious also, therefore, that upon such a construction of the clause which voices the exception, petitioner's claim of an unjust discrimination against him falls to the ground and carries with it his contention that any part of the statute is unconstitutional because of such discrimination. These considerations afford reason, in addition to that which we have already shown, for a determination that the people intended the exception in the statute to apply to corporate entities which borrow money upon bond issues. "Laws enacted to guard against unreasonable rates of interest are laws against oppression, and should be favorably regarded, as they always have been favored by the common law of England." Eaker v. Bryant, 24 Cal. App. 87, 140 P. 310. Usury laws are within the police power of the state (33 C. J. 217). It primarily rests with the Legislature to determine what police regulations are essential to the public welfare. Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248.

[6, 7] The constitutionality of acts of the Legislature is presumed. In re Brady, 65 Cal. App. 345, 224 P. 252. In passing upon the constitutionality of a legislative enactment, "the whole scope and design of the statute is to be studied, and its language is to be so construed as to aid that design, and not to defeat it." French v. Teschemaker, 24 Cal. 518. "It is with extreme reluctance that courts feel constrained to hold any law unconstitutional, and only do so when no other alternative presents itself whereby it can be avoided." Bell v. Superior Court, 150 Cal. 31, 87 P. 1031. "The delicate act of declaring an act of the Legislature unconstitutional and void should never be exercised unless there is a clear repugnancy between the statute and the organic law. In a doubtful case the benefit of the doubt is to be given to the Legislature." Heney v. Jordan, 179 Cal. 24, 175 P. 402. "It is a well-recognized canon of interpretation that, where a legislative enactment is susceptible of two constructions, one consistent and the other inconsistent with the provisions of the Constitution, such enactment should be so construed as to make it harmonious with the Constitution and comport with the legitimate powers of the Legislature." 5 Cal. Jur. 615.

These rules of law, enunciated concerning instances in which acts of the Legislature were in question, apply with unabated force when an attempt is made to construe an enactment issuing from people under the initiative provisions of the Constitution. We conclude, on the whole, that the exception embodied in the statute now under examination was intended to refer, not to loans made upon "corporate bonds and municipal and other public bonds" pledged as security, but to loans made to the corporate entities which issue such bonds and through the sale thereof on the market. Therefore we conclude, also, that petitioner's contention that he is unjustly discriminated against by the exception is without foundation.

[8] The next point made by petitioner relates also to the latter part of section 3 of the Usury Law. Following the scheme adopted in discussing the question of which we have just made disposition, we shall quote from the section those parts which are involved in the point now to be examined, omitting unnecessary words and passages which might serve to impede construction. Thus shortened the latter part of the section reads:

"Any person who shall ask more than an amount equal to five per cent. [on money] so actually loaned and secured in all sums of one thousand dollars or less, and three per cent. on all sums over one thousand dollars in full for all examinations, views, fees, appraisals, commissions or renewals made within one year from date of loan and charges of any kind or description whatsoever in the procuring, making and transacting of the business connected with such loans shall be guilty," etc. The expression, "so actually loaned and secured," as it shows in this excerpt, evidently connects with the clause "the sum of money actually loaned" as that clause appears in the latter part of section 3 as shown by the copy of the statute inserted near the beginning of this opinion, although, to render intelligible the excerpt from the statute now particularly under scrutiny, the words "on money" must be read before the words "so actually loaned and secured." We have accordingly inserted those words in brackets at the proper place in the excerpt now under examination.

The expression "so loaned and secured," in the excerpt now before us, would also seem to connect with the clause above it in the latter part of section 3, which reads, "when the repayment of the money loaned shall be secured by a mortgage," etc., and which clause has been the subject of such extended discussion above.

Petitioner contends that the portion of the statute which is now to be examined unjustly discriminates against him, but, as in the case of the point which we have above determined, a preliminary inquiry into the meaning of the statute must be made before we may embark upon a discussion of the specific question which is raised. In his construction of the feature of the enactment which is now of interest petitioner imposes a heavy burden on the tie that binds the expressions "the sum of money actually loaned," "when the repayment of the money loaned," and "so loaned and secured." From the relation between these clauses petitioner deduces a variety of consequences to flow from the operation of the Usury Act. He says that only two purposes could have been intended by the statute in those parts of it which are fastened together by the three clauses which we have quoted. Under the first of these purposes, as seen by him, he asserts, because of the presence of the prohibition against more than 12 per cent. interest on loans in that part of section 3 which we have quoted in discussing the point already determined, and through the connection caused by the interdependence of the three clauses mentioned—he asserts, we repeat—that the portion of the statute now under scrutiny allows an adding together of charges against a borrower, thus, to quote from his brief:

> "A lender may exact 17 per cent. on loans of $1,000 or less, but only 16 per cent. [15 per cent. (?)] on loans of $2,000."

Under the first purpose seen by petitioner, also, because of the presence of the provision, "shall be secured by mortgage," etc., in the statute, and because of the connection between the three clauses above mentioned, he forecasts this consequence:

> "A lender may exact only 17 per cent. on a loan of $1,000 which is unsecured, or which is secured by a mortgage, a trust deed, a corporation note, an individual bond, or other security. But if the loan is secured by bonds of the X Corporation, or by bonds of Oshkosh, Wisconsin, he may make any charge he wishes for appraisals, etc., and, therefore, may exact an unlimited amount."

We can see nothing in the phraseology of the statute which entails either of these extreme consequences. Certainly, the enactment should be construed, if possible, in such fashion as to avoid them both. The possibility of such a construction, nay, a necessity for it, is to our minds presented by the fact that the provision as to 12 per cent. interest and the one naming the various kinds of "securities," misnamed "evidences of debt," is separated from the provision as to 5 and 3 per cent. for "appraisals," etc., by the conjunction "or." In stating the "first purpose" of the latter provision, as he sees it, petitioner reads the section as if the conjunction "and" were there employed.

Petitioner's conjectured "second purpose" of this part of the statute is in our view the real one which the people had in mind in enacting the measure. Petitioner thus states the "second purpose" which he sees:

> "The other purpose that may have been intended to be accomplished is to make an exaction of more than 5 per cent. on $1,000 and of 3 per cent. above $1,000 for examinations, views, fees, appraisals and other charges, bad irrespective of the interest charged."

In discussing the constitutional question presented by petitioner we shall assume, for we now decide, that this latter quotation from his brief states the real and only "purpose" of the portion of the statute now under examination. The "first purpose" which petitioner sees in that part of the enactment is a mere figment of the imagination.

[9] Is petitioner unconstitutionally discriminated against by the provision which we have just interpreted? We cannot see how such a result is possible. It must be remembered here that the claim of unjust discrimination now made is not presented and cannot be presented upon the theory which was behind the point of which we have already disposed. There petitioner advanced the arguable contention that an exception in the statute—that concerning loans on "corporate bonds and municipal and other public bonds"—so operated as to allow an escape from punishment under the Usury Act of those who, naturally, were in the same class with himself. He was convicted under that portion of the statute which denounces a charge of more than 12 per cent. interest per annum on a loan of money. The feature of the law which he now assails defines a different crime. It singles out for punishment those who may charge 5 per cent. on loans of $1,000, or less, or 3 per cent. on loans of more than $1,000, for "appraisals," etc. Petitioner urges that this latter denouncement of a separate crime is unconstitutional on various grounds, none of which, we think, is open to him. He insists, for instance, that the classification in this branch of the statute as between loans of $1,000 or less and loans of more than $1,000 —as much as a 5 per cent. charge for "appraisals" being allowable under the first class and not more than 3 per cent. under the second—is not based upon a sound or natural scheme of classification. If the validity of this contention be admitted for the sake of argument—although we are far from so deciding—petitioner has not been injured by the unjust discrimination which he asserts—that is, in truth, there is no discrimination against him. Such a point may be presented only as between those who may charge 5 per cent. and those who may charge no more than 3 per cent. for "appraisals." It is a well-settled rule of constitutional law that:

> "A person whose rights are affected by one portion of a statute may not question the constitutionality of another portion, where the operation of the portion affecting him will not be influenced by the validity or invalidity of the contested provision." 12 C. J. 764.

We can see no reason why the portion of the Usury Act which affects petitioner—that part denouncing a charge of more than 12 per cent. interest — can be influenced in its operation by a determination that the part of the law limiting the charge for "appraisals" is unconstitutional. It seems to us that the two provisions are severable and that, therefore, the inhibition against an excessive rate of interest may stand even if the denouncement of an excessive appraisal charge must fall. This conclusion appears to be justified by all the authorities. 5 Cal. Jur. p. 643, § 69.

It must be confessed, however, that petitioner makes a semblance of a claim of discrimination against him by the branch of the statute which denounces excessive charges for "appraisals." He cites several "examples" of the manner in which the statute will operate under the latter provision. One of these examples is thus stated in his brief:

> "L lends B $2,000 secured by a mortgage on real estate and charges 1 per cent. interest plus an appraisal charge of 5 per cent. L has committed usury. M lends B $2,000, secured the same way, and charges B 12 per cent. interest and no appraisal charge. M has not committed usury. Yet M has charged B more than L."

Petitioner contends that this statement is enough to show that "the law" is unconstitutional. We think it is not. It merely illustrates the assertion we have already made to the effect that the inhibition against a charge of more than 12 per cent. interest and the denouncement of an excessive charge for "appraisals" are but descriptions or definitions of separate crimes. We think, in short, that the example falls far short of an exposition of the unconstitutionality of any part of the measure. To our minds it shows but a proper and natural instance of the operation of a law that was intended to have a highly beneficial effect. The statute, in its parts which are now under examination, has merely made a classification of usurers which is eminently proper upon just principles of constitutional law. It places in a first class those who charge excessive interest and in a second class those who make excessive charges for "appraisals" and kindred service. Of course, in the practical application of the law a variety of consequences may result. A money lender may so demean himself as to fall within the first class denounced by the Legislature, or he may so far forget that obedience to the mandate of the law which is required of every one as to fall into the second class. In either event he is guilty of a crime but in each instance he commits a different crime from that perpetrated in the other. Also, under the denouncements of the law, he may be guilty of both crimes in the conduct of a single transaction. To be more specific, if he charges more than 12 per cent. interest he is a criminal of the first class, if he charges more than the prohibited percentage for an "appraisal" he is a criminal of the second class, if he charges more than 12 per cent. interest and in the same transaction exacts a percentage in excess of that allowed by the Usury Act for an appraisal he is a criminal of both classes. We can see nothing in such a range of possibilities to induce the slightest objection, upon constitutional grounds, to the action of the Legislature which permits it. These views seem to us to be sound, as placing an estimate upon the constitutional powers of the Legislature, and to be based not only upon just but upon necessary principles. We regard charges for interest and charges for "appraisals" and the like as entirely separate and distinct affairs, each or either furnishing a separate field of legislative exploration and attention. We think no authorities have been cited to us which exactly reach the question here presented and we have found none. We think none is necessary. The propriety of the distinction drawn in the Usury Act, on this head, seems to us to be manifest.

Petitioner, however, cites other "examples" of the operation of the particular part of the statute now under examination, each of which, he says, demonstrates the unconstitutionality of the measure. It is enough to say that in our opinion they neither demonstrate nor permit such an outcome. The entire subject covered by petitioner's assault upon that part of the statute now under scrutiny has been discussed and no necessity exists for a particular examination of the other "examples" stated by him. The claim of unconstitutionality on the ground now urged is without merit.

[10] Petitioner also insists that he is unlawfully imprisoned for the reason that another portion of the latter part of section 3 is unconstitutional when read in connection with the remainder of the Usury Act. The portion referred to may be shortened, under the plan above adopted as to other parts of the enactment, to read thus:

> "Any person who shall ask any fee, bonus or commission for procuring [a] loan of money for a shorter period than six months when said loan is not secured by a mortgage or pledge upon real estate shall be guilty," etc.

Under rules of law which are stated above the objection thus made is not open to petitioner. In the pangs which he suffers pursuant to his conviction upon a charge of exacting an excessive rate of interest, he can have no concern with the question whether some other person may or may not be punished for charging an undue amount as a bonus or commission for procuring loans. The portion of the statute which he now assails denounces a crime totally different in its nature from that which he committed, and if that portion of the statute were held to be unconstitutional—and we by no means pass upon the question—we can see no reason for a fall of that part of the enactment under which petitioner was convicted. The claim of petitioner that the statute is obnoxious to the organic law because it discriminates against one who may exact a bonus or commission for procuring a loan for a shorter period than 6 months, there being no prohibition against such a charge when the loan is for a longer period than that named, can be raised legitimately only by one convicted upon a charge of having exacted a bonus or commission for procuring a loan for the shorter period. Under this phase of the Usury Act there can be no possible discrimination against petitioner. The same argument obtains as against other specific objections which petitioner makes to this branch of the statute.

It is insisted by petitioner that the Usury Act is unconstitutional because it provides that no more than 12 per cent. interest shall be charged for loan of "goods." It is said that this particular provision operates to deprive a lender of his property without due process of law. Without pausing to explore the substance of the contention it is enough to say that petitioner is in no position to make it. Such a question will properly arise when it shall be presented by some person charged with the particular offense denounced by the provision referred to.

While we have not mentioned specifically all points made by petitioner, we have answered the substance of every contention that is presented.

Writ discharged and petitioner remanded to custody.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

78 Cal. App. 790

PORTER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5379.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1926.)

1. Appeal and error 🔑436—Perfection of appeal divests superior court of jurisdiction only of matters embraced in judgment or order appealed from.

Perfection of an appeal divests superior court of jurisdiction of all matters embraced in the judgment or order appealed from, but not upon any other matter embraced in the action.

2. Appeal and error 🔑447.

An order for injunction, pending appeal from a judgment or order denying an injunction, is not an order upon or embraced in the order appealed from.

3. Appeal and error 🔑447—Superior court has no jurisdiction directly to vacate its temporary injunction pending appeal, order for which issued after regular submission of motion therefor.

Superior court has no jurisdiction directly to vacate or modify an order theretofore made for issuance of an injunction pending an appeal after regular submission of motion therefor, since its power over the subject-matter has been exhausted.

4. Injunction 🔑178—Where, pending litigation, undertaking on temporary injunction appears insufficient, court must require an increase as condition of continuance.

Where, at any time pending litigation, it appears that undertaking on temporary injunction is insufficient, court must require an increase of the undertaking as the condition of allowing the plaintiff to continue the injunction.

5. Appeal and error 🔑447—Superior court has jurisdiction to order increase in undertaking on temporary injunction pending appeal.

Superior court has jurisdiction, notwithstanding appeal, to order an increase in amount of undertaking on temporary injunction issued pending an appeal, even though result may be that the injunction will be set aside for failure to give the new undertaking.

Application for writ of prohibition by Charles L. Porter, to be directed to the Superior Court of Los Angeles County and Carlos S. Hardy, Judge thereof, to prevent said judge from hearing any motion for order requiring undertaking to keep temporary injunction in force. Writ denied.

R. M. Wiley, of Los Angeles, for petitioner.

WORKS, J. Petitioner in this proceeding commenced in respondent court a certain action in which, in addition to a prayer for other relief, he asked for a temporary injunction. Upon the filing of the complaint an order to show cause was issued, and thereafter, upon notice and after a hearing at which all parties to the action were present, the injunction was ordered on the giving of an undertaking in the sum of $20,000. The undertaking was given, was approved by respondent court, and the injunction issued. Thereafter the cause proceeded to judgment against the plaintiff, petitioner here, but it was by respondent court adjudged "that the temporary injunction heretofore ordered by this court * * * be and remain in full force and effect pending the appeal from this judgment and a final determination of said appeal." After the filing of findings and judgment in the action, and after the plaintiff had perfected an appeal from the judgment, which appeal is still pending, the defendants gave notice of motion for an order requiring the plaintiff, petitioner here, "to execute and furnish an undertaking in the penal sum of $50,000 as a condition for the keeping in force" of the temporary injunction pending an appeal from the judgment and until the final disposition of the appeal, and further requiring "that if said plaintiff shall fail, within the time fixed by said court, to furnish said undertaking, that said temporary injunction be vacated, annulled, and set aside." The cause thereafter came on to be heard pursuant to the notice of motion, and the plaintiff, petitioner here, objected that respondent court had no jurisdiction to entertain the motion contemplated by the notice. The objection was overruled, and respondent court was about to proceed with a hearing under the notice when petitioner filed his petition in this proceeding asking that the hearing be prevented. Thereupon we issued an alternative writ of prohibition. Respondents have made no return to the writ.

[1, 2] Petitioner contends that respondent was divested of jurisdiction to increase the amount of the undertaking from $20,000 to $50,000 by the perfecting of the appeal from the judgment. That this contention is unsound appears plainly from the opinion of the Supreme Court in a late case. There the court said, after referring to earlier cases, the italics in the quotation being those of the opinion:

> "It is clear that the perfection of an appeal divests the superior court of jurisdiction as to all matters *embraced in the judgment* or order appealed from. 2 Cal. Jur. 415, and cases cited. It is equally clear that the perfection of an appeal does not deprive the lower court of its jurisdiction to proceed upon any other matter *embraced in the action* unless it is a proceeding 'upon the judgment or order appealed from or upon the matters embraced therein.' (Code Civ. Proc. § 946; 2 Cal. Jur. 418 et seq.) An order for an injunction to preserve the status quo pending an appeal from a judgment or order denying an injunction is not an order upon or embraced in the order appealed from. While it is in a sense appurtenant to and concurrent therewith, it is nevertheless separate and separable therefrom. It may perhaps be said to be collateral to the order appealed from, but it is doubtful that it may be regarded as even incidental thereto, as costs may be said to be incidental to a judgment. The real reason why the trial court had no jurisdiction to vacate or modify the order which it had theretofore made for the issuance of an injunction pending the appeal is summed up in the following language in the opinion in Holtum v. Greif, 144 Cal. 525, 78 P. 12: 'The decision of the trial court having been once made *after regular submission of the motion* its power is exhausted—it is functus officio.'" Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617.

[3-5] It is manifest from this language that respondent has lost jurisdiction directly to vacate its temporary injunction, not, however, because an appeal has been taken from the judgment, but because the power of the court over the subject-matter of the temporary injunction has been exhausted. But has the court lost jurisdiction to require a larger undertaking than that which was given when the injunction was issued? Petitioner says that it has, for the reason that if the amount of the undertaking is increased by the court's order, and the new undertaking be not given, then the court will issue its order vacating the injunction, thus doing by successive steps what it could not do at once and by a single step. This result does not follow from the rule so clearly stated in Eisenberg v Superior Court. The Supreme Court has declared in a suit in which it was concerned with an undertaking on temporary injunction, that:

> "If, at any time pending the litigation, it should be made to appear to the court that the undertaking is insufficient, it would have the power, and it would be its duty, to require an increase of the undertaking as the condition of allowing the plaintiff to continue the injunction." Asevado v. Orr, 100 Cal. 293, 34 P. 777.

See, also, Lambert v. Haskell, 80 Cal. 611, 22 P. 327.

As the jurisdiction of respondent court to increase the amount of the undertaking before the appeal was taken from the judgment was plainly existent, and as the appeal did not transfer to the appellate tribunal the matters incident to the giving of the undertaking, it appears plain to us that respondent court has jurisdiction, despite the appeal, to order an increase in the amount of the undertaking, even though the final result may be that the injunction will be set aside for a failure to give the new undertaking. There is as great danger to the rights of defendant in the action from an insufficiency of the undertaking, which insufficiency appears after the appeal, as from an insufficiency which might have appeared before the appeal. Under such circumstances, the jurisdiction to order a sufficient undertaking must rest somewhere, and, as it does not reside in the appellate tribunal after the appeal, it must still abide in the superior court.

The alternative writ of prohibition is vacated, and a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

79 Cal. App. 101

PEOPLE v. WILL et al. (Cr. 887.)

(District Court of Appeal, Third District, California. Aug. 4, 1926.)

1. **Homicide** 🔑253(1).

Evidence *held* to sustain convictions of murder in the first degree.

2. **Homicide 🔑112(5)—Where defendant entered deceased's cabin, in violent manner, to forcibly eject him, deceased was justified in using pistol in self-defense; "violence" (Pen. Code, § 197).**

Where defendant entered deceased's cabin, in violent manner, for the purpose of forcibly ejecting him, deceased was justified in using a pistol in self-defense, under Pen. Code, § 197, making homicide justifiable against one endeavoring, in a violent manner, to enter another's habitation to offer violence to a person

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

therein; "violence" being synonymous with physical force in relation to assaults.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Violence.]

3. Homicide 🔑30(1).

One interfering in a difficulty on behalf of another steps into his shoes, and homicide defendant, engaging in pistol battle with deceased, on behalf of codefendant, attempting to eject deceased from his cabin, was equally guilty.

4. Criminal law 🔑1169(12).

Admitting defendants' statements claimed made through duress, etc., was not prejudicial, where they voluntarily testified to substantially the same at coroner's inquest, and introduced this testimony.

5. Homicide 🔑339.

In homicide case, excluding sheriff's testimony that he advised deceased that it would be a felony to possess firearms was not prejudicial error, where court instructed that it was presumed deceased knew this.

6. Criminal law 🔑768(1)—Instruction in homicide case that, unless jury did their duty, laws might as well be stricken from the statute books held not erroneous.

Instruction in a homicide case as to jury's duty to base verdict on evidence and that, unless the jury did their duty, laws might as well be stricken from the statute books *held* not erroneous.

7. Criminal law 🔑789(9) — Instruction that "reasonable doubt" did not mean every possible or fanciful conjecture, but lack of abiding conviction to a moral certainty of the truth of the charge, held not erroneous.

In homicide case, instruction that by reasonable doubt was not meant every possible or fanciful conjecture, that everything relating to human affairs and depending on moral evidence was open to such conjecture, and that reasonable doubt meant that, after entire comparison of all evidence, the jurors could not say they felt an abiding conviction to a moral certainty of the truth of the charge, *held* not erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

8. Homicide 🔑30(1)—Instruction that aider and abbettor was guilty, whether or not he went to scene of crime intending to commit murder or aid therein, held not erroneous.

Instruction that whoever aided or abetted in a murder was guilty of it, whether or not the fatal shot was fired by him, and whether he went to scene of crime intending to commit murder, or to aid or encourage perpetrator, or to lend assistance, if necessary.

9. Homicide 🔑30(1).

Where both defendants fired simultaneously and continued until deceased was dead, both defendants were principals.

10. Criminal law 🔑786(3)—Instruction to consider defendants' interest, in determining weight and credibility of their testimony, held error, but not reversible error (Const. art. 6, § 4½).

Instruction to consider defendants' interest in the result of the case, and that they were the accused parties testifying in their own behalf, in determining weight and credibility of their testimony, *held* error but not reversible error, in view of Const. art. 6, § 4½, forbidding setting aside a judgment in absence of miscarriage of justice.

11. Criminal law 🔑823(5)—Instruction, that killing need only be preceded by concurrence of will, deliberation, and premeditation, held cured by another instruction.

Instruction that there need not be appreciable time between intent to kill and killing, that killing need only be preceded by concurrence of will, deliberation, and premeditation was cured by instruction that intent must be result of deliberate premeditation.

12. Homicide 🔑300(3)—Instruction as to right of self-defense, by one bringing on difficulty, held not erroneous in view of facts.

Instruction as to right of self-defense, by one bringing on difficulty by his own misconduct, *held* not erroneous as denying such right to one whose fault was remote or trifling, where defendants' acts in seeking to eject deceased from cabin occupied by him were well calculated to produce belief that they intended to resort to whatever violence might be necessary, especially when instructions requested by defendant used language to the same effect.

13. Homicide 🔑113—Instruction that one by lawless acts could not create necessity for self-defense, but that defendant could show that he changed his mind and endeavored to escape, was proper.

Instruction that one by lawless act could not create necessity for self-defense, that necessity was shield for those without fault in occasioning it only, but that defendant could show in justification that, though he brought on an imminent danger, he changed his mind and endeavored to escape, but could not without striking the fatal blow, was proper.

14. Homicide 🔑300(3).

Instruction that, if deceased lawfully possessed his home, and defendants went there intending to use such force as might be required to expel him, this was unlawful, and deceased might resist, was proper, in view of Pen. Code, § 197.

15. Homicide 🔑300(3)—Instruction that killing was not justifiable if defendant shot deceased without act by deceased, save in lawful defense, sufficient to warrant defendant in believing he was in great danger, was proper.

Instruction that if, without overt act or physical demonstration by deceased, save lawful defense of person or home, sufficient to warrant defendant as a reasonable man in believing he was in great bodily danger, defendant shot deceased, killing was not justifiable, was proper.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

David S. Will and Henry Worth were convicted of murder in the first degree, and they appeal. Affirmed.

K. D. Robinson, of Auburn, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were jointly charged with the crime of murder and were jointly tried. Will and Worth were convicted of murder of the first degree, and Andrews of manslaughter. Will and Worth have appealed from the judgments and the orders denying their motions for new trials. Andrews did not appeal.

[1] March 11, 1924, Will received a deed to the west half of the southeast quarter and the east half of the southwest quarter of a certain section of land, the first parcel being patented land, and the other unpatented. He thereafter resided in a house on the east 80 near the west boundary line thereof. In the year 1922, W. C. King located a mining claim which was partly at least on the west 80, but a part of which Will contended, after the execution of said deed, was on the east 80. In April, 1923, King relocated the mining claim with the same boundaries as the original location, and built a cabin on it a short distance west of the boundary line between the two 80's, in which he and his wife thereafter resided until September 8, 1924. King and his wife then departed from the premises, leaving Thomas W. Carl in possession thereof, under an oral agreement to purchase the property from King. There was a dispute as to whether a part of King's mining claim was on Will's patented land. The King cabin was about 300 feet from the house in which Will resided. In July, 1924, Will posted and recorded a notice of location of a mining claim which, in part at least, overlapped the King claim. Will thereafter served notice on King to vacate the latter's claim, and the relations between them became unfriendly. Carl appears to have participated in the controversy between the rival claimants, taking King's side therein. Before the Kings left the premises, Carl and Will engaged in a fist fight, and the latter caused the arrest of the former. In the year 1901 Carl was convicted of the crime of manslaughter in Indian Territory, and thereafter served a term of imprisonment therefor.

The three defendants frequently discussed the matter of dispossessing Carl, and they sought the advise of attorneys as to the means to be employed to that end. On January 9, 1925, the attorneys signed and delivered to Will a letter directed to Carl, stating that they were advised by Will that Carl was trespassing on Will's said mining claim, describing it, and notifying him "to immediately refrain from all further trespassing upon said property," and that "David S. Will intends to enter upon said property, and perform work and labor thereon, and will hold you personally responsible for all interference therewith, and for any further trespass upon said property." During the evening of that day Will requested Clarence Burner, a deputy sheriff residing at Forest Hill, a few miles from Will's home, to go with him to the King cabin and serve the letter on Carl. Burner stated that he would do so during the forenoon of the following day. Burner thereafter discussed the matter with the sheriff, who advised him that the letter was not from the court and that he "had not the right to go and put him in possession of the property with a paper of that kind." In the meantime Will had made arrangements with the other defendants to go with him and Burner to serve the letter upon Carl.

Will testified that he desired to have them along as witnesses. Upon Burner's failure to appear at the appointed time, Will drove to Forest Hill to ascertain the reason for his nonappearance. Burner informed Will of the advice he had received from the sheriff and declined to serve the letter. Will then "stated that he had an order from his attorney to take possession and that he was going to take possession. * * * He said he had waited 5 months for a decision and that 'son of a bitch' had pestered him as long as he was going to let him, and it was either him or Carl." In one of the conversations with Burner, Will said that "he was going to have possession of his property or die in the attempt." Burner testified that Will said that "either him or Carl would go out of the cabin feet first, or something to that effect. * * * He said that Mr. Andrews and Mr. Worth were going with him. * * * I explained to him I thought it would mean trouble for him to go there and he said he was not afraid of trouble, as they were all going armed." After Burner refused to go with him, Will left and in about 1½ or 2 hours he returned to Forest Hill and said: "Well, Burner, it ended bad; I killed him."

The uncontradicted evidence shows that upon Will's return home from Forest Hill January 10th, he armed himself with a 38-caliber revolver, the barrel of which is 7 inches long, and started with the other defendants to Carl's cabin for the purpose of taking possession of the property. He inserted the barrel of the gun inside one of the lace-top boots he was wearing, the handle being above the top of the boot. Worth was armed with a 45-caliber automatic pistol, which he habitually carried. Andrews carried an axe and a saw. As they approached Carl's cabin, an altercation between Carl and Will took place, which terminated in the death of Carl from gunshot wounds inflicted by Will and Worth, each of them firing six shots. A witness for the prosecution testified that, a few hours after the homicide, Will said that, as the defendants approached the cabin, Carl "leveled a rifle on them" and said he would kill them if they "took another step"; that Will then informed Carl that Worth had a letter to read to him; that Carl set the gun down, but held it in one hand, while Worth walked up to the cabin and read the letter and handed it to Carl; that Will then walked up to the porch on which Carl was standing, waving his (Will's) hands and saying not to have any trouble; that when Will got on top of the porch—

"he made one leap and grabbed him and they had a scuffle, * * * and in the tussle the rifle dropped out of Carl's hand, and wrestled until they got over to the stove, and the stove was knocked over. * * * Then he said they let go and kind of peaceable, * * * and he said, after talking a little bit, Carl made a move, and he naturally thought he was reaching for his gun, * * * back towards the little partition with a curtain. * * * He (Will) was sitting on a chair by the table, and when he saw Carl reach what he thought for a gun, he reached for his gun, he said he had it in his * * * high-topped boots, and had it in loose purposely to get his gun and he, while he reached for that gun Mr. Carl had shot the first shot; that he pulled out his gun and shot. While firing one of his shots he heard Mr. Carl groan, * * * and he knew he had hit him, and * * * Mr. Will said he stood up and kept shooting."

January 12, 1925, Will made a statement in the sheriff's office, which was taken down by a stenographer and was admitted in evidence at the trial. In this statement Will said that after his return home from his second trip to Forest Hill—

"I was afraid that I might say something that would aggravate Carl, so I asked Mr. Worth to read the letter to him. * * * I walked over there from my house. It is only possibly 300 feet across. * * * Mr. Andrews took a saw and an axe. Mr. Worth read the letter for me to take possession and start doing work, and I said we would cut a tree down and block the road (leading to the King cabin) after he took his stuff out. * * * When Mr. Worth went ahead to read the letter, but Carl stopped Andrews and me on the bridge with a rifle, * * * maybe 25 or 30 feet (from Carl's cabin), something like that. * * * Carl said, 'You son of a bitch, your claim is up, and if you come on my property I'll kill you.' * * * He held it (the rifle) up ready to shoot, but he didn't point it towards me, but not even with his shoulder as a man naturally would, if he took quick action. * * * He was coming from the woodpile when he saw me leave the house with the other two men behind me, and he ran into the house, and got his rifle which was standing inside the door. * * * We were all pretty near together. * * * Worth said, 'I have a letter of importance to you, Carl, and you can in no way hold anything against me, Carl. I want to read this letter, and you may change your mind.' He talked very sensible. * * * After he read the letter, Carl took it and read it himself. * * * And when he read the letter, he set the rifle just inside the jamb of the porch. * * * I was still standing about 20 feet away, I expect. * * * He said (quoting some vulgar and abusive epithets relative to the defendants and their attorneys), but I kind of thought this fellow was putting it on for a bluff. * * * We stood there, and Mr. Andrews got away from me; he expected to get shot. * * * After he kind of got over his spasm af anger, I argued the matter with him. I said, 'Carl, look here,' and every time I spoke I would take a step ahead, and I would keep saying to him 'Carl, I am determined to take my property; I am going to take it;' and I told him that if there was any court dispute, it could be threshed out in court; that he was a damned fool and so was I, if we did anything that we would be sorry for. I said, 'Nevertheless I must have my property. I got instructions to take possession of it, and I sure will;' and it kind of impressed the fellow; and every time I would say something of that kind I would get a step ahead, and then he would reach for his rifle set behind the jamb. * * * I was possibly 15 or 20 minutes getting up on the porch. * * * I told them (Worth and Andrews, at the time defendants started to Carl's cabin) to take possession and start work just as quick as they were on the property, so we would have legal possession. * * * I told them that, after Carl had his things out, we would take the door off and then it would not be a habitable place. * * * I wanted to cut timber to block that road that they had in 2 years and about 3 or 4 months. * * * Well, I edged up to the porch; I finally got to just in front of the porch, and something attracted Carl's attention, and he looked the other way, and when he looked I must have jumped one foot on the porch or top step, and I had Carl clinched, and in the clinch he must have tried to get the rifle; he moved, * * * and when I clinched him, of course, he put up a fight as best he could, but I don't know, but in the clinch I heard the stove go down, and I swung him around, and he went under the table, and I held him, and I says, 'Now I am in this house and got possession;' and I never struck the man at all. I just clinched him, and then I held him with a clinch, so he could not strike me; and there was two knives on the table, * * * and he had one hand a little free, and I saw he was trying to get one of those knives; * * * and I took those two knives and threw them out of the door. * * * He seemed to cool down, and I released him, and he talked sensible. * * * I says, 'If you want to be good, I will let you go;' and he says, 'I am going to stay here;' and I said, 'I don't care if you stay, but I am going to hold possession.' * * * I thought it was all over with, but he was a cunning rat, because when I released him, you saw that curtain, he jumped back of that curtain, * * * and I hesitated to jump into him again. I am a very active man, and I hesitated. I sat down in that chair near the table that you saw there, * * * and I says to him, 'Mr. Carl, we don't want any trouble, I don't want any trouble with you at all. * * * Let's be sensible; let's don't do anything that will get either of us into trouble, you can't kill me, and I don't want to kill you; I am armed, and here is my gun in my boot.' * * * *And I says, 'If you shoot me, and don't get me vital, I sure will get you;' and then there was a pause, and he says, 'You son of a bitch, get out of here yourself; you will have to get out of here or I will kill you.' I thought of an argument, but I went there to get possession, and Mr. Carl make a grab, I don't know where he got it, I didn't see all of his grab, it was behind the curtain, the curtain was between me and him. I was sitting, but just as soon as I saw the gun, the flash was there, and when the flash came I felt a sting, but it did not break the skin, it just made a brown streak. * * * By the time he was to the curtain, part of him got in view there, and it was over quick. * * * Everything was so quick I can't go into details. * * * The reason why he didn't get me, my first shot got him. * * * I got him the first shot, because he went 'Oh.' * * * When I came to myself, he had went down, and I was still pulling my trigger, and I saw that he had stopped shooting. * * * I know he shot 3 or 4 times, but I can't say if any more. * * * I had made up my mind that as long as I could move, that was my direct determination, I don't want to cover up anything on my side, I was going to take possession. * * * It seems to me there was something said after he came out with the gun, I wouldn't say positively, but I may have stopped him from using it. Maybe I had my gun when he got back. I never reached for my gun until after I see a move of him trying to get his gun anyway. * * * I used to be an awful good shot, and, as I told you, I knew three of my shots had taken effect."

Will was a witness at the coroner's inquest upon the body of Carl and at the trial and, while his testimony there given differed in some particulars from his foregoing statement, in the main and most important parts it was substantially the same. At the coroner's inquest he testified that, after the homicide, "I told them (Worth and Andrews) not to go in the house or have anything to do with the body, but I wanted them to hold possession of the property in general. * * * We had talked the matter over before, and we agreed that if we got possession, we would cut down trees. * * * I told the boys that we would cut down some trees and take the door and windows out of the building. That would be taking possession. That house would be uninhabitable with the door and windows off." Immediately after the homicide Worth and Andrews removed the door and window sash from the cabin, felled a tree to block the road leading to the cabin, and later built a fence across the road.

While Worth, according to his own testimony, fired 6 shots, one of which probably was the immediate cause of Carl's death, he did not surrender himself to any peace officer, but hid his gun in the brush and for a time denied that he had taken any part in the homicide, and stated that he was not armed at the time, and that he did not even own a gun. On the day after the homicide, in answer to a question whether there was any scuffle or loud talk between Will and Carl outside of the cabin, Worth said:

"Oh, yes; there seemed to be a lot. I don't recall the words. Of course, neither one of them did not take kindly to each other, and all threatening. * * * Carl said: 'I am going to shoot you.' * * * That must have been about the time I was reading the letter. * * * He (Will) must have been * * * in front of the cabin. * * * We (later) heard a scuffling in the house. * * * We (Worth and Andrews) went upon the porch—up to the door. * * * It seems that just before the firing—I remember seeing that long pistol. * * * He (Carl) had that long pistol like a man standing like here, he was all ready to fire, and we crawled up there to the door, and perhaps in a second or two he fired; as I remember he said he would kill the whole bunch, * * * and fired and kept on firing * * * (at) Will. * * * (After the shooting was over) Mr. Will * * * came to the door * * * and said, 'Boys, he sure got me.'"

On the following day, Worth made a statement in the presence of the other defendants, in which he again denied that he had any part in the shooting of Carl. January 13th Worth made another statement in the presence of the other defendants, his statements made on both days being taken down by a shorthand reporter. In the latter statement Worth said:

"Well, as I told you men yesterday, perhaps I have been unduly—allowed myself to be unduly led into this. Of course, when I am a friend of any one, I am a friend. * * * Where I was born and raised, you see you can't stand a threat. I can't, * * * I will not take it. Anyway, I told you I would not kill any one, I don't think I really killed him. * * * I was to block the road, the idea was, as I understood it. That was property absolutely belonging to Mr. Will, and I believed I was doing right in going over there to fall these trees, and I would say to fall that tree and block that road. * * *

"Mr. Will: (To Worth) Tell the truth, as you remember.

"Mr. Worth: * * * The tree was cut after the fight, * * * and the door and window was taken out after the arrival of the officer. We went there to take possession; we were under orders to take possession. * * * I * * * believed that Thomas Carl was a man of dangerous temper, a man of vicious temper, hot-headed, threatening, had a bunch of guns, and made a show of his guns, and the way he could use them by throwing up cans, shooting at targets, and showing how quick he could draw pistols into action, what you would call a gun man. * * * I grew up with a gun in a gun country. I seen several men where they had been killed, and knew many cases, common cases, and knew men that died by the gun, and knew about as much about a gun or gunmen, and that was a common occurrence, and lots of gun practice in the way of doing trick shooting, quick-draw stuff, and this kind of thing; and my experience was such that I never placed confidence in a man that did that, and therefore I say I could not have feared Thomas Carl. I believe he was a man of character cruel and vicious, and would not hesitate to kill. * * * I realized I was more or less in jeopardy myself, and placing myself in a dangerous position. * * * It was common for me to carry the gun. * * * I was waiting for legal advice before I made any reference to my possession of this Colt army automatic pistol. * * * The idea was Mr. Will was going over and take possession, and the proposition was Mr. Carl had no right there, owned no property there, except movable, and he was to load up his car and get out of there.

"Q. Did you discuss what would happen, if Carl did not go? A. In this much. We all had confidence that he would not attempt any shooting when there was three of us. * * * We said he surely won't be foolish enough to shoot. * * *

"Q. When you heard the stove go over, you were about to go up on the porch? A. Yes, I was just stepping up. * * * I stepped up on the porch, and stepped in the door, and * * * grabbed that rifle, and set it outside of the door. * * * I hardly know just for a few seconds of time there what I did do, but I remember seeing Mr. Will sitting in a chair and Mr. Carl standing in what would be the opening of the curtains * * * with what looked to be a very large pistol in his hands, and that I did then hear, immediately after, * * * those words, 'I will kill the bunch,' and about immediately at that he raised what afterwards proved to be a Luger pistol and commenced firing at Mr. Will. * * * I heard Mr. Will say, 'He has shot me,' or 'He has got me.' I immediately drew my Colt automatic pistol and began firing. * * * I advanced to the stove and must have drawn while I was advancing. * * * My impression was that, as he started to raise that pistol, he would sweep Mr. Will and sweep us. * * * I had the pistol in both hands. I shoot that way. * * *

"Q. Did those two curtains interfere at any time with your view? A. I don't think it did. * * * Carl was in my full view. I was following him. The stove was here (showing) and I was following him seeing he could not get away. I was following that Luger pistol. I remember as my last shot sounded his head dropped over and his hand left the pistol."

Worth was a voluntary witness at the coroner's inquest, and the testimony which he there gave was introduced at the trial by the defendants. While such testimony in the main is in accordance with Worth's foregoing statement, it differs therefrom in some particulars. At the inquest he testified that, after reading the letter to Carl:

"I stepped back * * * about 5 or 6 feet. * * * He (Will) went up the steps and onto the porch, and * * * he put out his hand and says, 'Let's shake hands; let's be men about it; let's not quarrel.' * * * In a few moments then they disappeared inside the house. * * * Directly after they disappeared there was a rumble and clatter, and I went upon onto the porch. * * * I was semiconscious, gentlemen, that that peculiar movement behind the door jamb meant something. * * * I took that rifle and set it on the outside of the house. * * * The commotion seemed to have subsided. * * * Then I * * * looked in. * * * Mr. Will was sitting in a chair, and Carl was standing in like a partition of curtains. * * * I see a long barrel; I took it for granted it was a pistol. * * * He (Carl) raised that gun and commenced firing; it seems he kept on firing. * * * Which way I moved I don't know, but I must have * * * pulled the pistol—one, two, three, four, five, six. * * * I fired six shots. * * * The [Carl's] hand released the pistol. * * * His head dropped over. * * * I figured that the battle was over. * * * I had only one purpose, and that was to stop that Luger pistol. * * * My impression was that Mr. Will was being killed. * * * Mr. Andrews and myself, after Mr. Will started (to Forest Hill to surrender to Burner), we cut down this tree, and we took the door off the hinges and took the window out, took the sash out."

[2, 3] The statements and testimony of the appellants are amply sufficient to support a verdict of murder of the first degree. Indeed, it would be difficult to find a basis in the evidence for any other verdict. Carl was, and for several months prior to the homicide had been, in possession of the cabin and the land on which it stood as his home, and his predecessor, King, had been in continuous possession of the premises for more than 2 years immediately before Carl went into possession. It is clear that the defendants had agreed among themselves that they would forcibly and unlawfully eject Carl from the premises. The appellants, knowing of the strained relations between Will and Carl and that the latter was a dangerous "gun man," and that he would probably resist to the uttermost, instead of endeavoring to gain possession by the orderly processes of the law, deliberately armed themselves with deadly weapons, that of Will at least being plainly visible to Carl, and decided to take the law into their own hands, hoping that Carl would be overawed by the number of his antagonists, but determined to take possession of his home at all hazards. Carl warned them not to approach the cabin, but, when informed that they desired to serve the letter, or notice, upon him, he peaceably permitted Worth to make the service. The defendants had then accomplished everything that they could lawfully do towards gaining possession of the premises, but, notwithstanding this fact, Will succeeded in reaching the porch and engaged in a violent struggle with Carl. Carl had every reason to believe that the defendants intended, as in fact they did intend, to resort to whatever violence might be necessary to eject him from his home. As Carl seized a pistol to defend himself and his home, Will drew his own revolver, instead of withdrawing from the conflict which he had deliberately provoked.

Under such circumstances Carl was justified in resorting to the use of the deadly weapon in self-defense. "Homicide is * * * justifiable when committed by any person * * * against one who manifestly intends or endeavors, * * * in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein." Pen. Code, § 197. There can be no doubt that Will manifestly intended, and endeavored, and actually did enter the cabin in a violent manner for the purpose of forcibly ejecting Carl therefrom. "Violence is synonymous with physical force, and the two are used interchangeably, in relation to assaults by elementary writers on criminal law." 3 Bouv. Law Dict. p. 3402. See, also, Knowles v. Crocker Estate Co., 149 Cal. 278, 284, 86 P. 715. Worth is in no better position than Will. He knew that Will had wrongfully and unlawfully engaged in a violent struggle with Carl. "A person interfering in a difficulty in behalf of another simply steps in the latter's shoes; he may lawfully do in another's defense what such other might lawfully do in his own defense but no more; * * * and his act must receive the same construction as the act of the person defended would receive if the homicide had been committed by him." 30 C. J. 79; People v. Travis, 56 Cal. 251, 256.

[4] Appellants contend that their foregoing statements "were not voluntary and were made through fear, intimidation, duress, and by promise of leniency on the part of the officers," but the record in no manner sustains the contention, besides, the appellants voluntarily testified to substantially the same facts at the coroner's inquest and they introduced in evidence at the trial their testimony so given and, therefore, no prejudice to their substantial rights could have resulted from the admission of such statements.

[5] The sheriff of the county was called as a witness by the defendants and examined as follows:

> "Q. Along in September, 1924, did you have occasion to arrest one T. W. Carl? A. I did.
>
> "Q. At that time did you take any weapon from him? A. At the time of his arrest he delivered a gun to me.
>
> "Q. And after the preliminary examination did you return that gun? A. I did not.
>
> "Q. Why?
>
> "Mr. Lowell: Object to that as incompetent, irrelevant, and immaterial.
>
> "Mr. K. D. Robinson (attorney for defendants): This is the purpose. * * * It is leading up to a conversation with Thomas Carl in which he was advised by the sheriff that it would be a felony for him to have any weapons in his possession or custody. * * *
>
> "The Court: The objection will be sustained. * * *
>
> "Q. * * * Did you have a conversation with T. W Carl with reference to his possession of firearms?
>
> "Mr. Lowell: To which we object as incompetent, irrelevant, and immaterial and hearsay.
>
> "The Court: * * * Objection will be sustained.
>
> "Mr. K. D. Robinson: * * * Wouldn't it go to show he was the aggressor if the deceased knew, procured firearms, and knew that when he did so he was committing a felony?
>
> "The Court: * * * He is presumed to know the law as far as that goes. Would not be necessary to show they were notified or advised by the sheriff."

These rulings are assigned as error. The court in effect told the jury that it is presumed that Carl knew he was violating the law by keeping firearms, he theretofore having been convicted of a felony. The defendants therefore had the benefit of what they were endeavoring to prove. It was undisputer at the trial that Carl did have firearms at the time of the homicide. If it be conceded that the rulings were erroneous, it does not appear that the defendants suffered any prejudice therefrom.

[6-11] The other errors of which complaint is made relate to the instructions to the jury. The first of these instructions is a copy of one approved in People v. Wolff, 182 Cal. 728, 739, 190 P. 22. The second is substantially in the language of the instruction approved in People v. Davis, 135 Cal. 162, 165, 67 P. 59. In addition, the court gave the usual approved instruction upon the question of reasonable doubt. The third instruction states in substance that whoever aids and abets in the commission of a murder is himself guilty of murder, whether or not the fatal shot was fired by him, whether or not he went to the scene of the crime with the purpose of committing murder, and whether or not he went there "to aid or encourage the perpetrator or to lend assistance in case such assistance becomes necessary." The instruction is, in effect, that the intention to commit murder, or to aid and abet in the commission thereof, may be formed at the scene of the crime, even though the defendant may have gone there without any such intention. Such undoubtedly is the law. It may be further said that the appellants were both firing simultaneously and continued so to fire until Carl dropped dead. In such a case the rule as to aiding and abetting has but a limited application. Clearly the appellants were both principals.

The fourth instruction reads as follows:

> "The court instructs the jury that the defendants are competent witnesses in this case, and you must consider their testimony in arriving at your verdict; but in determining what weight and credibility you will give to their testimony in making up your verdict, you may take into consideration as affecting their credibility, their interest in the result of the case, and that they are the accused parties on the trial testifying in their own behalf."

A similar instruction, though more objectionable, was severely criticized in People v. Maughs, 149 Cal. 253, 263, 86 P. 187, 191, and the court there said:

> "We think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our Constitution and laws, as to call for the reversal of any judgment which may be rendered against him."

In People v. Ryan, 152 Cal. 364, 369, 92 P. 853, 855, which was tried before the decision in the Maughs Case, in considering a similar instruction, also more objectionable that the one under consideration here, the court said that "it states to the jury a rule regarding the consideration of the defendant's testimony, which every intelligent man upon the panel would doubtless keep in mind, without being reminded of it by the court, and, aside from the fact that it directs attention particularly to a single witness who is a party to the action, it would be covered by the rule laid down" in previous decisions that a case will not be reversed for the giving or refusing to give an instruction which states a mere common-place matter within the general knowledge of jurors. Since the decisions in the Maughs and Ryan Cases, section 4½, art. 6 of the Constitution has been adopted, providing that:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

While it was error to give the instruction, the evidence against the appellants is so strong and convincing that it cannot be held that there has been a miscarriage of justice. The guilt of appellants is abundantly proved by their own statements, admissions and testimony.

The fifth instruction states that:

> "There need be no appreciable space of time between the intention to kill and the actual killing. * * * It is only necessary that the act of killing be preceded by (and the result of) a concurrence of will, deliberation and premeditation on the part of the slayer."

The words in parentheses were omitted from the instruction. An instruction in the same language was condemned in People v. Maughs, supra. The instruction here complained of, however, was immediately followed by another instruction that "the intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection." This cured the error in the instruction complained of because if the intent with which an act is done is the result of premeditation the act itself is the result of premeditation.

[12-15] The sixth instruction is substantially in the language of one which was criticized in People v. O'Brien, 78 Cal. 41, 47, 20 P. 359, 361. Appellants say:

> "Under this instruction the defendant could not have the plea of self-defense, however remote or trifling the fault might be, * * * and that if the jury found the defendant guilty of any misconduct, they should deny him the benefit of the plea of self-defense, without regard to the degree or character of his misconduct."

The character of the misconduct of a defendant as shown by the evidence must be considered, however, in determining whether such an instruction has resulted in prejudice to the rights of the defendant. In the most favorable view of the evidence, the fault of the appellants was neither remote nor trifling, but of a grievous character, well calculated to produce in Carl's mind a well-founded belief that they intended to resort to whatever violence might be necessary to accomplish their evident purpose. The instructions were very full and, on the whole, favorable to the appellants, and, in the language of the court in the O'Brien Case:

> "Taking the different portions of the instruction together, we think the jury must have understood the court to say that a person who arms himself with a deadly weapon for the purpose of seeking his adversary and provoking a quarrel with him cannot *feloniously* use such weapon to take the life of his adversary, and then come into court and claim that he acted in self-defense. The jury were told in very clear terms that a party is not deprived of the right to defend his person from a felonious assault because he began the affray, if he afterward, and before the fatal blow was struck, in good faith endeavored to withdraw from the combat. We therefore cannot say that the court erred."

In instructions proposed by the defendants and given by the court, language to the same effect as that used in the instruction complained of was employed. One of such instructions states:

> "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person," etc.

The seventh instruction is in the language of one given in People v. Kennett, 114 Cal. 18, 19, 45 P. 994, beginning with the words italicized by the court in that case and continuing to the end of the instruction, and of which the court there said "that in and for itself it contains no error." In People v. Miller, 125 Cal. 44, 47, 57 P. 770, 771, the same instruction was criticized, but it was held that "the giving of the instruction here does not constitute error."

The eighth instruction reads:

> "If you are convinced to a moral certainty that Thomas Carl was in lawful possession of the King cabin as his home, and if you further believe that defendants went to said cabin with the intention of using such force as might be required to expel Thomas Carl, this was an unlawful act on the part of defendants, and if you further believe that defendants were in the act of doing so, then Thomas Carl had the right to resist by force."

While the instruction might have been more appropriately framed in the language of section 197 of the Penal Code, it is substantially in accordance with the terms of that section. As hereinbefore stated, the words "force" and "violence" are synonymous terms when used in relation to assaults.

The ninth instruction reads:

> "If you believe to a moral certainty and beyond a reasonable doubt, that without any overt

act or physical demonstration upon the part of the deceased, *save that of lawful defense of his person or home,* sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the defendant, fired the fatal shot at the deceased and killed him, such killing under such circumstances was not justifiable."

An instruction in the same language, excepting the words herein italicized, was approved in People v. Wolfgang, 192 Cal. 754, 760, 221 P. 907. It is not perceived that the addition of the italicized words renders the instruction erroneous. It certainly is lawful for one lawfully to defend his person, or home, and his life cannot be lawfully taken because of his doing so.

The court carefully guarded the rights of the defendants throughout the trial, and the evidence against the appellants is so clear and convincing that there is no basis for an opinion that the errors complained of have "resulted in a miscarriage of justice."

The judgment and the order are affirmed.

We concur: NEEDHAM, Justice pro tem.; PLUMMER, J.

CALIFORNIA REPORTER

249 PACIFIC REPORTER

249

199 Cal. 305

PEARSON v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK et al.

(L. A. 8621.)

(Supreme Court of California. Aug. 28, 1926.)

1. Husband and wife 🔑262(1).

Under Code Civ. Proc. § 1963, subd. 12, and Civ. Code, § 164, in absence of contrary evidence, property conveyed to married woman by deed is presumed to be her separate property.

2. Appeal and error 🔑1056(6).

Reversible error cannot be predicated on the exclusion of evidence, the admission of which could not have changed result.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Elizabeth Pearson against the Hellman Commercial Trust & Savings Bank and another. Judgment for plaintiff and defendants appeal. Affirmed.

Page & Hurt and Arthur F. Coe, all of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

FINCH, Justice pro tem. This is an appeal by the defendants from the judgment herein quieting plaintiff's title to certain real estate.

The complaint is in the usual form in actions to quiet title. It alleges that the plaintiff is the owner and in possession of the property and that the defendants, "without right, basis or foundation whatsoever," claim "some right, title, interest, or estate in and to said property adverse to the plaintiff." The answer denies that the plaintiff is the owner or in possession of the property, and as separate defenses, alleged that W. J. Pearson, the husband of the plaintiff, is the owner of the property; that the property is the community property of the plaintiff and her husband; and that attachments have been duly levied upon said property in pending actions by defendants against said W. J. Pearson. In appellants' opening brief it is said:

> "Briefly, the plaintiff's proof was this: That starting at an arbitrary point of time, and without tracing back to a paramount title, she introduced deeds from certain third persons to herself purporting to convey the property to her. She also attempted to show that, as between herself and W. J. Pearson, it was her property, attempting to show, but failing, we think, that it was her money and property that bought the property in question."

Plaintiff testified that she purchased the property in suit, giving some of the details of the purchases. There is no evidence to show that W. J. Pearson has any interest in the property or that it is community property. There was no attempt to show, nor was there any intimation, even in the evidence, that the plaintiff's grantors were not the owners of the property at the times of the several conveyances to her.

[1, 2] It is a disputable presumption "that a person is the owner of property from exercising acts of ownership over it." Code Civ. Proc. § 1963, subd. 12. By selling and conveying the property to her, plaintiff's grantors exercised acts of ownership "of the highest character, viz., the absolute disposition thereof by sale." Bickerdike v. State, 144 Cal. 698, 701, 78 P. 277, 278.

> "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Civ. Code, § 164.

In the absence of any evidence tending to overcome these presumptions, they are decisive of the questions presented on this appeal.

Appellants' contention that the court erred in admitting in evidence the deeds to which reference has been made is sufficiently disposed of by what has been said. Complaint is made that the court erred in excluding certain evidence sought to be introduced by the defendants. Since the admission of such evidence could not have changed the result of the trial, a discussion of the question of its admissibility would serve no useful purpose.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J; SHENK, J.

199 Cal. 307

GOODALE v. THORN. (Sac. 3637.)

(Supreme Court of California. Sept. 1, 1926. Rehearing Denied Sept. 30, 1926.)

1. Bills and notes 🔑497(5).

On proof of fraud or illegality in inception of note sued on, burden is on plaintiff indorsee to show that he is innocent holder.

2. Bills and notes 🔑327.

Indorsee may show that he is innocent holder by showing that he purchased note before maturity or from innocent indorsee for value in usual course of business.

3. Bills and notes 🔑497(2)—When plaintiff indorsee of note shows he is innocent holder, unless circumstances create presumption that he knew facts impeaching its validity, defendant must show that plaintiff took note with notice.

When indorsee suing on note shows that he purchased it before maturity or from innocent indorsee for value in usual course of business, unless evidence shows circumstances creating presumption that he knew facts impeaching its validity, defendant has burden of showing that plaintiff took note with notice of defendant's equities.

4. Appeal and error 🔑1046(3)—Statement by court at beginning of trial, that plaintiff indorsee of trade acceptance did not have burden of proving that he was holder in due course, held not injurious, in view of evidence.

In action by indorsee on trade acceptances, statement by trial court at beginning of trial, after being informed that defendant denied all of complaint alleging that indorsee was holder in due course, that plaintiff did not have burden of such issue, was not injurious to defendant even if erroneous, in view of evidence showing plaintiff to be holder in due course.

5. Bills and notes 🔑525.

Evidence *held* to sustain finding that plaintiff indorsee was purchaser of trade acceptance in good faith for value and without notice.

6. Bills and notes 🔑337.

That trade acceptances were sold by plaintiff's son-in-law to bank and plaintiff bought them to assist son-in-law did not prevent plaintiff from being purchaser in good faith, under Civ. Code, § 3137.

7. Bills and notes 🔑211—That trade acceptances transferred by payee by blank indorsement were not indorsed by subsequent holders to plaintiff suing thereon was unimportant (Civ. Code, §§ 3090, subsec. 5, 3111, 3112, 3130).

Trade acceptances made payable to certain person were legally transferred to bank by his blank indorsement, under Civ. Code, § 3112, and thereafter they were negotiable by mere delivery, under sections 3111 and 3130, and payable to bearer, under section 3090, subsec. 5, and fact that they were not indorsed to plaintiff suing thereon by bank or subsequent owner was unimportant.

8. Appeal and error 🔑883—Abandonment by counsel of further examination of witness without making certain meaning of court's ruling held to preclude taking advantage of such ruling on appeal.

In action on trade acceptances, where plaintiff indorsee was asked whether, after acquiring them, he had transferred them to any one else, and on objection defendant's counsel stated purpose of question was to test ownership at time of trial, and court remarked to proceed, abandonment of further examination on such point without making certain meaning of court's ruling precluded defendant from taking advantage thereof on appeal.

9. Appeal and error 🔑901.

To justify reversal, error must be clearly shown.

10. Bills and notes 🔑501—Exclusion of testimony that person concerned in transfers of trade acceptances sued on was real owner of shares held by plaintiff in bank of which he was president held proper.

In action on trade acceptances, testimony that certain person concerned in transfers of them was real owner of shares of stock held by plaintiff in bank of which he was president was not relevant to issues and was properly excluded.

11. Bills and notes 🔑509.

In action on trade acceptances, excluding evidence as to whether plaintiff indorsee discussed transaction with person who knew of infirmities therein after he purchased them was not error.

12. Bills and notes 🔑342.

That revenue stamps were not affixed to trade acceptances regular on face, within Civ. Code, § 3082, when purchased by indorsee, did not prevent him from being holder in due course, under section 3133.

13. Bills and notes 🔑365(1)—After defendant failed to overcome evidence of plaintiff, indorsee of trade acceptances, that he was holder in due course, and defendant announced he had no further evidence thereon refusal of offer to prove infirmities in them was not error.

In action on trade acceptances, after defendant failed to overcome plaintiff's evidence establishing that he was holder in due course and defendant announced that he had no further evidence thereon, refusal of defendant's offer to prove alleged infirmities therein was not error.

14. Bills and notes 🔑352.

That note given by plaintiff indorsee for trade acceptances had not been paid did not prevent his recovery thereon, under Civ. Code, § 3135.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by C. E. Goodale against Craig S. Thorn. From a judgment for plaintiff, defendant appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Bradley & Bradley, of Visalia, for respondent.

PER CURIAM. The defendant herein, Craig S. Thorn, prosecutes this appeal from a judgment rendered against him in an action brought by the plaintiff, C. E. Goodale, to recover upon two assigned trade acceptances dated October 1, 1920, each calling for the payment of $1,500. Said trade acceptances were drawn by J. P. Walker, at Visalia, Cal., accepted by defendant on October 1, 1920, and made payable at the Merchants National Bank, Los Angeles. They are identical in form, except as to time of payment, one being made payable in eight months and the other in fifteen months after the date thereof, and, as indicated by their terms, were taken in payment for ten registered Duroc hogs, sold by Walker to defendant.

Each trade acceptance is made the subject of a separate count in the complaint, the allegations of both counts being substantially the same, plaintiff having alleged therein, among other things, that he purchased said trade acceptances before the date of maturity thereof for a valuable consideration in the usual course of business and without any knowledge or notice that the same would not be paid by the defendant when due.

The defendant in his answer, besides denying the above-mentioned allegations relating to plaintiff's acquisition of said trade acceptances, alleged with reference thereto that Marco H. Hellman or the Merchants National Bank of Los Angeles was the owner thereof; that said instruments were placed in plaintiff's hands for collection after maturity, plaintiff paying no consideration therefor and knowing at the time of the transfer thereof to him that the same would not be paid by the defendant on account of certain alleged misrepresentations having been made to him by Walker regarding the hogs in payment for which said trade acceptances were given. The answer then alleges, in substance, that prior to execution and delivery of said trade acceptances, defendant purchased from Walker ten Duroc hogs, consisting of one boar and nine sows, which were willfully represented by Walker as having been actually registered with the National Duroc-Jersey Record Association; that Walker agreed to deliver the registration certificates therefor to defendant at the time of the delivery of said animals, but failed to do so until long thereafter and then furnished certificates for only six sows; that Walker knew that defendant "made said purchase for the purpose of raising hogs of high quality, subject to registration," and upon information and belief alleged that the boar and the three sows for which certificates were not furnished were common stock, never having been registered at all, and for that reason were valueless to defendant for the purpose for which they were purchased; that therefore defendant "received no consideration whatever for the acceptance of said trade acceptances."

Continuing, the answer alleges that Walker made such representations with full knowledge that they were untrue and with intent to deceive the defendant; that defendant was deceived thereby and induced by reason thereof to sign said trade acceptances. It is furthermore alleged that if plaintiff became the owner of said trade acceptances he "acquired the same with full knowledge of the contract aforesaid between the said J. P. Walker and this defendant of which the alleged trade acceptances are a portion, and with full notice that the said alleged trade acceptance was conditioned as to its payment upon the delivery of the ten registered Durocs mentioned therein, with their proper certificates of registration, and that delivery thereof had not been made." The answer also sets up a counterclaim for the payment of $4,000 based upon the same matters urged as a defense, the prayer of the answer being that plaintiff take nothing by his action and that defendant be awarded damages in the sum of $4,000. Upon the issues of fact thus tendered, the trial court found in plaintiff's favor, and judgment was entered accordingly.

At the commencement of the trial, a discussion occurred regarding the nature of the issues to be tried and the order in which the proof thereon should be offered, during which the trial court stated after being informed that defendant had denied the allegations of the complaint relating to plaintiff's having purchased said instruments before maturity, in good faith, and without notice, that the burden was not upon plaintiff to prove the affirmative of that issue. Defendant contends that this was error.

[1-3] It is doubtless the rule in this state, as defendant in effect contends, that—

> "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities." Eames v. Crosier, 101 Cal. 260, 35 P. 873.

To the same effect are the cases of Sinkler v. Siljan, 136 Cal. 356, 68 P. 1024; Bell v. Pleasant, 145 Cal. 410, 78 P. 957; Blockman Commercial Bank v. Moretti, 177 Cal. 256, 170 P. 419.

[4, 5] But in the instant case it cannot be

successfully maintained that the ruling complained of affected defendant's rights in the premises or in any manner operated to his prejudice, because it is shown by the record, that, notwithstanding the trial court's statement of the law to the contrary, the plaintiff assumed and sustained the burden of proving the affirmative of the issue mentioned. In this connection the record discloses that, as a part of plaintiff's case, plaintiff was called as a witness and upon direct and cross examination testified that he purchased said instruments before maturity in good faith, by paying the face value therefor, without notice of any of the alleged infirmities thereof which were pleaded by the defendant in his answer. He was afterwards recalled as a witness by the defendant and gave substantially the same testimony as he gave in support of his own case. His testimony upon this point was in a measure corroborated by that of Walker; and when the evidence was about to close at the conclusion of the trial, counsel for defendant stated that he had no other proof to offer as to plaintiff's knowledge of the alleged infirmities of said instruments. It will therefore be seen that the evidence thus adduced in plaintiff's behalf was not only sufficient to meet the requirements of the above-mentioned rule as to the burden of proof, but was also ample to sustain the finding of the trial court that plaintiff was a purchaser in good faith, for value, and without notice.

[6] During the occurrence of the transactions mentioned in the pleadings, Marco H. Hellman was vice president of the Merchants National Bank of Los Angeles and interested in the Herman W. Hellman estate. Walker was plaintiff's son-in-law, and, with Marco H. Hellman, was engaged in the business of raising and selling hogs, a portion of the registered stock belonging to them having been previously owned by the Hellman estate and located on property belonging to Goodale. Within two weeks after obtaining said trade acceptances from the defendant, Walker sold the same through Marco H. Hellman to the Merchants National Bank, the transfer being consummated by indorsement thereof in blank by Walker. Subsequently, and during the month of March, 1921, which was prior to the date of maturity of the first instrument, Goodale, for the purpose of assisting Walker in making payments on a ranch which Walker and a partner named Walters were buying from one Ray, purchased said instruments from the Hellman estate without further indorsement being made thereon, giving in payment therefor his promissory note for $3,000, payable in six months. In what manner or when the Hellman estate acquired said trade acceptances does not appear. When the first instrument fell due and demand for payment thereof was made by Goodale, the defendant, Thorn, stated according to Goodale's testimony, that he was unable to pay the same until he had sold some of his hogs; but afterwards and upon maturity of the second instrument, he refused to pay either of said instruments. Soon thereafter, and on March 13, 1922, Goodale commenced this action.

In view of the facts above related, particularly those showing the family and business relationships of the parties, defendant contends that, regardless of the question of the burden of proof, Goodale, at the time he purchased said trade acceptances, had knowledge of suspicious circumstances sufficient to have put a prudent man on inquiry as to the nature of the transactions represented by said trade acceptances, and, that having ignored said suspicious circumstances, although means of ascertainment of the truth thereof were at hand, he is charged with whatever knowledge such an inquiry would have disclosed. It is the declared law of the state, however, that "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith" (Civ. Code, § 3137); and "mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith" (Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113; Sinkler v. Siljan, supra). In our opinion the asserted suspicious circumstances relied upon by defendant fall far short of amounting to an impeachment of plaintiff's claim of good faith; and moreover, plaintiff having testified, as above pointed out, that he purchased said trade acceptances before maturity by paying the face value therefor, being at the time unaware of the existence of any controversy regarding the sale of said hogs, the circumstances enumerated by defendant at most raised but a mere conflict of evidence on that point, and consequently are legally insufficient to justify a nullification on appeal of the trial court's finding on this disputed issue.

[7] The fact that said instruments were not indorsed by Merchants National Bank or the Hellman estate is unimportant. They were made payable to Walker and legally transferred by him to the bank by Walker's blank indorsement thereof (Civ. Code, § 3112); thereafter they were negotiable by mere delivery (Civ. Code, §§ 3111 and 3130) and payable to bearer (subsec. 5, § 3090, Civ. Code).

[8] With reference to this same question of plaintiff's ownership of said instruments, defendant assigns as error certain rulings of

the trial court upon the admissibility of proof. Goodale was asked by defendant whether, after acquiring said trade acceptances, he transferred the same to any one else. Objection was made by plaintiff's counsel and the following colloquy took place:

> "The Court: * * * I think the objection will have to be sustained to that.
>
> "Mr. Bagby (counsel for defendant): I presume your honor sees the purpose of the ques tion, just to test his ownership at the present time?
>
> "The Court: Well, proceed.
>
> "Mr. Bagby: That is all at this time with this witness."

[9] Assuming that under the issues tendered by the pleadings defendant was entitled to ask this question, it does not appear whether the court's direction to "proceed" meant to proceed along the line of examination then being pursued or some other. To justify reversal, error must be clearly shown, and, inasmuch as defendant's counsel abandoned further examination on this point without making certain the meaning of the court's ruling, we think defendant is now precluded from taking advantage of the point.

[10] The other two rulings complained of were not erroneous. One relates to the exclusion of testimony attempted to be elicited from Goodale by defendant to the effect that Marco H. Hellman was the real owner of certain shares of stock held by Goodale in a bank at Lemon Cove, of which bank the latter was president; this was a matter not relevant to the issues of the case.

[11] The other assignment pertains to an objection made by plaintiff to a question wherein Goodale was asked by defendant whether after purchasing said instruments he discussed the transaction with Walker. No ruling was made on this objection; and in any event, if Goodale did acquire knowledge of infirmities in said instruments subsequent to the time he purchased and became the owner of the same in due course, such knowledge would not have affected his right to recover thereon.

[12] Defendant furthermore contends that, inasmuch as there were no revenue stamps affixed to said instruments at the time plaintiff purchased them, neither instrument was "complete and regular upon its face," and consequently, by virtue of the provisions of section 3133 of the Civil Code, plaintiff was not a holder thereof in due course. That each instrument was "complete and regular upon its face" so far as it was necessary to conform to the provisions of section 3082 of the Civil Code, which defines the requirements for negotiable instruments, defendant does not deny; and moreover, it is conceded that the omission to affix the stamps did not affect the completeness and regularity of said instruments to the extent of precluding their introduction in evidence nor of impairing their negotiability; but it is claimed by defendant that the absence of the stamps amounted to a circumstance sufficient to arouse suspicions of a prudent man as to the regularity of the transaction represented by said instruments, the failure to inquire into the truth of which circumstance constituted bad faith. This brings us back to the same proposition, already disposed of, that without actual knowledge mere proof of circumstances putting a reasonable man upon inquiry is not sufficient to constitute a defense to a suit by the holder for value before maturity. Sinkler v. Siljan, supra; Popp v. Exchange Bank, supra. We therefore conclude that defendant's point is without merit.

[13] Just prior to the conclusion of the evidence the trial court refused the offer of defendant to prove the alleged infirmities of said instruments. We are of the opinion that such refusal was not error. The offer of defendant was made after he had failed to overcome plaintiff's evidence establishing the fact that plaintiff purchased said instruments before maturity, in good faith, and for value, and without notice of any infirmity therein, and also after defendant announced that he had no further evidence to offer on that issue. The course adopted by the trial court in excluding the proffered evidence is therefore sustained by the cases of Blockman Commercial Savings Bank v. Moretti, supra, and Lynch v. Holbrook, 49 Cal. App. 380, 193 P. 505, wherein it is held in effect that in an action by an assignee of a negotiable instrument against the maker thereof, evidence that the instrument sued upon was without consideration and obtained by fraud of the assignor becomes immaterial in the absence of sufficient evidence tending to show that plaintiff was not a bona fide transferee before maturity for value and without notice of the alleged equities of the maker. Indeed, at the commencement of the trial counsel for defend admitted that such was the rule, having stated in substance that if the trial court should hold that Goodale was a holder in good faith and for value, then the question of failure of consideration would become immaterial.

[14] The trial of the action took place in October, 1923, and no evidence was offered to show that the six months' note given by plaintiff in March, 1920, in payment of the purchase price of said instruments or any portion thereof had been paid. Section 3135 of the Civil Code provides:

> "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

Defendant contends that in the absence of evidence showing payment in full or in part of the note representing the purchase price of said instruments, or any direct evidence to the effect that the Hellman estate accepted said note in payment of such purchase price, plaintiff is not entitled, under the provisions of the Code section quoted, to recover upon the instruments thus purchased. We are unable to sustain this contention. It is the rule that "the taking of a note for a pre-existing debt is not payment, unless it is distinctly understood that the note is taken as such. The note only postpones the payment of the old debt until default is made in payment of the note" (Western Fuel & Coal Co. v. S. G. Lewald Co., 190 Cal. 25, 210 P. 419); but in this case there was no pre-existing debt; the note itself constituted the original debt and liability thereon attached at once. It would follow, therefore, that at the time of the delivery of said note the purchase price for said instruments was paid in full.

The judgment is affirmed.

---

79 Cal. App. 119

BARBEE et al. v. YOUNG, Judge.
(Civ. 3206.)

(District Court of Appeal, Third District, California. Aug. 4, 1926. Rehearing Denied August 30, 1926. Hearing Denied by Supreme Court Sept. 30, 1926.)

1. New trial 🔑155—Time within which court may act on motion for new trial held to run from date of service on moving party of notice of entry of judgment, notwithstanding notice of intention was filed prior to entry of judgment (Code Civ. Proc. § 660, and section 659, as amended by St. 1923, p. 751).

Under Code Civ. Proc. § 660, providing that power to pass on motion for new trial expires within two months after service on moving party of notice of entry of judgment, time began to run on date when such notice was served, notwithstanding that prior to entry of judgment moving party filed notice of intention to move for new trial, under section 659, as amended by St. 1923, p. 751.

2. Time 🔑9(6)—Grant of new trial 60 days after date when period in which court may order new trial began to run held timely (Civ. Code, § 14, subd. 4; Code Civ. Proc. § 17, subd. 4, § 660), "month."

Where period of two months within which court may order new trial, under Code Civ. Proc. § 660, began to run on April 26th, grant of new trial on June 25th was timely whether calendar months be applied, under Code Civ. Proc. § 17, subd. 4, and Civ. Code, § 14, subd. 4, providing that "month" means calendar month unless otherwise expressed, or 60 days, be applied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Month.]

3. New trial 🔑163(2)—Formal order granting new trial, signed as of date when order was pronounced in open court, related back to and became effective as of date of pronouncement.

Where court made its order in open court granting motion for new trial, and some days thereafter signed formal order granting new trial, dating said order as of the date of the pronouncement in open court, *held* that order became effective as of date when pronounced.

Petition by Earl V. Barbee and another for certiorari to review an order of the Superior Court of San Joaquin County, D. M. Young, Judge, granting a new trial and recalling execution. Petition denied.

A. H. Carpenter, of Stockton, for petitioners.

Eicke & Warren, of Stockton, and George E. Gardner, of Oroville, for respondent.

PLUMMER, J. By this proceeding the petitioners seek a writ of review and the annulment of an order made by the judge of said superior court, granting a new trial in a certain cause heretofore tried in said court entitled "Earl V. Barbee and E. L. Schmidt, plaintiffs, v. C. Welsh et al., defendants."

The return to the petition shows that on the 22d day of April, 1926, a notice of motion seeking a new trial was filed by the defendants in the cause last mentioned; that on the 23d day of April, 1926, judgment was entered in the said cause and notice of the entry of said judgment served upon the defendants on the 26th day of April, 1926; that thereafter and upon the 26th day of April, 1926, the defendants immediately served and filed a second notice of motion for a new trial; that thereafter and in due course of time the defendants' motion for a new trial was called for hearing and argued by counsel for the respective parties, submitted to the court, and on the 25th day of June, 1926, the court, while in regular session, granted defendants' motion for a new trial and made its order in open court granting the defendants' motion for a new trial on all the grounds stated in defendants' motion and particularly on the ground of insufficiency of the evidence, and at the time of making said order also ordered that the execution theretofore issued in said cause be recalled; that thereafter and on the 28th day of June, 1926, counsel for the defendants having prepared the same, the court signed a formal order granting a new trial in said cause dating said order as of the 25th day of June, 1926. The return made to this court shows that a minute order was entered on the 25th day of June, 1926, in the minutes of said court of the order granting the defendants' motion for a new trial and also of the order vacating the judgment theretofore rendered in said cause and also of the order of the court recalling the execution theretofore issued in said cause. In contradiction of the return, as certified to by the county clerk of the county of San Joaquin, and ex officio clerk of the superior court of said county, the petitioners filed an affidavit of one Thomas U. Stroup, deputy county clerk of said county and courtroom clerk of department No. 1 of the superior court of said county presided over by the respondent in said proceedings. This affidavit, so far as material here, sets forth the following:

> "That on the 25th day of June, 1926, at a regular session of said court, Judge Young made the following order in the case of Earl V. Barbee v. C. Welsh et al. (No. 19031) to wit: The motion for a new trial is ordered granted on all the grounds stated in the notice of motion for a new trial, and particularly on the grounds of insufficiency of the evidence, and ordered that the execution be recalled; that at said time I made the following entry in the rough minute book or blotter which is as follows, to wit: 'Motion for new trial granted on insufficiency of the evidence. Execution ordered recalled.'"

The affidavit further sets forth that thereafter counsel for the defendants were notified of the order of the court and by the affiant asked to prepare a written order, and that thereafter on the 28th day of June, 1926, the order referred to as having been signed and filed on the 28th day of June, 1926, was handed affiant by Hon. D. M. Young, the respondent herein, and filed on said day and adopted by affiant as a minute order of said court and entered and recorded in the minutes of said court in minute book No. 13 as of the date of June 25, 1926.

[1, 2] Under the foregoing circumstances it is contended by the petitioners that the court had lost jurisdiction on the 25th day of June, 1926, to order a new trial in said cause, and also that the entry of the formal order signed by the judge of said court on the 28th day of June, 1926, was effective only as of that date and was after the time allowed by law for the entry of an order granting the defendants a new trial. In support of these contentions, it is first argued that the filing and service of a notice of intention to move for a new trial by the defendants on the 22d day of April, 1926, caused the time within which the trial court might grant a new trial in said cause to date from that date, and cites as authority for such contention cases holding that where a party has filed a notice of intention to move for a new trial he thereby waives notice of the previous entry of the judgment, and that the successful party is thereby relieved of the necessity of giving formal notice of the entry of a judgment in order to start the statute in operation. That portion of section 660 of the Code of Civil Procedure relating to new trials applicable here reads:

> "The power of the court to pass on motion for a new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment."

It is evident from the record in this cause that the defendants did not on the 22d day of April, 1926, have notice of the entry of judgment, and that their notice simply followed the provisions of section 659 of the Code of Civil Procedure, as amended in 1923, (St. 1923, p. 751), which provides:

> "The party intending to move for a new trial must, either before the entry of judgment or within ten days after receiving notice of the entry of the judgment, * * * file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds," etc.

It requires no argument to show that the cases dealing with the question of waiving notice of the entry of the judgment have no application where the circumstances show that no judgment was entered at the time of filing the first notice of intention. Section 659 of the Code of Civil Procedure deals simply with the right of a defeated party where the court has announced its conclusions or filed its findings of fact and conclusions of law to immediately give notice of motion for a new trial, and has nothing to do with the time limit fixed upon the court by section 660 of the Code of Civil Procedure relating to the authority of the court to grant such motion or have it denied by operation of law. The record, instead of showing that the defendants had notice of the entry of judgment as referred to in the cases relied upon by petitioners, is exactly the contrary, and shows that the defendants could not have had notice because judgment was not entered. The only record before us which shows a notice of the entry of judgment is that which fixes the date as April 26, 1926. That the defendants' previous notice of motion for a new trial was sufficient is beside the question. The second notice was doubtless filed as a matter of precaution, or possibly because counsel were unaware of the amendment to section 659 of the Code of Civil Procedure made by the Legislature in 1923. Upon the foregoing we hold that the time limit designated in section 660 of the Code of Civil Procedure for granting new trials began to run in this case on the 26th day of April, 1926. The section in question reads, "within two months." Section 17 of the Code of Civil Procedure, subdivision 4, reads: "The word 'month' means a calendar month unless otherwise expressed." Subdivision 4 of section 14 of the Civil Code likewise provides that the word "month" means a calendar month unless otherwise expressed. In the particular instance it is unnecessary to comment upon whether calendar months or 60 days should be applied, as either calculation would extend the period to and including the 25th day of June, 1926. But we see no reason for holding other than that calendar months were intended by the Legislature when adopting section 660 of the Code of Civil Procedure, which would extend the period to and including the 26th day of June, 1926.

[3] This leaves us but one question further to determine, and that is: What is the effect of the proceedings of the trial court had on the 25th day of June, 1926, in the matter of granting a new trial in the cause heretofore referred to? Did it become effective as of that date or does it date only from June 28, 1926? In 18 Cal. Jur. p. 662, second subdivision of section 14, we find the following:

> "It is common practice for a court to commit the preparation of important orders to counsel; an order when so prepared and signed is as much the order of the court as though the judge of the court had himself written it in its final form, and the formal order, when signed as done in open court on the date of the hearing, and filed, becomes the final order of the court as of that date."

In the case of Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127, the court had under consideration the time when an order of the court became effective, and in treating the same used the following language:

> "An order or decree of court takes effect from the time it is pronounced, and the failure of the clerk to file the papers or enter the judgment does not delay or defeat the operation of the court's pronouncement. In re Cook, 77 Cal. 220 [17 P. 927, 19 P. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267]; In re Cook, 83 Cal. 415 [23 P. 392]; In re Newman, 75 Cal. 213, 221 [16 P. 887, 7 Am. St. Rep. 146]; Niles v. Edwards, 95 Cal. 41 [30 P. 134]; In re Clarke, 125 Cal. 388, 395 [58 P. 22]; Estate of Wood, 137 Cal. 129, 133 [69 P. 900]; Crim v. Kessing, 89 Cal. 478, 488 [26 P. 1074, 23 Am. St. Rep. 491]."

In Von Schmidt v. Widber, 99 Cal. 511, 34 P. 109, the court, in referring to the entry of orders by trial courts, quotes from a previous decision of the Supreme Court of California with approval as follows:

> "The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk."

In the Matter of the Estate of Randall, 188 Cal. 329 [205 P. 118], the court was again considering orders and when they became effective, and thus expressed its views upon the question controverted here:

> "This having been done and the said formal order when so prepared having been signed by the court as 'done in open court' on the date of the hearing, it became, when so signed and filed, the formal and final order of said court as of said date."

It will be noted in the cases which we have herein cited that the court says the formal order is effective as of the date when the order was actually made by the court in open court. In the Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313, the Supreme Court of this state, having under consideration the date when its own orders became effective, followed the rule which we have stated, that the order becomes effective at the time of its pronouncement by the court, and not as of the date when the clerk makes the entry or when the formal order drawn by counsel is subsequently signed. The same rule is set forth in 29 Cyc. 1521, as follows:

> "An order made in pursuance of a decision on a motion relates back and operates as of the date when the decision was made"—citing authorities.

The case of Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, relied upon by petitioners, is commented upon in the opinion in the case of Fresno Estate Company v. Fiske, supra, and the distinction pointed out that the court in the Brownell Case was dealing with the entry of judgments. In the Brownell Case we find the following:

> "The word 'taken,' as used in section 473, is, as we think, used in the same sense as the words 'render' or 'rendition,' when used with reference to a judgment. The word 'rendered' is appropriately used in reference to a judgment or decree, *but not to a proceeding or order.* The phrase in question embraced judgments, orders, and proceedings, and the word 'taken' was adopted as a term alike applicable to either or all of them, and having relatively the same meaning as 'rendition.'" (Italics ours.)

These words which we have quoted were used after the reference made by the court to the provisions of the Code relative to the making and filing of findings before a judgment could be entered. As stated in Fresno Estate Co. v. Fiske, supra, the inapplicability of what was decided in the Brownell Case is likewise apparent here. We are dealing with an order of court made in open court which required nothing further on the part of the trial judge. His order became effective immediately on its being pronounced and any action thereafter taken by the court by way of written memoranda, formal statement, or memorial constituted only evidence of the order of the court already made. Our attention is also called to the following words found in 29 Cyc. p. 1515, to wit: "Where an order is granted upon notice of motion to the adverse party it does not become complete or effective for any purpose until entered." A reference to the cases cited in support of the text shows that the subject being considered in each case was that of an entry of an order or judgment under the various statutory requirements of the states whose decisions are there cited, and does not in any wise limit the rule also set forth in Cyc., which we have quoted, that the order speaks as of the date of its actual pronouncement by the court. We might add further in relation to the cases cited relative to waiving of the notice of the entry of judgment a quotation from 20 Cal. Juris, 176, dealing with waiver of the notice of entry of judgment, as follows:

> "Such waiver is effected by giving notice of intention to move for a new trial, or by a motion in court or other proceeding with reference to the judgment which presupposes knowledge that it has been entered, and by which it is sought to protect a party's interest against the other party; for the object of the statute in requiring notice is fully attained when the record shows that the party entitled thereto has acted in court upon actual knowledge of the entry of the judgment."

Authorities are there cited supporting the text. As pointed out heretofore, it is impossible to presuppose knowledge of something which the record shows has not been done. Hence, the conclusion from the authorities cited and the reasoning which we have stated that the time within which the trial court had power to order a new trial began to run on the 26th day of April, 1926, and included by any calculation the 25th day of June, 1926, and as we think also the 26th day of June, 1926, and the order of the court made on the 25th day of June, 1926, granting a new trial to the defendants, became effective at the time of its pronouncement, and that the formal memorial signed later as of that date likewise dated back to the time when the court actually made its order. We think nothing further needs to be stated in order to show that the trial court acted within its jurisdiction. The jurisdiction of the trial court to grant a new trial being determined, the propriety of its order recalling the execution requires no consideration.

The petition is denied.

We concur: HART, J.; SHIELDS, Presiding Justice pro tem.

---

79 Cal. App. 207

PEOPLE v. LAWLER. (Cr. 1310.)

(District Court of Appeal, First District, Division 2, California. Aug. 21, 1926. Rehearing Denied Nov. 14, 1926.)

1. Rape ⚷53(2)—That prosecutrix testified she locked door before she went to bed held not to render inherently improbable her story that defendant entered room during night.

That prosecutrix testified that she locked door to her room before she went to bed *held* not to render inherently improbable her testimony that defendant, in prosecution for assault with intent to commit rape, entered her room during night.

2. Rape ⚷57(2)—Identification of defendant in prosecution for assault to commit rape held for jury.

Whether testimony of police officer, in prosecution for assault with intent to commit rape, that he saw a man, whom he described, in vicinity of prosecutrix's room on night offense occurred, satisfactorily identified defendant, *held* for jury.

3. Criminal law ⚷1159(5)—Court of Appeal could not disturb verdict of guilty, notwithstanding proof tending to establish alibi.

Where, in prosecution for assault with intent to commit rape, defendant included in defense proof tending to establish an alibi, but jury found him guilty, Court of Appeal could not disturb jury's determination, since it had right to determine what proof was most satisfactory.

4. Criminal law ⚷956(13)—Attorney's affidavit that juror commented on evidence in jury box held not to show misconduct, in view of affidavits by jurors.

Affidavit of defendant's attorneys that juror commented on evidence during presentation of case and prior to submission *held* not to show misconduct, in view of affidavit by juror that he did not make such comment and affidavits by other jurors that they did not hear any comment on evidence.

5. Criminal law ⚷855(7)—That juror during argument questioned district attorney, who replied that he could not discuss matter because not brought out, and juror responded he had not been sure it was brought out, held not irregular, nor prejudicial.

That, during prosecuting attorney's argument in prosecution for assault with intent to commit rape, juror pointed to defendant and asked if "this man was going toward or from building when seen," and reply was made, "I don't know; that was not brought out, so I can't discuss it," and juror responded, "I wasn't sure that it was brought out," *held* not irregular, nor prejudicial.

6. Criminal law ⚷868.

Where juror's misconduct is known when it occurs, defendant cannot remain quiet and keep point in reserve, in event of unfavorable verdict.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Al Lawler was convicted of assault with intent to commit rape, and he appeals. Affirmed.

Robert Gordon and F. Oakes, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with the crime of assault with intent to commit rape. He was tried in the trial court before the court sitting with a jury. The jury found him guilty. He made a motion for a new trial. The motion was denied. Judgment was entered in accordance with the verdict. From that judgment, and from the order denying him a new trial, the defendant has prosecuted this appeal.

The appellant claims (1) that the verdict was contrary to the law; (2) that the verdict was contrary to the evidence; (3) that the court erred in denying appellant's motion for a new trial; and (4) that certain jurors were guilty of misconduct by which a fair and due consideration of the case was prevented.

[1] The appellant takes many pages to quote the testimony of numerous witnesses. Having done so, he states that he fully realizes that an appellate court will not disturb the verdict of the jury simply on a conflict of the evidence. Thereupon he states that his "appeal is raised, not merely to point out the very evident conflict of evidence against defendant, but rather to point out that the testimony presented against the defendant was inherently improbable and untrue." His attempted differentiation is not successful. Taking up the "inherent improbability," we find it is without merit. Because at one time in her testimony the prosecutrix testified that she locked the door to her room before she went to bed, and, in another place in her testimony, she testified that about midnight the defendant entered her room, the appellant argues that her story is inherently improbable. To state the argument is to answer it. Perhaps the prosecutrix was mistaken when she testified that she locked her door. There are many other possible explanations that would square with her story. But the locked or unlocked door is a circumstance which falls far short of justifying a court of review in saying that the entire story as told by the prosecutrix was inherently improbable. It is not at all necessary to recite that story in this decision. It is sufficient to state that the story as told by the prosecutrix was one that was not at all inherently improbable, and the only real question presented by the record was the identification of the defendant.

[2] On the evening of the alleged offense one of the witnesses, a police officer, testified that he saw a man, whom he described and whom he no doubt thought was the defendant, in the immediate vicinity of the room of the prosecutrix. The appellant asserts that the identification was not satisfactory. Perhaps it was not, but that was a subject for argument to the jury.

[3] The defendant included in his defense certain proof tending to establish an alibi. He now alleges that such proof was so satisfactory and convincing that the case of the prosecution cannot stand. Although the defendant is satisfied with his proof, it is quite clear from its verdict that the jury was not. However, the jury had the right to determine what proof was to its mind most satisfactory, and, having done so, we are not at liberty to disturb its determination.

[4] The alleged misconduct on the part of certain jurors includes two different incidents which it is claimed occurred in the courtroom while the case was being presented to the jury and before the submission of the cause. As each incident arose, no record of any kind or nature was made. The record shows that the trial judge did not hear the first incident. No objection was interposed and no application was made to the trial court asking any relief of any kind. Nevertheless the incidents were brought forward at the time the appellant presented his motion for a new trial. At that time his attorneys, Robert Gordon, Esq., and Frederick Oakes, Esq., made and presented to the trial court a joint affidavit setting forth the facts which it was claimed occurred during the progress of the trial. It is claimed that the defendant had introduced as an exhibit a page from a Japanese hotel register in Stockton which had a certain signature thereon. That the defendant had also introduced an exemplar of his writing. On a certain occasion those two exhibits were being shown to the jury. It is claimed that at that time one juror, N. W. Rickmond, remarked, "That isn't the same writing, you can't make me believe these are the same signatures," and, taking a small book and pencil from his pocket, did write therein and attempt to draw Mrs. Sarah L. Cowen (another juror) into conversation, saying, "Just look at this," that thereupon Mrs. Sarah L. Cowen reprimanded him, and did say. "Hush, don't discuss that here." Juror N. W. Rickmond made an affidavit in which he quoted the above statements, and alleged that he did not make the statements as set forth nor statements in substance the same. Booth B. Goodman, another juror, made an affidavit in which he alleged that he was present at all times as a juror and that he did not hear any juror make any statement commenting on the evidence. Mrs. Sarah L. Cowen made an affidavit in which she stated that she had read the affidavit executed by defendant's attorneys, and then she alleged that she did not hear any juror, before the cause was submitted, make any comment on the evidence.

There was no error in the ruling of the trial court holding that there was no misconduct shown on the part of the juror N. W. Rickmond. The appellant urges that affidavits by the jurors that they did not hear were not of the same weight as affidavits by other persons, who alleged that they did hear. Under some circumstances the argument would have much weight, but in the absence of a clear record to the contrary we are not at liberty to assume that the trial court had deaf jurors or jurors hard of hearing. Moreover, we must assume that the jurors were together in the jury box. Under all of these circumstances, in the absence of some most peculiar combination of facts to the contrary, we cannot assume that the attorneys for the defendant were in a better position to hear and know what transpired in the jury box in the court room than were the jurors themselves.

[5] Another incident involved the juror C. W. Kinsey. In the joint affidavit above mentioned, it was alleged that when the deputy district attorney was presenting his argument to the jury Mr. Kinsey "pointed to the defendant with his thumb and asked, 'Was this man going toward the building or away from it when the policeman saw him?' The deputy district attorney replied, 'I don't know which way he was going; that was not brought out in the evidence so I can't discuss it.' That then Mr. Kinsey replied, 'I wasn't sure that it was brought out.'" Assuming that the incident occurred, there was nothing irregular or prejudicial in the incident.

[6] Moreover, both incidents were known to appellant, as each incident took place, and no objection was made, and he could not thus remain quiet and take the chance of a favorable verdict and keep the point in reserve. Monaghan v. Rolling Mill Co., 81 Cal. 190, 194, 22 P. 590.

The judgment and order appealed from are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

79 Cal. App. 76

PEOPLE v. BENNETT. (Cr. 890.)

(District Court of Appeal, Third District, California. July 31, 1926.)

1. Jury 🔑131(4)—Defendant, charged with murder, could ask each juror if he would convict because other jurors believed defendant guilty, or because he desired to go home, and if he believed in law of self-defense and of excusable homicide (Pen. Code, § 195).

The defendant in murder prosecution had right to ask each juror, in his voir dire examination, if he entertained a reasonable doubt of defendant's guilt he would vote to convict him, because some other jurors believed he was guilty; whether, entertaining reasonable doubt of guilt of defendant, he would yield to verdict of guilty because he desired to return home or to his business; whether he believed in law of self-defense, Pen. Code, § 195, and law excusing, upon certain prescribed conditions and circumstances, the killing of human being by another person.

2. Jury 🔑131(15) — In ascertaining whether jurors are legally qualified, questions involving general propositions of law may be submitted in their voir dire examination.

In murder prosecution, defendant may submit questions involving general propositions of law to jurors in their voir dire examination, in ascertainment of whether prospective jurors are legally qualified.

3. Criminal law 🔑1186(4).

Acts of trial court, which have effect of denying accused trial by fair and impartial jury, are not within Const. art. 6, § 4½.

4. Criminal law 🔑1166½(6)—Errors in sustaining objections to legitimate voir dire examination were cured by failure to object to same line of examination.

Where trial court's rulings in permitting objections of district attorney to legitimate voir dire examination of jurors were palpably erroneous, such errors were cured when district attorney failed to object to same character of examination.

5. Witnesses 🔑327—Testimony that witnesses in murder prosecution were intoxicated at time of killing was admissible to show they were incapable of giving account of circumstances.

In murder prosecution, testimony that witnesses had been drinking heavily prior to killing was admissible as showing they were so intoxicated at time of act as to render them incapable of giving an account of circumstances.

6. Witnesses 🔑372(2).

In prosecution for murder, it was competent to show on cross-examination that criminal charge pending against prosecution's witness was postponed by district attorney.

7. Criminal law 🔑863(2)—Further instruction on maximum penalty for second degree murder held not to have misled jury.

Where, after retiring, jury requested further instruction on maximum penalty for second degree murder, and judge instructed that statute provided imprisonment for not less than 10 years, whereupon jury retired and within 10 minutes returned verdict of guilty, *held*, contention that jury was misled into belief that maximum penalty was 10 years could not be sustained.

8. Criminal law 🔑1166½(1)—Order that no one should converse with defendant during recess held not prejudicial.

Where defendant was undergoing cross-examination in prosecution for murder, court's order that pending recess no one, including attorney for defendant, should converse with defendant, *held*, case will not be reversed, in absence of showing that defendant suffered any prejudice thereby.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Lawrence J. Bennett was convicted of murder of the second degree, and he appeals. Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against in the superior court in and for the county of Butte for the crime of murder in that he killed and murdered one Carl Bruce. The jury found him guilty of murder of the second degree. A motion for a new trial by him having been made, the same was denied by the court. He appeals from the judgment and the order denying him a new trial.

The points made for a reversal, generally stating them, are: (1) That the court erred in that it wrongfully restricted the defendant in his examination of the jurors upon their voir dire; (2) that error was committed in numerous instances upon the question of the admissibility of certain testimony; (3) that the court and the district attorney were guilty of misconduct which materially prejudiced defendant's case before the jury; (4) that the court erroneously instructed the jury with respect to the penalty prescribed by law for murder of the second degree, at the request of the jurors themselves, after the case had been submitted to them and they had retired for deliberation thereon. It is conceived to be conducive to clarity in the consideration of the points first to state in a general way the facts of the case, and also the substance of some of the testimony.

The homicide occurred near the hour of 3 o'clock on the afternoon of the 21st day of April, 1925, at the farm of one William Bennett, situated about 6½ miles from and northwest of the city of Chico. It appears that early on the morning of that date the deceased and one Wade Eades left Chico in an automobile for the ranch of Bennett, arriving there between 5 and 6 o'clock in the morning. Upon their arrival they immediately went into the Bennett house where the defendant and his father were asleep. They awakened the defendant, whom they said, they found in bed with a certain young woman, whose name need not be mentioned herein; that they finally succeeded in getting the defendant to arise, dress himself, and step downstairs, and induced the young woman to proceed with preparing breakfast for them. There were also present at this time a man by the name of Robert Penning and another by the name of Elwood Donaghay. Just when they arrived at the place or the reason for their being there does not clearly appear from the evidence. But that fact is of no consequence. It also appears that some one took to the Bennett place a jug of intoxicating liquor, and that the parties began drinking from said jug early in the morning, and continued at intervals so to do until the homicide occurred. It also appears, that during the afternoon of the day named, the deceased and the defendant engaged in a quarrel and called each other opprobrious names. This quarrel was apparently about to result in a personal combat between the parties, when Eades, intervening, took hold of the defendant, threw him to the ground, and held him, while the deceased started from the house and passed across the road not far distant therefrom, and thence passed over a fence into a field, going some several hundred feet.

Eades about this time released his hold of the defendant, who, having previously procured a club, described by some of the witnesses as being something of the size of a baseball bat, started in pursuit of the deceased, and overtook him near a ditch in the field, into which the deceased had fled. The defendant was seen to have raised his club and swing it once or twice. Later investigation disclosed that he had struck the deceased on the head such a blow as to have caused his death. None of the witnesses seems to have been able to state precisely the circumstances immediately connected with and preceding the delivery of the fatal blows by the defendant. None of them saw the deceased strike at or make any demonstration as if he were going to strike or assault the defendant. All of them testified that there was hardly a perceptible period of time intervening between the time when the defendant reached the deceased in the field, and the time that he struck the deceased. Indeed, there is no substantial variance between the testimony of any of the witnesses, even including that of the defendant, as to the circumstances leading to the homicide as well as those immediately attending the act of killing. The testimony of the witnesses further shows that the defendant, after knocking the deceased to the ground, started on his return towards his father's house and while so doing met two or three of the other parties. Some of the witnesses testified that he made a statement to the effect that he had killed Bruce. It was also shown that he made a demand on Eades for his (Eades') automobile and that the latter stated that he did not desire to let him have it because it might look bad as against him; that the defendant insisted on taking the automobile, stating in effect that he would take it in any event; that he did take the automobile and was driven to Chico by the young woman above referred to, and leaving the car in Chico took the train for Sacramento, where he was found by the sheriff of Butte county early the following morning with the young woman mentioned, in a room in a lodging house in said city; that the sheriff placed him under arrest, and returned him to Oroville, and lodged him in jail.

It appears that the defendant and the deceased had been intimate friends for a number of years and down to the time of the homicide, but the people undertook to show, and there was some testimony to that effect, that, while the defendant was away from the house and at some other part of the premises, the deceased became guilty of some insulting conduct toward the young woman; that as the defendant was returning, and was approaching the point where the deceased and the young woman were, he overhead the young woman accuse the deceased of having insulted her, and that the difficulty between the defendant and the deceased was due to the former's resentment of the latter's act of misconduct toward the young woman.

The facts recited in the foregoing statement are gleaned from the testimony of the witnesses introduced by the people. The defendant's testimony, while in certain particulars at variance with that of the people's witnesses, nevertheless, in the main tends strongly to corroborate the testimony presented by the people and itself would seem to clearly warrant the conclusion that the defendant not only started the trouble between him and the deceased, but, with a club in his hand, followed the deceased after he (deceased) apparently attempted in good faith to get out of the way of further altercation or quarrel between them. The defendant's testimony was in part as follows:

That on Monday, the 20th day of April, 1925 (the day immediately preceding that upon which the homicide occurred), he and deceased were in the company of each other and together drank heavily of intoxicating liquor; that on the night of the 20th of April, he returned to his home at his father's ranch between the hours of 11 and 12, immediately going to bed upon his arrival home; that early the next morning—between the hours of 4 and 5 o'clock—the deceased and Wade Eades appeared at his father's ranch and, immediately entering the house, went to the second story, where he was in bed, and awakened him; that Bruce, addressing him, said, "Come on, Lawrence, and have a drink;" to which the defendant demurred, answering, "I don't want one right now;" that he (defendant) thereupon "rolled over and went back to sleep, and he (deceased) woke me up again and I got up and went downstairs and into the kitchen, and he said, 'There is a bottle sitting in the water bucket; we have got some more sitting here;' and in a little while I saw Bob Penning with a gallon jug; * * * we had not had any liquor on the premises—neither my father nor I—and the gallon jug belonged to Bob Penning, who was drunk at the time."

Defendant, continuing, stated that in a short time after the conversation just related, all the parties (Penning, Eades, Donaghay, the deceased, the defendant, the latter's father, and the young woman referred to above) sat down together to breakfast. He stated that he and all the other parties just named, with the exception of the young woman, began drinking out of the jug as early as 5 o'clock in the morning and kept it up until he went "to town" (referring to Chico), where he remained an hour (during which time he drank nothing), and then returned to the ranch, and resumed drinking with the other members of the party. The importance of the testimony as to the amount of liquor drinking indulged in by the several parties during the day will be perceived when later herein we consider certain points made here by the defendant.

As above stated, the defendant left the house for a short time. It appears from his testimony that he walked up the road a short distance, intending, as he stated, "to go to town" and hoped that he might "catch a ride to town"; that, after going a short distance, he decided to return to the house, and, as above stated, as he approached the place where the deceased and the young woman were sitting or standing, he heard the two last-named arguing. "I sat down on the road," proceeded defendant, "and didn't pay any attention to the argument—it didn't interest me—and it kind of ceased, and I said, 'Honey, don't argue with him; we don't want any trouble here;' and we all went to the ranch, and we still had the jug with us, and got back to the ranch (he having said the quarrel between the girl and the deceased occurred a short distance from the house); and we sit in the road, Wade Eades and myself and Sharkey Bruce and Bob Penning, and we had one drink right after the other and then some one started to get mad; but I don't know what it started about, or I don't know what was the matter, or what Sharkey Bruce said to me, or what I said to him—everything then went rum-dum with me. That is all there is to it. And the next thing I remember I see Sharkey (referring to deceased) going out through the field, and I just could see him and that is all, and I went out to him, and I said, 'I will go and talk to Sharkey, and ask him to come back to the ranch and make up;' and I said, 'I never had anything against him;' and I went out there and got pretty near to the fence where he was, and he hollered, 'Come on over, you s——n of a b——ch, I will fix you;' and those are just his words, and I got over, and he made a lunge at me, and I swung, and I don't know if I hit him or not, and he lunged again, and I hit him again—I swung again, and he went down, and I don't know what happened after that. Q. You were pretty well intoxicated? A. Yes, I was drunk, just as drunk as I ever was in my life. Q. That is all you know what happened on that? A. I don't remember anything. Q. When you started out, did you have any intention of killing your friend Karl? A. Why should I have any intention to kill a friend of mine? Positively I did not."

The defendant, on being cross-examined, affected at times a lapse of memory as to the occurrences immediately preceding the homicide. This, he said, was due to the fact that he was during the entire day so far under the influence of liquor that he really did not realize what was going on. He said that he could not remember how the trouble leading to the homicide was started, and, while on one occasion he declared that he could not recall what occurred immediately preceding the act of striking the deceased, he later stated, as he declared on his direct examination, that just before he delivered the blow with the club upon the head of the deceased the latter made a lunge at or toward him, and that, the deceased being physically a much larger and more powerful man that he, he "just swung, I guess; I don't remember." He further stated that he did not remember how, where, or when he obtained possession of the club he carried into the field when he followed the deceased. He at one time stated (cross-examination) that he had no recollection of the circumstance of Eades "holding him down," but, subsequently, in the course of his cross-examination, he was asked and answered as indicated the following questions:

"Q. When Eades let you up where was Bruce? A. I don't know; he was out in the field some place.

"Q. Do you remember Eades letting you up? A. No, sir; not exactly the time he let me up; I don't know.

"Q. Do you remember of him letting you up? A. I remember him letting loose of me, and I got up myself, I guess.

"Q. Do you remember Eades letting go of you? A. No, sir; I don't remember him letting go of me or anything about it.

"Q. Do you remember Eades having hold of you? A. Yes, I remember him having hold of me. Yes, sir."

In brief, the testimony of the defendant, elicited both on his direct and his cross examination, was characterized throughout more or less by statements which were inconsistent with each other. In fact, his asseverations of want of memory as to some of the occurrences or events of that day, which bore more or less on the fact of the tragedy, were frequently contradicted by other statements made by him during the course of his testimony. In connection with the cross-examination of the defendant, however, the district attorney introduced into the record an extrajudicial statement made to the prosecutor on the 23d day of April, 1925—two days after the homicide was committed—in which statement the accused recited in detail the facts and circumstances connected with and leading to the tragedy. The substance of the statement is:

That he (defendant), Eades, Bruce, and the young woman referred to hereinabove were together the night before the day of the homicide (defendant was not certain whether Penning was a member of the party that night); that, with the exception of the young woman, all began drinking on said night; that early in the morning of the 21st of April, Eades, Penning, and the deceased appeared at the ranch of the senior Bennett, and Eades went to the sleeping room of the defendant and awakened him, saying, "Let's get up and cook some eggs;" that thereupon defendant arose, dressed, and went downstairs and, as he stated, "we cooked some eggs," and about the same time Penning "brought into the kitchen a gallon jug of liquor." This gallon jug of liquor, defendant said, Penning had in the house, but how it got there, or who took it to the ranch, he (defendant) did not know. "We drank until breakfast was ready," the defendant proceeded to say, "and then he and (naming the young woman) and myself went into town and back out again. When we got back to the ranch, we proceeded to drink more jackass and went on down the road. There were present there myself, Eades, Penning, 'Sharkey' (a nickname by which deceased was known among his intimates), and the girl. * * * She sit down by the fence and we were drinking then and set down a-purpose to drink, and so we just got down, and we had one drink after another, and I walked out to catch pollywogs, just to be fooling around and kidding around, and when I came back Bruce (deceased) had shoved his hand under the girl's dress and started a big rumpus with her. She didn't like it."

Defendant went on to say that he did not witness the malodorous performance of which the deceased was accused by the young woman, but that he heard the latter say to deceased, "Keep your hands out from under my dress," and heard deceased curse her in language unfit to be repeated, and make the threat that he would cut anybody's throat that undertook to do anything to him that he did not like; that the girl also cursed the deceased. Proceeding, defendant said that they then "went back to the ranch," and that he and the deceased began quarreling; that he "went around the house," procured a club about a yard long, and returned with the club to the front of the house, where the deceased and the other parties were; that he and deceased continued to quarrel, but that before they came to "blows" Eades seized him (defendant), threw him to the ground, and held him there until the deceased left the place, and started in the direction of the field in which the fatal meeting between the two men took place. After deceased had proceeded a short distance into the field, the defendant proceeded further to say, he ran after him (deceased), carrying with him the club he had picked up "around the house"; that, when he got to the fence, the defendant called the deceased, who was then about 50 yards distant from the fence and asked him to return to the ranch; that deceased, replying, said to defendant, "You s——n of a b——ch, come on and I will fix you;" that thereupon the defendant, still carrying the club, passed over the fence and ran to where the deceased stood in the field. "Q. Weren't you afraid of him? A. Yes; I was afraid of him all the time. * * * Q. Didn't you want to have it out with him? A. Not exactly. I knew if we got to talking we would settle it all right. What I was afraid of, I knew if ever I came to town he was going to jump me again. I knew that. I was afraid of him all the time, and he was one of these kind, when he got drunk, old memories would come back—old memories would come to Sharkey Bruce; they always did."

The defendant said that, when he got to where the deceased stood, the latter made a lunge or some hostile demonstration toward him (defendant), and he thereupon hit deceased with the club. "I hit at him once," he said, "and missed him. Q. You hit him perhaps twice? A. I hit at him once and whether I hit him or not, I don't know. He just kept coming at me and I hit him again. Q. Do you remember on which part of the head you hit him? A. He was coming right down there this way at me, this way, and I jumped over this way, and at the same time I hit him. Q. Was it on the right or the left hand side of the head? A. No, sir; I think it was on the left hand side of the head, I believe, or near there. He just swung around like that and I jumped."

Defendant was asked whether or not he knew that the club with which he struck the deceased "was a piece of a singletree," to which he answered, "I don't know; it might have been." He stated that, after striking and knocking deceased to the ground, the latter falling into the ditch near which the assault occurred, he (defendant) started on his return to the house; that on the way he met Penning, Eades, and the young woman going toward the spot where he left the deceased lying; that he could not state whether he did or did not say, as some of the witnesses testified that he did say, when he met those parties, that he had killed Bruce. He stated that he took Eades' car, and, first obtaining from his father the sum of $75, he, accompanied by the young woman, the latter driving the car, went to Chico, where he met a brother, and later had something to eat, and left the automobile of Eades in Chico, and then, with the young woman, took a train for Sacramento, where he was arrested by the sheriff of Butte county at the time and place above indicated.

Asked by the prosecutor whether he asked Eades for the use of his automobile to convey him from the premises, and upon the refusal of Eades to consent to his taking the car, he (defendant) said he would "take it anyway," the defendant stated that he did not remember whether such an occurrence did or did not take place. He was further asked where he intended to go and he replied:

> "I was going down (to Vallejo) to see my mother I suppose.
>
> "Q. And from there were you figuring on going to Colorado? A. No, sir; I told the Welshes (friends in Chico where he got his meal on the evening of the homicide) that just for fun;" that his intention was, "as soon as I came to my senses, I would come back because I don't figure on beating the law. * * *
>
> "Q. Do you think that the booze is the cause of the whole thing, Lawrence? A. Yes; I do, because, if he (deceased) had not gone to fooling with my woman, I would never got riled up on booze at all. She is not my woman, but I think as much of her as I do of my life."

There are many other details contained in the extrajudicial statement of the defendant, but the substantial or important portions of said statement are sufficiently set forth in the above résumé thereof. **It is only just to state that the defendant, at the trial, upon having his attention called by the district attorney to his extrajudicial statement, declared that certain parts thereof he had no recollection of** making.

Drs. D. H. Moulton and N. T. Enloe, physicians and surgeons of Chico, conducted an autoptical examination of the deceased at the office of the coroner in Chico. The first-named testified:

> "We found bruises on both sides of the head over the ears over the temporal region, and a fracture of the skull on the right side running down the back of the ear through the parietal bone into the occipital bone, and a fracture of the inner plate about 2 inches long, which had caused the rupture of a blood vessel and fractured the middle maxillary artery, which bled into the brain tissue causing pressure and death.
>
> "Q. Can you state, Doctor, what was the cause of this breaking of this artery? A. Well, it must have been a blow.
>
> "Q. A blow on the head? A. Yes, sir, a blow on the head.
>
> "Q. Was it a fracture of the skull on the inside? A. Yes, sir; a fracture of the skull.
>
> "Q. And that fracture severed an artery? A. It did.
>
> "Q. And that artery being severed caused a blood clot on the brain? A. It did.
>
> "Q. And that was the immediate cause of death? A. That was the cause of death."

The doctor stated that there were evidences of two blows on the head, one on the right and another upon the left; that the blow on the right side of the head was the cause of death. He further stated that a party receiving such an injury as he found had been inflicted upon the head of the deceased would ordinarily not survive much beyond half an hour after the injury was received. Dr. Enloe's testimony corresponded with that of Dr. Moulton in all vital particulars.

[1] The foregoing statement of the testimony is sufficient for our purposes herein. Before proceeding, however, with an examination of the assignments involving the charge that the court erred in refusing to to permit the attorney for the accused to propound to prospective jurors certain questions upon their voir dire examination, we feel perfectly free to express the opinion that the learned trial judge in this case confined the right of the defendant to conduct such an examination of the tentative jurors as would properly test the question of their qualifications to pass upon the important ultimate issue involved in the trial within an unreasonably narrow compass. The defendant had the right to ask each juror, if, after the case was submitted to him, he entertained a reasonable doubt of the defendant's guilt, he would, notwithstanding that doubt, vote to convict him of some crime within that embraced within the charge in the information because some of the other jurors believed that he was guilty.

He also had the right to ask each juror whether, entertaining a reasonable doubt of the guilt of the defendant of any offense embraced within that charged, he would, nevertheless, yield to a verdict of guilty merely because he might desire to return to his home or to his business. He also had the right to ask each juror if he believed in the law of self-defense and the law excusing, upon certain prescribed conditions and circumstances, the killing of a human being, by another person. Section 195, Pen. Code.

These were some of the questions which the court refused to permit the defendant to ask the jurors when objection thereto was interposed, the ruling being based upon the fallacious theory that the questions invaded the province of the court in the matter of the charging of the jury upon the law. We know of no reason why it is not just as proper to ask a talesman upon his voir dire examination whether he would, if selected to try the case, be governed by the law and the particular rules applicable generally to all criminal cases as the same are to be stated to them in the court's charge, as it is to ask him if he would be governed, in arriving at a verdict, by the evidence brought before him. It is, of course, the exclusive function of the court to instruct the jury upon the law pertinent to the case as it is made by the evidence; and, among the legal propositions which it is the duty of the court to explain to a jury, is that they are the exclusive judges of what the evidence does or does not show. Because this is a duty of the court, just as reasonably could it be said that it would be improper to ask a talesman whether he would be guided by the evidence in considering a case as it would be to say that it is improper to ask him whether he would be guided by the law as it is stated to him by the court in considering the case and arriving at a conclusion therein. That the matter of instructing a jury upon the law by the court, and the question whether the jury will follow the law as thus it is submitted to them are, when considered with respect to the exercise of the right of a party to probe a juror's mind to ascertain and determine whether he can and will try the case fairly and impartially, two entirely different and distinct considerations, is a self-evident proposition.

[2] A court may charge a jury accurately respecting the law pertinent to the case, yet it does not follow therefrom that the jury will accept the court's statement of the law as correct and follow it in passing upon the issues to be decided. Hence, to a party whose rights are to be committed to the arbitrament of a jury, it is always of singular importance that he should be convinced that those individuals who are to compose the jury will be governed, in determining what their verdict shall be, not alone by the evidence adduced before them, but also by the law which the court may conceive is pertinent to the case and essential to an enlightened consideration of the proofs. It has always been held that, while a defendant in a criminal case will not be permitted to "embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged" (People v. Hamilton, 62 Cal. 392; People v. Edwards, 163 Cal. 752, 755, 127 P. 58; People v. Brittan, 118 Cal. 409, 412, 50 P. 664; People v. Trask, 7 Cal. App. 103, 105, 93 P. 891), still the field of inquiry in the ascertainment of whether a prospective juror is or is not free from actual or implied bias is and should be broad. In other words, such inquiry should not be so restricted as to prevent a thorough probe of the juror's mind to the end that it may thus be satisfactorily determined whether such juror, if selected to try the accused, would accord to him, as well as to the people a perfectly fair trial upon the evidence and the principles of law appropriate to the case (People v. Edwards, supra; People v. Reynolds, 16 Cal. 129).

We are not to be understood as holding that there may not be questions involving legal propositions which may not be properly put to prospective jurors, or that in a voir dire examination every evidentiary phase of the case may be in detail submitted to the talesmen for their views as to how they might regard the same when considering their verdict; but the questions we are here considering—the presumption of innocence, the burden of proof, the doctrine of reasonable doubt, and the principle of self-defense—involve general propositions of law which, with the exception of the right of self-defense, are applicable to all criminal cases, and whether laymen summoned to jury duty understand them and their significance as affecting the rights of an accused in the trial of his case and whether, understanding them, they will apply them in considering the evidence and in arriving at a conclusion, constitute matters of pertinent inquiry in ascertaining whether prospective jurors are in all particulars legally qualified to pass upon the question whether the defendant is guilty or not guilty, or whether there exists in their minds a reasonable doubt of his guilt.

[3] These views would seem not only to comport with the very theory upon which the sacred right of trial by jury proceeds, but also harmonize with the general trend of the cases, of which the following from California may be named: People v. Plyler, 126 Cal. 379, 381, 58 P. 904; People v. Teshara, 134 Cal. 542, 544, 66 P. 798; People v. Rollins, 179 Cal. 793, 797, 179 P. 209; Kramm v. Stockton R. R. Co., 22 Cal. App. 737, 746, 136 P. 523. And it should always be remembered that, in the trial of a criminal case, any act or action of a trial court which must necessarily have the effect of denying to the accused a trial by a fair and impartial jury

will not be excused or mitigated by the terms of section 4½ of article 6 of the Constitution. The right of trial by jury is fundamental. It is a right which was transmitted to us by the common law and as such is expressly guaranteed by the Constitution, and the distinctive quality of that right—its very essence—is that every person put upon trial upon an issue involving his life or his liberty is entitled to have such issue tried by a jury consisting of unbiased and unprejudiced persons. The section of the Constitution just mentioned was never intended to impair the exercise of that right, nor, indeed, to embarrass in the least the exercise of any of the fundamental rights of the people. People v. Stennett, 51 Cal. App. 371, 395, 197 P. 372; People v. Wismer, 58 Cal. App. 679, 688, 209 P. 259; People v. Carmichael (Cal. Sup.) 246 P. 62.

[4] It must also be remembered that there is an obvious distinction between the matter of the procedure which the Legislature has established for the exercise of the constitutional right to a trial by jury and that right itself. But in the instant case, while, as stated, the trial court in many instances permitted the objections by the district attorney to a legitimate voir dire examination of the jurors to lead it into what we regard as palpably erroneous rulings, yet it transpired that to practically the same character of examination of the jurors the district attorney, probably inadvertently, as we judge from his previous objections to the same line of examination, failed to object, with the result that the errors referred to were substantially cured. As has been pointed out above, the court, when objection to such an examination was made, invariably ruled that any questions propounded to the jurors regarding the law of the case were entirely incompetent and improper; that the law of the case would be handled by the court and that the jurors would be so instructed as to make it clear to them that it would be their duty to give the defendant the benefit of the rules of law as to which counsel for the defendant attempted to interrogate them.

As seen, some of the disallowed questions referred to the law of self-defense, excusable homicide, the doctrine of reasonable doubt, etc. As stated, though, practically the same questions were asked, were not objected to by the district attorney, or disallowed by the court sua sponte, and were answered. Thus each of the jurors examined was asked and answered these questions: Whether he (we will refer to the women as well as the male talesmen) had any opinion as to the guilt or innocence of the accused; whether he would give defendant a fair and impartial trial according to the evidence viewed by the light of the law as given to him by the court; whether he would follow the law as the court gave it to him; whether he had any bias or prejudice against the law of self-defense or the law regarding excusable and "accidental" homicide; whether he would accept the law of the case from the court, even though the law as so stated did not coincide with his notion or view of the law; whether the fact that the defendant was charged with the crime of murder would prejudice or bias him against the accused "in any way, shape or form at any time throughout the trial of the case"; whether (in response to the district attorney) he knew of any reason whatever that would prevent him from serving as a fair and impartial juror "in this case if you are selected"; whether he would give both sides a fair trial; whether he had talked with any person claiming to be familiar with the facts, particularly with or to members of the coroner's jury that inquired into the cause of the death of the deceased, about the case.

Lastly, defendant's counsel was permitted to ask each juror this question:

> "If you were on trial upon this charge would you be perfectly satisfied and willing to have a juror sit where you are now sitting with the frame of mind and your attitude generally towards and your knowledge of the facts of the case and try you upon this charge?"

Of course, the desideratum of a voir dire examination of talesmen is to secure a jury composed of persons who can and will act in the trial of the case with entire impartiality as between the contending parties. People v. Reynolds, supra. It seems plain to us that the last-indicated examination of the tentative jurors in this case was sufficiently scopeful to secure such an exposure of the state of their minds with respect to the case as to have facilitated an ascertainment with reasonable certainty whether they could and would try the case with perfect fairness and entire impartiality. Manifestly, nothing more or further by the way of a voir dire examination can legally or reasonably be asked.

The next assignments, as seen, relate to rulings on evidence. There are many of these assignments. A general reference herein to a number relating to the same subject-matter will be sufficient. On cross-examination of the witnesses Penning, Eades, and Donaghay, who, as shown, testified on behalf of the people, the defendant's counsel undertook to bring out from each the fact that all of the parties, including the defendant and the deceased, began drinking liquor together the night before the day of the homicide, that they resumed such drinking at an early hour of the morning following, and kept it up incessantly to the time the deceased was struck and killed. To many of the questions asked along those lines the district attorney interposed objections which the court sustained, the ground of the rulings being, as the court explained, that any testimony showing that said parties indulged in liquor either the night before or several hours preceding the act of killing on the day thereof, was too remote from said act. The court explained that such testimony would be inadmissible unless the drinking was shown to have taken place near the precise time of the homicide. The object of the cross-examination was, obviously, to show that the witnesses present when the homicide and the events leading thereto occurred had been and were under a state of inebriety to such an extent that they were practically oblivious to everything that was going on at the Bennett ranch that day, or, in other words, were not mentally capable of giving a correct account of the facts and circumstances preceding and attending the act of killing. For this purpose the cross-examination was perfectly proper.

[5] It requires no expert to confirm the proposition that the power of perception and of memory of one who keeps himself charged to full capacity with intoxicating liquor, particularly that of the "jackass" variety, for several successive days or many consecutive hours, will, as a general rule, become deranged or so weakened that any statement that such person might make as to happenings going on about him while in such a condition would be wholly undependable. Therefore, testimony that witnesses called to testify to the commission of an act occurring when they had been for many hours or days previously and were then indulging in the excessive use of intoxicating liquor, is admissible as tending to show that they were so intoxicated at and before the time the act or the occurrences to which they attempted to testify took place, as to render them incapable of giving a rational or even an approximately accurate account of the circumstances of the act or the occurrences. Indeed, even testimony that witnesses called to prove the fact in dispute were in an intoxicated condition immediately after it occurred, would be competent for that purpose. In the present case, however, as will be seen from the above statement of the testimony, the fact of the intoxication of the witnesses named was sufficiently shown, the district attorney, for some reason, failing to object in those instances where such testimony was received. In fact, the district attorney himself proved the fact by introducing in evidence and thus standing sponsor for the verity thereof the accused's extrajudicial statement, in the course of which the defendant a number of times declared that he and the other witnesses above named had been drinking heavily for some time prior to and down to the time of the tragedy.

[6] The next assignment under this head arose as follows: Against the prosecution's witness Penning, there had previously been filed and were pending in the superior court of Butte county, at the time the instant case was called for trial, two criminal charges based, respectively, upon the sale and upon the possession of intoxicating liquor. Counsel for the defendant sought to bring out by the cross-examination of said witness that such charges were pending against him, and that one had been set for trial for a date some 2 weeks prior to the date fixed for the trial of the present case, but was postponed, on motion of the district attorney, to a date 2 weeks subsequent to the date fixed for the trial of the instant case. An objection by the district attorney to this proposed cross-examination was sustained by the court. The cross-examination, as the attorney explained, was designed to disclose a circumstance tending to show that the testimony of Penning for the people was or might be influenced by a hope on his part that he would or might be leniently treated by the prosecuting officers in the criminal case or cases pending against him by giving testimony which would contribute to the conviction of the defendant. We think the proposed inquiry involved a proper subject of cross-examination for the reasons stated by the Supreme Court as follows, in People v. Dillwood, 4 Cal. Unrep. 974, 39 P. 438, and that the defendant would be entitled to prove the fact by the record if the witness denied it.

> "It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant."

See, also, People v. Thomson, 92 Cal. 506, 28 P. 589; People v. Hoffman, 195 Cal. 295, 232 P. 974.

Such testimony goes to the question of the credibility of the witness. The evidence in this case, however, is apparently conclusive of the defendant's guilt, and it would, indeed, involve a plain repudiation of the terms and the spirit of section 4½ of article 6 of the Constitution to hold that a miscarriage of justice resulted from the ruling. There is here no substantial evidence of self-defense, nor any pretense that the accused committed the homicide while laboring under a state of insanity, and certainly no evidence that the homicide was the result of an accident. About all that could reasonably be claimed under the evidence is that there was in the act of killing no malice or a deliberate purpose to take life, and the jury gave the defendant the benefit of that view of the evidence.

The assignment of misconduct on the part of the court and the district attorney during the trial of the cause does not require extended notice. As is nearly always true, where a trial is closely contested, attorneys often make remarks which are not warranted, and which, therefore, should not be made. In this case, we cannot say that the district attorney's alleged misconduct was of so grievous a nature as to compel a reversal, although it is to be granted that he occasionally made statements that should have been left unsaid. The same may be said of the like charge against the court, although it is to be conceded that the latter, in ruling upon objections urged by the district attorney, was sometimes unreasonably severe and as often unjust in his criticism of the defendant's attorney, when the latter sought to make proof of certain facts which the district attorney and the court conceived were not proper to be brought into the case. The defendant's counsel, as the record appears to show, was noticeably courteous to the court on all occasions during the trial, and, in a number of instances in which the court's language in addressing the attorney seemed to involve a reprimand, the latter's position was legally sound. But too strong a case of guilt was established to justify the conclusion that the alleged misconduct of the prosecutor and the court had the effect of frustrating the ends of justice herein.

[7] The next point which should be given attention is founded upon the circumstance that, after the case had been submitted to the jury, the latter requested that they be returned into court for the purpose of receiving further instructions on the law, whereupon the judge, the district attorney, the attorney for defendant, the court reporter and the sheriff stepped to the door of the jury room, and the judge asked the jurors what further instructions they desired. The foreman, in reply, stated that they wanted to know what the maximum penalty for second degree murder and the maximum penalty for manslaughter were. The judge, in effect, stated to them that he was not at liberty to answer those questions, and then, addressing the attorneys, asked them what they desired him to do respecting the matter. Both the district attorney and the defendant's counsel expressly stated that they had no objection to the judge enlightening the jurors upon the matter to which their questions related, and thereupon the judge, addressing the jury, explained that, as to the penalty for second degree murder, the statute merely provides that it shall be imprisonment in the state prison for a term of not less than 10 years and that for manslaughter the penalty is imprisonment in the state prison for a term not exceeding 10 years.

Counsel for the accused now argues that the form in which the judge stated the penalty for second degree murder was misleading and prejudicial to his client, in that, as indicated by the fact that, within ten minutes after the judge so stated the penalty for that degree of murder, they returned a verdict of guilty of murder of the second degree, the jurors "unquestionably" got the impression that the maximum penalty for second degree murder was 10 years. We think the contention is untenable. The necessary assumption of counsel's argument is that the jury were disposed to find the accused guilty of that offense only for which a maximum punishment of ten years is prescribed. That assumption, though, is plainly negatived by the consideration that the judge explicitly explained to the jury that the term of 10 years constituted the maximum penalty for manslaughter, so that had the jury desired that the defendant should not be subjected to a penalty in excess of 10 years of imprisonment, they certainly would have found the accused guilty of manslaughter.

The judge, however, stated the penalty for second degree murder precisely in the language of the statute, and it is quite clear that his statement thereof was sufficiently explicit to convey to any intelligent mind that the law specifically prescribed for that degree of murder the minimum penalty only, and, having so fixed it, it was entirely in the discretion of the prison board to make the maximum penalty therefor in any given case either at the fixed minimum penalty or a penalty consisting of any number of years between said minimum and life imprisonment or life imprisonment itself, or what would amount to the same thing. We, therefore, do not think that the jury could have been or were misled by the manner in which the judge gave the information regarding the penalties as to which they requested enlightenment or that the episode, which, perhaps, should not have taken place in any degree prejudiced the rights of the accused

[8] What might have been a most serious error, complained of herein, results from an order made by the court, while the defendant, in the witness chair, was undergoing cross-examination by the district attorney, to the effect that, pending the recess of the court from the adjournment time of a certain day until the hour for the reconvening of the court the following day, no one should be permitted to converse with or talk to the accused, who, at all times during the trial, was in the custody of the sheriff. The court stated that the order would include the attorney for the defendant. The order was so obviously wrong that it is surprising that it should have been made. We do not know of any proposition better or more thoroughly settled in this country than that it is not within the power or province of any court of justice to make an order which, if executed, would prevent a defendant in a criminal case from consulting with his counsel at any time, either before or during the progress of the trial. But the record here fails affirmatively to show that the defendant suffered any prejudice from the order

so made. It is not made to appear that counsel for the defendant was prevented from personally interviewing or conversing with his client during the period of time covered by the order. In fact, the defendant made no showing that his attorney did not have full opportunity to converse and consult with him at all times, and to an extent that would enable him to present such a full and complete defense as was available to him. The case, therefore, should not be reversed because of the void order referred to.

Lastly, it is to be remarked that the charge of the court was free from prejudicial error, and, on the whole, stated the law applicable to the facts fully, clearly, and correctly. The principles of law declared to the instructions preferred by defendant and disallowed by the court were substantially covered by the court's charge.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

79 Cal. App. 230

CRUMMEY v. POPP, Superintendent of Streets, et al. (Civ. 5674.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1926.)

1. Statutes 🔑174, 175—Where act is complete in itself, and some provision therein is susceptible of two interpretations, one effecting that purpose should be favored.

Where an act is intended to be complete in itself and some specific provision therein is susceptible of two interpretations, one which effects that purpose, and the other which would require resort to some other act or proceeding, the former interpretation should be favored.

2. Municipal corporations 🔑281(1)—Statutory provisions for election by owners to take over contract held to make no distinction between owners under "front foot" and "district" plans of assessment (Deering's Gen. Laws 1923, Act 8199, § 12).

Owners under "district" plan of assessment may elect to take over contract, under Deering's Gen. Laws 1923, Act 8199, § 12, there being no distinction between owners liable to be assessed under "front foot" and "district" plans of assessment; terms of statute being general and including contracts awarded under both plans.

3. Constitutional law 🔑70(3)—Municipal corporations 🔑266—Owners will not be deprived of right to take over street improvement contract because of difficulty in ascertaining number of owners, such difficulty being matter for Legislature (Deering's Gen. Laws 1923, Act 8199, § 12).

Property owners under "district" plan of assessment will not be held to be deprived of their right to take over street improvement contract, under Deering's Gen. Laws 1923, Act No. 8199, § 12, because it would be difficult to ascertain correct number of owners, where assessment district includes entire municipality, since this is for legislative determination.

Application by Raymond H. Crummey for a writ of mandate to be directed to W. L. Popp, as Superintendent of Streets, and others. Writ denied.

R. M. F. Soto, of San Francisco, for petitioner.

Archer Bowden, City Atty., of San Jose, and Randolph V. Whiting, of San Francisco, for respondents.

LANGDON, P. J. This is an original proceeding in mandamus to require the respondent superintendent of streets to enter into a contract with petitioner for the performance of certain street improvements in the city of San Jose, and to require the respondent city manager to approve a bond offered by petitioner to secure the payment of labor and materials under such contract. The respondents defend upon the ground that the respondent Clark, as agent of property owners, is entitled to the contract instead of the petitioner.

It would serve no useful purpose to outline the pleadings or the facts of the case. It is sufficient to say that it is conceded that the municipal authorities initiated proceedings for the improvement of a public street, under the Improvement Act of 1911 (Stats. 1911, p. 730; Deering's General Laws, 1923, Act No. 8199), and that all these proceedings were in due form and within time until the respondent Clark, as agent for the property owners, gave notice that they elected to take the contract at the same price at which it had been awarded to the petitioner. The claims of the respective parties arose at this point in the proceedings, and the sole question to be determined on this action is whether, under section 12 of the Improvement Act of 1911, where the improvement is to be made under the district plan, property owners may elect to take over the contract.

[1] The act in question provides an alternative method for all public improvements specified in section 2 and was intended to be all-inclusive, though not repealing any of the other acts providing for similar improvements. Any interpretation of the act must therefore be made in view of the well-known rule that, where one act is intended to be complete in itself and some specific provision therein is susceptible to two interpretations, one which effects that purpose, and the other which would require resort to some other act or proceeding, the former interpretation should be favored.

The specific provision which is in issue here is found in section 12, reading, in part, as follows:

> "The owners of three-fourths of the frontage of lots and lands liable to be assessed, * * * may * * * elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded."

The petitioner argues that this section is applicable only when the work has been agreed to be done on the "front foot" plan of assessment, while the respondents argue that it is applicable to work to be done under the "district" plan of assessment as well.

Looking at the act as a whole, it is apparent that the Legislature provided for both methods of assessment and expressly included the "district" plan in section four where the counsel was expressly authorized to adopt that plan whenever the contemplated improvement "is of more than local or ordinary public benefit, or * * * the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed." In section 79 the meaning of the words "work" and "improvement," as used in the act, is defined to "include all work mentioned in this act." Thus every improvement contemplated by the act may be paid for under the "district" plan of assessment when so determined by the council under the provisions of section 4. With but a few exceptions, all the proceedings required to be taken down to the award of the contract are the same under either method of assessment. Throughout the act we find a very definite policy on the part of the framers of the act to provide a complete scheme for the improvement of streets under both methods of assessment, and we also find that the provisions of the entire act are applicable to both of these methods, except in the few instances where special distinctions are made.

[2] Turning to section 12 we find that provision was made whereby the owners "liable to be assessed" might take over the contract and do the work in their own behalf. There is here no distinction between owners liable to be assessed under the "front foot" and "district" plans of assessment. The terms are general and must be held to include contracts awarded under both plans, as to hold otherwise would necessitate our writing into the section an exception which the Legislature has given no indication that it intended to be there.

[3] The section provides that "the owners of three-fourths of the frontage of lots and lands liable to be assessed" may elect to take over the contract. From this it is argued that the election can be had only when the work is done on the frontage plan of assessment, because otherwise it would be difficult to determine the true owners of a sufficient amount of frontage. But the "district" plan may be adopted when the improvement is confined to lots fronting on the street improved, if the work is of more than ordinary public benefit, or if the cost of the work is more than one-half of the assessed value of the lots assessed. No reason has been suggested why the owners should not be permitted to take over the work in such a case. The fact that it would be difficult to ascertain the correct number of owners where the assessment district included the entire municipality is a consideration to be addressed to the Legislature.

Petition denied and writ discharged.

We concur: NOURSE, J.; STURTEVANT, J.

79 Cal. App. 222

L. H. MITCHEL & SONS et al. v. BENWELL et al. (Civ. 5576.) *

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1926.)

1. Mines and minerals 🔑109—Agreement to assume operators' indebtedness and develop oil well held sufficient consideration for lessee's promise to pay part of cost (Civ. Code, § 1605).

Agreement to assume indebtedness of oil well operators and take over development of well *held* sufficient consideration, under Civ. Code, § 1605, for lessee's promise to pay part of cost.

2. Appeal and error 🔑1008(1).

Trial court's finding, warranted by contract, that there was consideration from promise to pay part of cost of developing oil well, is binding on appeal.

3. Mines and minerals 🔑109—Finding that oil well was producing for over a month before complaint in suit for money payable monthly from production was filed, and that earnings exceeded sum sued for, held responsive to pleadings and sustained by evidence.

In action for money due under contract to pay part of cost of developing oil well out of first production, but not more per month than was earned by 10 points of defendant's third royalty, court's finding that well was producing for over a month before complaint was filed, and that such 10 points of oil then produced exceeded amount sued for, *held* responsive to pleadings and sustained by evidence as to amount received by defendant.

4. Appeal and error 🔑179(1)—Prematurity of action for money due on contract need not be considered, where presented to trial court only by answer denying that oil production from which payable exceeded sum sued for.

Whether action for amount agreed to be paid toward cost of developing oil well was prematurely brought need not be considered, where presented to trial court only by answer denying that 10 per cent. of defendant's royalty, from earnings of which monthly payments were to be made, exceeded sum sued for.

---

*Hearing denied by Supreme Court October 25, 1926.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by L. H. Mitchel & Sons and others against John L. Benwell and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Henry M. Lee, of Los Angeles, for appellants.

Meserve & Meserve, of Los Angeles, for respondents.

STURTEVANT, J. The trial court caused a judgment to be entered against the defendants for moneys due under a written contract. The appellants made a motion to vacate the judgment and enter a judgment in favor of defendants, and the motion was denied. They made a motion for a new trial and the motion was denied. Thereafter they appealed under section 953a of the Code of Civil Procedure. The findings followed the pleadings and fully state the facts. They are as follows:

"I. That it is true that plaintiffs L. H. Mitchel, Hoyt H. Mitchel, and Glen H. Mitchel are copartners doing business under the firm name and style of L. H. Mitchell & Sons.

"II. That it is true that the defendants, John L. Benwell and Mary A. Benwell, are now and, for all the times mentioned in the within action, have been husband and wife.

"III. That it is true that on or about the 19th day of November, 1922, defendant John L. Benwell made and entered into a contract in writing with plaintiffs, in words and figures as follows, to wit:

" 'San Francisco, Cal. November 19, 1922.

" 'L. H. Mitchel & Sons, 803 Stock Exchange Building, Los Angeles, Cal.—Gentlemen: In consideration of your agreement to assume the indebtedness of Messrs. Casteel & Hitchcock in connection with their operations of Benwell No. 2, and your agreement to take over the development of this oil well and bring it into production, paying the entire cost thereof, I hereby agree to contribute seventy-five hundred dollars ($7,500), providing your expenditures aggregate a cost of fifty thousand dollars ($50,000), or in like ratio, in the event the expenditure is a lesser sum. This money to be paid to you through whatever bank is designated as my despository and dispensing agent.

" 'The amount of seventy-five hundred dollars ($7,500) is to be paid to you out of the first production, but not more shall be taken each month than is earned by ten points (10) of my thirty-three and one-third points (33⅓) royalty.

" 'This is in no sense an assignment, but is merely an admission of an obligation to pay you the above sum on the above conditions.

" 'This writing has no relationship to my lease in any sense, and, when the full seventy-five hundred dollars ($7,500) shall have been paid, I am free of all indebtedness and obligation to you.

" 'This agreement is to be on the condition that the control of all operations shall not be exclusive but shall be jointly as between yourself and Casteel & Hitchcock and this provision shall apply to all expenditures incidental to the completion of said well and bring the same to production.

" 'The well referred to is known as Benwell No. 2, and is located on lots six (6) and seven (7) of La Reina Place, a subdivision of a portion of lot eighty-five (85) of the American Colony tract, Los Angeles county, state of California, as per map recorded in Book 11, page 104 of Maps, in the office of the recorder of said county.

" 'Very respectfully yours,

" '[Signed] John L. Benwell.'

"IV. That it is true that, subsequent to the date of said contract, plaintiffs entered into an agreement with two certain parties, to wit: Messrs. W. T. Casteel and H. H. Hitchcock, in connection with and relative to the operations of drilling a certain oil well known and designated as 'Benwell No. 2,' and located on that particular real property described as lots six (6) and seven (7) of La Reina Place, a subdivision of a portion of lot eighty-five (85) of the American Colony tract, Los Angeles county, state of California, as per map recorded in Book 11, page 104 of Maps, in the office of the recorder of said county.

"V. That it is true that plaintiffs, pursuant to an agreement with said parties, Messrs. W. T. Casteel and H. H. Hitchcock, agreed to assume and take over the development and the drilling of an oil well for the production of oil on said property described, and to bring into production, if possible, a well on said property, and to pay the entire cost thereof; and that it is true that plaintiffs did take over said operations of said well on said property described, and did pay out and expend from plaintiffs' own funds all of the necessary moneys to develop said oil well on said property, and did, subsequent to the date of said contract herein set forth, to wit, November 19, 1922, complete the drilling of a well on said property, and cause the same to be brought into production of petroleum oil; and it is true that said well on said property is now, and has since December, 1922, been producing oil from said property.

"VI. That it is true that plaintiffs laid out and expended a sum in excess of $50,000 for necessary and proper expenditures for the drilling of said oil well on said property described, and that plaintiffs did, in fact, expend a sum in excess of $75,000, to wit, approximately the sum of $76,585.29, for the drilling of said oil well, and in order to place the same on production, and to produce oil therefrom.

"VII. That it is true that defendants have received from the oil produced on said property a sum equal to the sales price of 33⅓ per cent. of the oil produced therefrom, or a 33⅓ per cent. royalty.

"VIII. That it is true that said well had been producing for a period in excess of one month prior to the date of the filing of the complaint in the within action, and that it is true that 10 points of defendants' 33⅓ per cent. royalty of said oil produced from said property at the date of filing the within complaint, exceeded in amount the sum of $7,500.

"IX. That it is true that plaintiffs have kept and performed all of the terms and conditions of said contract to be by plaintiffs, or either of them, kept and performed.

"X. That it is true that defendant John L. Benwell failed and refused to keep and perform terms and conditions of said contract, to be by said defendant kept and performed, and said defendant breached said contract.

"XI. That it is true that plaintiffs demanded of defendants the payment to plaintiffs of the sum of $7,500; and that it is true that said $7,500 has not been paid plaintiffs by defendants, or otherwise.

"XII. That it is not true that plaintiffs had at any time in their possession funds out of which plaintiffs were reimbursed for the money due plaintiffs under said contract; and that it is not true that plaintiffs have, in fact, been paid in full on account of all or any claims or demands arising out of or relating to said contract in any wise whatsoever; and that it is not true that said claim has been paid in full, or in any other manner.

"XIII. That it is not true that there was a lack or want of consideration in the making, execution, and delivery of said contract, as set forth in the complaint on file herein, and sued on in the within action, and as set forth in the within findings, and that it is not true that there was any failure of consideration for the making, execution, or delivery of the contract set forth in the complaint sued on in the within action, and as set forth in the within findings."

On this appeal the appellants present three points: (1) The court erred in holding appellants still liable for the payment of said sum of $7,500 for the reason that respondents had been fully paid by the parties; (2) there is no consideration for appellants' alleged agreement to pay; (3) that said action was prematurely brought, if any right did exist in plaintiffs and respondents to maintain said action, in that no proof was offered or received to establish the fact that at the time of bringing the said action defendants and appellants had received out of their royalty of 33⅓ per cent., a sum equal to 10 points thereof, which fact had been specially denied.

In support of their first point the appellants earnestly rely on two exhibits, B and E, being copies of accounts kept by the respondents, but those two exhibits are to be read in connection with Exhibits C and D, which are copies of other accounts from respondents' books, and when the four are read together they fully sustain the contention of the respondents that, while the respondents had collected the said sum of $7,500 for the account of Hitchcock and Casteel, said sum was held in a suspense account pending the disputes between the parties to this action. The respondent L. H. Mitchel testified he had not received the money. Respondents' bookkeeper, A. S. Burdette, fully explained the matter as above stated. Messrs. Hitchcock and Casteel levied on and attached said money in the hands of respondents as the property of Hitchcock and Casteel. The trial court found the fact against the appellants, and there was certainly some substantial evidence to support the finding.

[1, 2] The second point made by the appellants may be answered by a most cursory reading of the contract. It is quite clear that there was a consideration for the promise made by the appellants. Civ. Code, § 1605. Furthermore, the trial court made its finding on the issue in favor of respondents and against the appellants.

[3, 4] The third and last point made by the appellants is without support. The facts contained in the record are as follows: The contract contained a clause, "The amount of $7,500 is to be paid to you (plaintiffs) out of the first production, but not more shall be taken each month than is earned by 10 points of my 33⅓ points royalty." The complaint filed February 7, 1923, alleged, "That said well has been producing for a period in excess of one month prior to the date hereof, and that 10 points of defendants' 33⅓ per cent. royalty of said oil, produced from said property, exceeds in amount the sum of $7,500." The amended answer denied "that 10 points of defendants' 33⅓ per cent. royalty of said production from said property exceeded in amount the sum of $7,500 or that at the time of the filing of said complaint defendant had received" in excess of $3,700. The trial court's finding VIII, supra, is fully responsive and is against the appellants. The evidence fully sustained the finding as made. Nothing "was taken monthly." The whole matter was taken up before the trial court not as to the amount of a monthly deduction, but as a lump sum as of the date of December 31, 1923. Mr. Mitchel testified the defendant had received $97,226.46. How much per month he received was not gone into. The contingency of deductions in excess of 10 per cent. never arose. That clause in the contract was waived, as neither party ever took any action thereunder. The appellants tendered the issue, but they introduced no evidence showing that the action was prematurely brought. Moreover, the point was never presented to the trial court in any form except by the allegations of the defendants' answer as quoted above.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

79 Cal. App. 195

PACIFIC EMPLOYERS' INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5696.)

(District Court of Appeal, First District, Division 2, California. Aug. 19, 1926.)

1. Master and servant 🔑417(7).

Findings of Industrial Accident Commission cannot be disturbed, if any facts appear in record supporting findings.

2. Master and servant 🔑403—Burden of proof is on party asserting that one rendering service for another is not "employee" (Workmen's Compensation Act, §§ 8 [b], 19d1).

Party asserting that one rendering service for another is not an employee, within meaning of Workmen's Compensation Act, has burden of proof, in view of section 19d1, since, under section 8, subd. (b), any person rendering service for another, other than as an independent contractor or one expressly excluded by the act, "is presumed to be an employee within meaning of act."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

3. Master and servant 🔑405(2)—Evidence held to support finding of relation of employer and employee between real estate firm and district manager (Workmen's Compensation Act, § 8, subd. [b]).

Evidence, taken with presumption, under Workmen's Compensation Act, § 8, subd. (b), that one rendering service to another is an employee, *held* sufficient to support finding of relation of employer and employee between real estate firm and its district manager, who claimed compensation for injury.

4. Master and servant 🔑375(1)—Injury to district manager of real estate firm, while going to meet wife to learn appointments, held in course of employment.

Evidence that district manager of real estate firm was injured while going to meet his wife to learn what appointments she had made with certain prospective customers *held* to support finding that he was injured in course of his employment.

Proceeding under the Workmen's Compensation Act by Harry Sherwood Stewart, claimant, opposed by Monroe, Lyon & Miller, employer, and the Pacific Employers' Insurance Company, insurance carrier. An order of the Industrial Accident Commission awarded compensation for injuries, and the insurance carrier brings certiorari to annul said order. Affirmed.

W. R. Millington, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

NOURSE, J. The petitioner was the insurance carrier of Monroe, Lyon & Miller, a real estate firm engaged in the sale of a subdivision of a tract of land near Aptos, in Santa Cruz county. The firm had its principal place of business in the city and county of San Francisco, and engaged district managers to establish and maintain branch offices in the cities of San Jose, San Francisco, San Mateo, Sacramento, Stockton, and Fresno. One Stewart was thus engaged as the district manager at the city of Sacramento, and, while returning from Aptos with a party of prospective purchasers, and passing through the city of San Francisco, he received injuries to his left shoulder in attempting to board a street car at the ferry building in the latter city. After due proceedings had, the respondent commission awarded him the sum of $26.78, which award the petitioner now asks this court to annul, upon the ground that the evidence does not support the finding of the commission as to the status of Stewart as an employee of the real estate firm, or the finding that he was injured while in the course of his employment.

[1-3] The case must be considered in view of the well-known rule that, if any facts appear in the record supporting the findings of the respondent, those findings may not be disturbed in a proceeding of this kind. Briefly the facts upon which the findings were made are that on June 1, 1925, Stewart, who had theretofore been employed as a secretary of a saddlery firm in San Francisco, was engaged by the real estate firm to go to Sacramento, and open a branch office for the firm in that city for the purpose of conducting sales of the Aptos property in that district. At that time the firm obtained for Stewart a license as a real estate salesman in which he was described as an employee of the firm. All signs and notices at the branch office in Sacramento were required to be in the name of the real estate firm, and all business was required to be conducted in that name, and Stewart was designated by the firm as an employee with the title of district manager, but with the understanding that he was to act in the capacity of an employee only. This was all evidenced by letters addressed to Stewart by the real estate firm prior to his employment and which constituted the contract of employment between the parties. At all times up to the date of his injuries Stewart acted in the capacity of district manager for the real estate firm under definite rules and instructions issued periodically by the firm to its various district managers. By the terms of the contract he was to receive a commission upon the gross sales which were made from his office, and was also to receive from the firm literature and similar supplies to be used in the conduct of his office. Inasmuch as under subdivision (b) of section 8 of the Workmen's Compensation Act (Stats. 1917, pp. 831, 835) any person rendering service for another,

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

other than as an independent contractor or one expressly excluded by the act, "is presumed to be an employee within the meaning of this act," the burden of proof is on the party asserting it to show that one rendering service for another is not an employee within the meaning of the act. Workmen's Compensation Act, § 19d1. The evidence which we have noted, taken with this presumption, is fully sufficient to support the finding of the relation of employer and employee.

[4] When Stewart left his party at the ferry building at San Francisco, he boarded a street car of the Market Street line for the purpose of meeting his wife, who had remained in San Francisco during the day for the purpose of attending to a personal errand and also for the purpose of arranging meetings for her husband with two prospective purchasers. The arrangement between Stewart and his wife, when he left her in San Francisco, and departed for Aptos, was that upon his return he would meet her at a certain hotel in San Francisco and learn from her what appointments or engagements she had made with these two prospective purchasers. The fact that, because of his injury while on this errand, he was unable to meet these prospects does not support the contention that he was not in fact engaged in the service of his employer at the time of his injury. Though the evidence tending to show that Stewart was then engaged in the service of his employer is meager, nevertheless, it is some evidence which, if believed by the respondent commission, is sufficient to support the finding.

Upon the entire record, therefore, we cannot say that there is not some evidence to support both findings under attack.

Award affirmed.

We concur: STURTEVANT, J.; TYLER, Presiding Justice pro tem.

79 Cal. App. 215

WESTERN PIPE & STEEL CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5625.) *

(District Court of Appeal, First District, Division 2, California. Aug. 24, 1926.)

1. Master and servant 🔑416—Industrial Accident Commission's finding of compensable disability held not to preclude reopening of case on ground of employee's incompetency (Workmen's Compensation Act, § 11, subd. [d], and section 20, subd. [d]).

Industrial Accident Commission's finding that no disability beyond that compensated was caused by injury *held* not to adjudicate employee's competency, when employer filed petition for determination of claim, so as to preclude commission, under Workmen's Compensation Act, § 20, subd. (d), from acting under section 11, subd. (d), on petitions of subsequently appointed guardian ad litem to reopen case on ground of incompetency as new disability.

2. Master and servant 🔑416—Industrial Accident Commission may open award on application of guardian ad litem of incompetent employee (Workmen's Compensation Act, § 11, subd. [d], and section 20, subd. [d]).

Under Workmen's Compensation Act, § 11, subd. (d), Industrial Accident Commission may open award, notwithstanding section 20, subd. (d), on diligent application by subsequently appointed guardian ad litem for employee adjudicated incompetent.

Application by the Western Pipe & Steel Company of California for certiorari to review an award of compensation by the Industrial Accident Commission to John Fitzgerald, an incompetent, by Georgina G. Fitzgerald, his guardian ad litem. Award affirmed.

Carroll S. Bucher and Thomas W. Slaven, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission

Courtney L. Moore and Grant H. Smith, both of San Francisco, for respondent Fitzgerald.

STURTEVANT, J. On the 20th day of January, 1926, the defendant commission made an award in favor of John Fitzgerald against the petitioner based on alleged injuries received by the said John Fitzgerald while in the employment of said company. Being dissatisfied with the award, the petitioner applied for and was granted a writ of review.

For some time prior to the 17th day of February, 1920, John Fitzgerald had been employed by the petitioner. On the date last mentioned he met with an accident. On August 31, 1922, petitioner filed its application with the respondent to have the claim of Fitzgerald determined as to the nature, extent, and duration of his disability, and the amount of compensation, if any, due the employee. On September 18, 1922, a hearing was had. On the 27th day of October, 1922, findings and award were entered. On the 19th day of August, 1924, Georgina G. Fitzgerald was duly appointed general guardian of John Fitzgerald by and under an order of the superior court of Contra Costa county On the 10th day of January, 1925, as such guardian, she filed with the respondent her "petition for reopening case on ground of new and permanent disability." On the 8th day of July, 1925, her said petition was denied. On the 8th day of August, 1925, she filed a petition for rehearing. That petition was granted August 8, 1925, and on the 20th day of January, 1926,

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court October 22, 1926.

the findings and award were entered, which the petitioner seeks to review.

One of the points made by the petitioner is that at the time the guardian filed her first petition the respondent commission had lost jurisdiction (Workmen's Compensation Act, § 20, subd. [d] being St. 1917, p. 850), and that all proceedings had thereunder were in excess of jurisdiction. The respondent commission replies that, when the petition for adjustment of claim was filed on August 31, 1922, and ever since that date, John Fitzgerald was an incompetent person, and that the respondent commission, in receiving and hearing and acting on the petitions of Georgina G. Fitzgerald, was acting under the jurisdiction conferred on said commission by section 11, subdivision (d), of the statute mentioned. As to that reply, the petitioner answers that in its original petition the employer put in issue the question as to the competency or incompetency of the employee, and evidence was taken on the subject, and findings were made thereon, and that the question was res adjudicata when on the 10th day of January, 1925, the said guardian sought to have said matters inquired into.

The original application was served on John Fitzgerald personally. It does not appear that a trustee or guardian ad litem was appointed by any authority and that the only representative apointed for the employee was Georgina G. Fitzgerald, as hereinabove recited. In making its application for adjustment of claim, the employer alleged "a question exists as to the nature, extent, and duration of disability." It was also alleged "that the following is a statement of particulars relative to this application: * * * tissues of right foot removed * * * has been under treatment since date of injury. Total disability. 62 weeks. Partial to date." The employee filed no answer or pleading. The cause was heard by Edward O. Allen, referee, and was submitted to the commission for its findings and award. The findings and award, in so far as pertinent to the question before us, contained the following:

> "* * * (2) No disability sustained by defendant (John Fitzgerald) beyond that compensated under finding No. 3 hereof was caused by said injury. (3) Said employee was a helper, 45 years of age, and said injury caused permanent disability consisting of limited motion of right ankle joint, as follows: Dorsi-flexion 15 degrees less than right ankle; plantar flexion 7 degrees; marked loss of lateral motion; foot being held in partial inversion. The percentage of said permanent disability is 21, entitling him to $15.76 a week for 84 weeks, amounting to $1,323.84, all of which has been paid. The foregoing weekly benefit is based upon wages of $4.-64 a day for 5½ days a week.
>
> "Award.
>
> "Award is made in favor of John Fitzgerald against Western Pipe & Steel Company of California of $1,323.84, all of which has been paid."

[1] The petitioner calls to our attention finding No. 2 and argues that the finding has the same meaning as though it were written:

> "No disability sustained by defendant (to wit, his incompetency) beyond that compensated under finding No. 3 hereof was caused by said injury."

We do not so understand the finding, but if it is to be so read it carries the petitioner too far. The award spoke as of the date of the filing of the application. If the award is to be read as the petitioner would have us read it, it then shows on its face that the commission was entering an award against an incompetent person who had not been and was not represented by a guardian. The award would thus be self-destructive, as it would show on its face that the rights of the employee had not been protected.

[2] The petition above quoted did not allege directly or indirectly any mental injury. Nor did it allege that at the time the petition was filed John Fitzgerald was competent or incompetent and, if incompetent, that his incompetency was caused or was not caused in whole or in part by the injury sustained by him. The findings, as quoted, are no broader than the petition. It is clear, therefore, that the award did not purport to adjudicate the competency or incompetency of John Fitzgerald as of the date of the filing of the petition, August 31, 1922, or of any other date. The question then arises, did Georgina G. Fitzgerald have the right, on January 10, 1925, to attack the award entered on October 27, 1922, and in making such attack to allege and prove, if she could do so, that John Fitzgerald was incompetent on the 31st day of August, 1922, when this petitioner filed its original application, and that John Fitzgerald had remained incompetent and was incompetent on the date of the disputed award of January 20, 1926, and that such incompetency was caused by the said accident. These questions, we think, must be answered in favor of the respondent commission. As we have just shown, there had not been any determination of the competency or incompetency of John Fitzgerald before his guardian filed her petition. Subdivision (d) of section 11 of the Workmen's Compensation Act (St. 1917, p. 842) provides as follows:

> "If an injured employee, or in the case of his death, one or more of his dependents, shall be under 21 years of age or incompetent at any time when any right or privilege accrues to such person under the provisions of this act, a general guardian, appointed by the court, or a guardian ad litem or trustee appointed by the commission or a commissioner may, on behalf of any such person, claim and exercise any such right or privilege with the same force and effect as if no such disability existed; and no limitation of time provided by this act shall run against any such person under 21 years of age or incompetent unless and until such guardian or trustee is appointed. The commission shall have power to determine the fact of the minor-

> ity or incompetency of any injured employee and may appoint a trustee to receive and disburse compensation payments for the benefit of such minor or incompetent and his family."

A glance at the section indicates that its provisions are for the protection, in the one instance, of the employer, and in the other instance, of the employee. If the employer has the least doubt as to whether the employee has become incompetent, without regard to whether such incompetency arose before the accident, or was caused by the accident, or arose after the accident, he may have a guardian ad litem appointed. Having done so, he will be able to protect any subsequent award from an attack that the proceedings were brought by or against an incompetent person who was not properly represented in court. To the end that the employee may be fully protected, provision is made that, when it is claimed that he is incompetent, the commission is authorized and directed to appoint a guardian ad litem to the end that the employee may be properly represented in court, and that his cause may be fully and completely presented. A guardian having been appointed, the statute provides that such guardian "may, on behalf of any such person (the employee), claim and exercise any such right or privilege with the same force and effect as if no such disability existed. * * *" The time within which he must act is by the terms of the statute limited only as from the date of the guardian's appointment.

In 34 C. J. p. 292, § 506, it is said:

> "Legal disability, such as * * * insanity, of a party against whom a judgment is improvidently rendered without regard to such disability, is ground for opening or vacating such judgment."

The same question has been directly adjudged in this state. Winslow v. McCarthy, 39 Cal. App. 337, 178 P. 720. The same principle was involved, although the ground of attack was for some other irregularity in a large number of other cases. Smith v. Bratman, 174 Cal. 518, 163 P. 892, and cases cited. In the case entitled Estate of Ross, 140 Cal. 282 at page 287, 73 P. 976 977, Mr. Justice Lorigan, speaking for the court, said:

> "Courts are always inclined to be liberal in relieving parties laboring under a disability from the effect of a decree which appears to be unjust, and which deprives a party of his rights, and the lower court is warranted in vacating it upon diligent application and a reasonable showing."

In the instant case the question of diligence is covered by the provisions of the statute "no limitation of time provided by this act shall run against any such person under 21 years of age or incompetent, unless and until such guardian or trustee is appointed." As to a reasonable showing, it is sufficient to state that the showing was full and complete. In section 11, subdivision (d), at least the same power vested in the respondent commission.

Assuming the law to be as stated above, on January 20, 1926, the respondent commission, after a full hearing, made its findings and award as follows:

> "(1) At the time of filing application herein by the Western Pipe & Steel Company of California, applicant above named, on August 31, 1922, and at the time of hearing held herein on September 18, 1922, and of issuance of findings and award herein on the 27th day of November, 1922, the defendant above named, John Fitzgerald, was mentally incompetent.
>
> "(2) In the proceedings had before this commission during the year 1922, defendant was not represented by counsel, nor was he properly before the commission represented by a guardian ad litem properly authorized and appointed by order of any court in this state.
>
> "(3) The findings and award issued by this commission on the 27th day of October, 1922, are therefore void and of no effect and are not an adjudication of the rights of the parties herein.
>
> "(4) By a proceeding regularly filed and had before the Superior Court of the state of California in and for the county of Contra Costa on the 19th day of August, 1924, defendant above named was adjudged to be an incompetent person and Georgina G. Fitzgerald, his sister, was duly and regularly appointed as his guardian ad litem. Said defendant now appears in this proceeding through his regularly appointed guardian ad litem, Georgina G. Fitzgerald.
>
> "(5) John Fitzgerald, defendant, while employed as a helper on February 17, 1920, at Richmond, Cal., by applicant Western Pipe & Steel Company of California, sustained injury occurring in the course of and arising out of his employment, as follows, his right foot was accidentally caught in a drum. At said time the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917.
>
> "(6) Said employee was a helper, 45 years of age, and said injury caused permanent disability consisting of limited motion of right ankle joint, chronic incurable ulcer on the heel, and mental incompetency, causing total disability. The percentage of said permanent disability is 100, entitling him to $15.76 a week for 240 weeks, amounting to $3,782.40, and to the further sum of $9.70 a week, beginning with the 1st day of October, 1924, for the rest of his life. Amount accrued to the 12th day of January, 1926, is $4,432.30. Payments therein $1,323.84. Balance due as of said date $3,108.46.
>
> "The foregoing weekly benefit is based on wages of $4.64 a day for employment 5½ days a week.
>
> "(7) It is the judgment of this commission that the whole amount of said benefit should be paid directly to Georgina G. Fitzgerald for the support of said incompetent John Fitzgerald to be received by her in her own right and disbursed in her discretion for such purpose.
>
> "(8) The defendant's attorney is entitled to a lien against the unpaid compensation for the reasonable value of services in the sum of $75.

"Award.

"Award is therefore made in favor of John Fitzgerald against Western Pipe & Steel Company of California of the sum of $3,108.46, payable to Georgina G. Fitzgerald, defendant's guardian ad litem, less $75 payable to Courtney Moore, defendant's attorney, and the further sum of $9.70 a week beginning the 13th day of January, 1926, for the remainder of his life."

We find no error in the record. The award is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

79 Cal. App. 229

WICKHAM v. REMPP. (Civ. 5565.) *

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1926.)

Accord and satisfaction 🔑26(3)—Bills and notes 🔑518(1)—Evidence held insufficient to show failure of consideration or accord and satisfaction in suit on note.

In suit on note for money advanced to maker by other option holders to pay his share of option to purchase ranch, defenses of failure of consideration and of accord and satisfaction *held* not established, where evidence was undisputed that contingency in which note was to be cancelled never arose.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Eldon B. Wickham against A. Rempp. Judgment for plaintiff, and defendant appeals. Affirmed.

L. S. Dadmun, of Los Angeles, for appellant.

Victor H. Koenig and Koenig & Ramsaur, all of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued as assignee of a promissory note for $2,500. Defendant answered, admitting the execution of the note, but alleging a failure of consideration and an accord and satisfaction. Judgment went for the plaintiff as prayed, and defendant appeals on a typewritten transcript.

The only grounds urged on the appeal are that the evidence is insufficient to support the findings adverse to the appellant in his two special defenses. Briefly, the evidence is that the appellant received from respondent's assignors $2,500 in cash to enable him to pay his share of an option which was held for the purchase of the Cuyamaca ranch, and that at the same time he executed and delivered to respondent's assignors the promissory note in suit for the repayment of the money so advanced. Thereafter the parties executed a written agreement with the Cuyamaca Corporation which they, with other parties, had organized, by the terms of which agreement the respondent's assignors promised to cancel and deliver to appellant the note in suit when, and only when, the corporation had acquired from the owner any portion of the property under option or had sold any portion of such property to others. The evidence is undisputed that this contingency never arose.

The trial court, after finding that the foregoing facts were true, concluded that there was neither a failure of consideration for the note nor an accord and satisfaction. The evidence fully sustains the findings of fact, and judgment properly followed for the respondent.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

79 Cal. App. 199

SORENSEN v. CODDINGTON. (Civ. 5642.)

(District Court of Appeal, First District, Division 1, California. Aug. 20, 1926.)

1. Appeal and error 🔑790(2)—Appeal from order denying motion to set aside execution sale will be dismissed, though liability for appeal costs be involved, where sale has been annulled.

Court of Appeal will not retain an appeal taken to reverse an order, denying a motion to set aside an execution sale, though liability for costs of appeal may be involved, where subsequent to perfection of appeal, trial court had annulled the sale, since question is moot.

2. Execution 🔑253(1)—Denial of motion by stranger to action to set aside execution sale did not deprive court of jurisdiction of similar motion subsequently presented by defendant.

Denial of motion by lessee of property sold under execution, who was a stranger to the action, to set aside execution sale, did not deprive defendant in the action from subsequently presenting a similar motion, nor divest trial court of jurisdiction to entertain such motion and to grant it on stipulation.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by E. Sorensen against C. H. Coddington, also known as Chas. H. Coddington. Judgment was rendered for plaintiff, and writ of execution issued and was levied on personal property in possession of C. Martin, Coddington's lessee. C. Martin presented motion to set aside execution sale, and from an order denying his motion he appeals. On separate motions by E. Sorensen and by Feigenberg Bros. and another, purchasers at execution sale, to dismiss appeal, and on motion by C. Martin for submission and reversal. Appeal dismissed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court October 22, 1926.

John T. Wentz, of San Leandro, for appellant.

Fitzgerald, Abbott & Beardsley and Edward D. Landels, all of Oakland, for respondent purchasers at sale.

Edward J. Smith, of San Francisco, for plaintiff and respondent.

KNIGHT, J. Three motions are presented herein for determination, each arising out of an appeal taken by C. Martin from an order denying his motion to set aside an execution sale of personal property which had been seized by the sheriff while in the possession of Martin as lessee thereof and sold to the firm of Feigenberg Bros. and one Bercovich, pursuant to a writ of execution issued in an action brought by E. Sorensen against C. H. Coddington, Martin's lessor. The purchasers at said sale and the plaintiff in the action now present separate motions for the dismissal of said appeal, and Martin has moved that said appeal be forthwith submitted for decision and that the order appealed from be reversed. All three motions are based upon the same ground, namely, that the issues involved in said appeal have become moot.

The essential facts are as follows: Sorensen commenced an action against Coddington to recover upon a promissory note and upon two assigned claims for the sale of merchandise. An attachment was issued and levied upon certain real property belonging to Coddington. Judgment by default was entered, grounded upon constructive service of summons, Coddington being at the time a nonresident of the state. Thereupon a writ of execution issued and was levied upon certain personal property belonging to Coddington, but which at the time of the levy was in possession of and under lease to Martin. Feigenberg Bros. and Bercovich became the purchasers at the execution sale. Thereafter Martin commenced an action against the purchasers to recover the possession of said personal property or its value and damages for its detention, claiming that the judgment against Coddington and the subsequent proceedings taken under execution were void. Judgment in that action was entered on December 10, 1925, in favor of the defendants therein, and according to the averments in one of the affidavits on file herein was based upon the ground that Martin's conduct, which the court held amounted to a consent to such sale, estopped him from challenging the validity thereof. Martin appealed from said judgment, and that appeal is now pending hearing before the Supreme Court.

After the rendition of said adverse judgment and the taking of an appeal therefrom, Martin, although not a party to the action of Sorensen v. Coddington, presented a motion therein on January 29, 1926, to set aside said execution sale upon substantially the same grounds as were urged by him for relief in his action against the purchasers. The motion was denied, and on February 19, 1926, he took appeal from the order made therein, which appeal has been made the subject of the motions now under consideration. Subsequent to the taking of said appeal, Coddington, the defendant in the action, made a similar motion to set aside said execution sale, which motion was likewise denied. The attorneys for Feigenberg Bros. and Bercovich assert, according to the affidavits filed by them, that at the time Coddington's motion was made they believed it to be meritorious in point of law and that it would be granted; that accordingly they had agreed to return the property purchased at the sale; but, as above stated, said motion was on March 19, 1926, denied, and thereafter, to wit, on April 19, 1926, the attorneys representing respectively the plaintiff Sorensen, the defendant Coddington, and the purchasers Feigenberg Bros. and Bercovich, in conformity with their asserted agreement, entered into a stipulation requesting the trial court to annul said execution sale, and on May 3, 1926, obtained an order annulling the same. Martin's attorney was not requested to sign said stipulation, opposing counsel say, because he had participated with Coddington's attorney in the presentation of Coddington's motion, and therefore they believed he was fully cognizant of the agreement to annul the sale and of the intention to return the property. Following the filing of the order annulling said sale, said personal property, or a large portion of it, was returned to Martin.

[1] As already mentioned, all parties to these proceedings agree that the issues presented by Martin's appeal have become moot as a result of the order annulling the sale and the restitution of the property, Martin's position in the matter being, as stated in the affidavit filed in support of his motion herein, "that the appeal in this case was and is taken for the express purpose of reversing the order of the lower court, denying the motion of appellant in the lower court to set aside said execution sale, and that by reason of said execution sale having been set aside by the lower court, by virtue of the stipulation and order hereinafter set out, since the perfection of this appeal herein, appellant has obtained everything that he would obtain by being sustained by this court in his position on this appeal, except his costs thus far incurred and paid, approximately the sum of $133, and that therefore the questions for the determination of which this appeal was taken, have become moot. * * *" That being so, his appeal in our opinion must be dismissed, the rule governing in such cases being as follows: "As appellate courts will not decide questions which are moot and which will not affect the rights of the parties, an appeal will be dismissed where all the questions involved in it have become moot and abstract or where, because of the happening

of some event, a decision would be ineffectual and could serve no useful purpose." 2 Cal. Jur. p. 749, citing cases. And the matter of the payment of the costs of the appeal does not serve as legal grounds of objection to the dismissal of the appeal under such circumstances, the Supreme Court, in Turner v. Markham, 156 Cal. 68, 103 P. 319, having said in this regard:

> "This court has often decided that it will not retain an appeal where its consideration and disposition upon the merits will not affect any substantial right of the parties. The mere fact that liability for costs of appeal may be involved does not affect this conclusion. Estate of Blythe, 108 Cal. 124 [41 P. 33]; Nelson v. Nelson, 153 Cal. 204 [94 P. 880]."

[2] The grounds upon which the trial court based its ruling denying Martin's motion to set aside said execution sale do not appear, but, even assuming that said ruling was founded upon theories which he claims were erroneous, namely, that being a stranger to the action he was not entitled to question the validity of said sale in that action, and that the rendition of the adverse judgment in the action against the purchasers precluded him from thereafter attacking said sale by motion in the original action, it would nevertheless seem clear that the adjudication of such motion did not have the effect of depriving the defendant in the action, against whom the legal barriers confronting Martin did not exist, from subsequently presenting a similar motion, nor of divesting the trial court of jurisdiction to entertain such motion nor to grant the same on stipulation, which was the real effect of its order annuling said sale.

For the foregoing reasons we believe that the motion of appellant Martin to forthwith submit for decision the appeal from and to reverse the order denying his motion to set aside the execution sale should be denied, and that the motions of Sorensen and of Feigenberg Bros. and Bercovich for the dismissal of that appeal should be granted.

It is so ordered, and the appeal is therefore dismissed.

We concur: TYLER, P. J.; CASHIN, J.

---

79 Cal. App. 190

HARRIS v. HARTER et al. (Civ. 5535.)*

(District Court of Appeal, First District, Division 2, California. Aug. 18, 1926.)

1. Malicious prosecution 🔑58(1) — On issue whether attachment was excessive, evidence of value of property levied on held improperly excluded.

On issue in action for damages from wrongful attachment whether or not attachment was excessive, evidence of value of property levied on *held* improperly excluded, since an attachment in the sum which attachment debtor conceded was due and payable would not have been wrongful.

2. Trial 🔑165.

Motion for nonsuit admits truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom.

3. Malicious prosecution 🔑13.

Action for wrongful attachment will lie when property levied upon exceeded in value the amount which it was later ascertained was owing and for which judgment was recovered.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action for damages for wrongful attachment by M. L. Harris against T. D. Harter and F. A. Perrigo, individually and as copartners doing business as Harter & Perrigo. From a judgment for defendants, plaintiff appeals. Reversed.

Joseph C. Meyerstein, of San Francisco, for appellant.

Dudley D. Sales, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action to recover damages for an alleged wrongful attachment. The defendants answered, and the case was tried before the court sitting without a jury. When the plaintiff had finished introducing his case and rested the defendants made a motion that the trial court order a nonsuit. The motion was granted. From the judgment entered thereon the plaintiff has appealed and has brought up a bill of exceptions.

In his complaint the plaintiff alleged that John B. Ellison & Sons of Philadelphia were doing business in San Francisco; that T. D. Harter and F. A. Perrigo, copartners, were doing business in San Francisco; that on the 2d day of September, 1921, the defendants John B. Ellison & Sons and the copartnership, Harter & Perrigo, commenced an action in the superior court against M. L. Harris upon an alleged account for goods sold and delivered, claiming $2,263.01; that thereupon defendants took out a writ of attachment for the sum alleged to be due and caused said writ to be levied September 3, 1921, on the furniture, equipment, fixtures, and goods in plaintiff's place of business in Oakland; that the sheriff retained possession thereof until the said M. L. Harris furnished a bond to secure the release of said property, and which bond was furnished on the said 3d day of September, 1921; that on the 30th day of September, 1921, for the sum of $1,986.99, the attaching creditors caused said action to be dismissed and the writ of attachment to be released and discharged; that

---

*Hearing denied by Supreme Court October 16, 1926.

on the 2d day of September, 1921, M. L. Harris was indebted to John B. Ellison & Sons in the sum of $1,970.34 and no more, " * * * but that only the sum of $441.51 of said sum was due or owing when said action was commenced and said attachment was levied upon the goods and material * * *" of M. L. Harris; that the said M. L. Harris was ready, able, and willing to pay, at the time said attachment was issued and levied, the sum of $441.51; that said action was commenced and the writ of attachment was caused to be issued "maliciously and without probable or any cause therefor and for the purpose of harassing and annoying plaintiff herein and to put him to great trouble and expense and in causing said writ of attachment to be issued and levied the defendants and each of them were guilty of oppression and malice"; that the plaintiff was damaged in the sum of $25,000.

That the plaintiff introduced some evidence tending to prove each and every allegation contained in his complaint is not disputed. In that behalf the plaintiff testified that for twelve years he had been engaged in the tailoring business in Oakland and had purchased woolen goods from John B. Ellison & Sons through Harter & Perrigo, who represented in California the Philadelphia house; that on the 17th day of August, 1921, he purchased from Harter & Perrigo a bill of goods amounting to six hundred and sixty odd dollars on which purchase he was given a credit of 30 days; that on the 29th day of August, 1921, he purchased goods in the sum of $1,186.78 on an invoice dated September 1, 1921, and Harter & Perrigo gave a credit thereon of 60 days. In other words, it was the contention of the plaintiff that at the time the attachment was levied, although he owed Harter & Perrigo, as the representatives of the Philadelphia house, the amount so owing was not due and payable by reason of the credits which the vendors had extended. As a part of his direct examination the plaintiff further testified that on the 30th day of September, 1921, he paid Harter & Perrigo $1,986.99, said amount being the actual balance due on the account, and $166.65 costs of suit.

The plaintiff further testified:

> That on the 2d day of September, 1921, he had prepared to carry on a campaign of sales "of Martin's at $65 in Oakland." That in the morning of that day Mr. Harter called him on the telephone. "He informed me that he understood that I was putting on a sale of Martin's at $65 in Oakland. I said, 'Yes; what about it?' He said, 'I don't want you to do it.' I said, 'I don't see where you have any right to tell me what I should or should not do, as long as I pay you for your merchandise.' He said, 'I won't have you do it.' I said, 'Well; it is going on just the same.' He said, 'If you put on that sale I will attach you.' I said, 'Then you are going to attach me, Mr. Harter, because I am selling Martin's at $65?' He said, 'Yes.' I said, 'If you are going to attach me because you want your money, send somebody over to check up with me, and your money is ready.' He said, 'I don't want the money; I want that sale off.' I said it was going on just the same."

[1] During the presentation of his case the plaintiff had testified that on the 3d day of September, 1921, the sheriff levied an attachment on his place of business, taking possession of the plaintiff's stock of woolen goods, machinery, and general equipment for carrying on a tailoring business. He was then asked, "What was the value of the stock of merchandise, goods, etc., that you had there at that time?" The defendants objected on the ground that it was incompetent, irrelevant, and immaterial and not in response to any issue. The court sustained the objection. The objection should have been overruled. An important issue in the case was whether or not the attachment was grossly excessive. It will be noted that Mr. Harris at all times conceded that he owed $441.51 which was due and payable. An attachment in the sum would not have been a wrongful attachment. Grant v. Moore, 29 Cal. 644, 656. For the purpose of ascertaining whether in the instant case the levy was excessive it was material to know what was the value of the property levied upon.

[2, 3] The only other question involved on the appeal is this: The respondents contend that in an action for malicious prosecution the plaintiff must show that the former action terminated favorably to the defendant. In this connection they point to the record that the former action was terminated by the judgment debtor paying $1,986.99. Thereupon respondents cite and rely upon Grant v. Moore, supra. But that case is readily distinguishable in its facts. It appears that in that case that the attachment creditor had attached a safe belonging to the judgment debtor. It does not appear whether the safe had anything in it. The court remarked that there was no evidence showing that the property belonging to the debtor which was attached exceeded in value the amount which it was later ascertained was owing, $339.08. Whereas, in the instant case the respondents by their objection kept out of the record at least some of the evidence regarding the value of the property attached. However, as we are dealing with a motion for a nonsuit made at the end of the plaintiff's case, that motion admits the truth of the plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom. Hoff v. Los Angeles Pac. Co., 158 Cal. 596, 599, 112 P. 53. We may properly infer, therefore, that on the 29th day of August, 1921, the debtor had in his place of business valuable property, and when he purchased upwards of $1,600 in goods that he installed them in his place of business, and that at the time of the attachment he

had properties there approximately in the value of $2,263.01, the amount of the levy. Under these circumstances the appellant cites and relies on Clark v. Nordholt, 121 Cal. 26, 53 P. 400. That authority certainly sustains the appellant in his contention. What we have said conforms to the general rule on the subject. In 38 C. J. 391, § 16, the author says:

> "Ordinarily, the rule permitting an action for malicious prosecution applies with equal force where there was no debt and where the debt was for a sum much less than the sum demanded, although it has been held that the action will not lie when the attachment is founded on a just claim, although smaller than that for which the suit was brought when the property attached was of no greater value than the amount of the claim."

Because of the errors mentioned, the judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

79 Cal. App. 212

CALIFORNIA CREDIT & COLLECTION CORPORATION v. RICCA. (Civ. 5536.)

(District Court of Appeal, First District, Division 2, California. Aug. 24, 1926.)

1. Corporations 🔑80(11)—In action on renewal note, where maker set up defense of fraud in original transaction, burden of proof was on him.

In action by assignee on renewal note given as part payment in purchase of stock, where maker set up defense of fraudulent representation of agent as to amount of company's business, issue of fraud having been raised by maker, burden of proof was on him.

2. Corporations 🔑80(11)—In action on renewal note given for corporation stock, evidence held insufficient to show that representations as to company's business were false.

Where, in action on renewal note given as part payment in purchase of stock, maker set up defense of fraudulent representations of agent as to amount of company's business, evidence as to quotations of stock in newspapers *held* insufficient to support finding that representations were false.

3. Corporations 🔑80(11)—Fraud as defense in suit on note for corporation stock must be shown by preponderance of evidence.

Where fraud in sale of corporation stock was set up in suit on note given therefor, it was not sufficient for defendant to establish facts from which inference of fraud might or might not be drawn, preponderance of evidence being necessary.

Appeal from Superior Court; Monterey County; J. A. Bardin, Judge.

Action by the California Credit & Collection Corporation against Antone Ricca. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

J. R. Cunnyngham and Daly B. Robnett, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued as assignee for collection upon a promissory note for $3,750 executed and delivered by defendant to the Virden Packing Company on October 15, 1921, in renewal of a former note in the same amount given as part payment of the purchase price of 40 shares of the capital stock of the packing company. The defendant answered admitting the execution of the note, and setting up the special defense of fraud in the original transaction. The cause was tried before the court, sitting without a jury, and resulted in a judgment for the plaintiff as prayed.

The facts pleaded in the answer upon which the defendant based his claim of fraud were that the agent of the Virden Packing Company represented to him that the company was doing a large and profitable business, and that the actual value and the market value of its capital stock was $100 per share, and that it would soon thereafter be worth $125 per share. It was then alleged that these representations were false, and were known to be false by the agent, that they were made with the intent to deceive the defendant, and that he had no knowledge of the actual or the prospective value of the stock, but relied entirely upon the agent's representations.

The trial court found that the representations as alleged were made for the purpose of inducing the defendant to purchase the stock, but not with the intent of cheating or defrauding him, and that none of the representations was false.

[1, 2] On this appeal the only point calling for consideration is the sufficiency of the evidence to support the finding that the representations were not false. In this connection we must bear in mind that, the issue of fraud having been raised by the appellant in defense to the note, the burden of proof was on him. The only evidence tending to prove the falsity of any of the representations pleaded was that on October 15, 1921, the stock was quoted in a San Francisco newspaper under the head of "unlisted securities" as $25 "bid" per share, and that on December 15, 1923, and December 17, 1923, it was similarly quoted at $29 "asked" per share. No evidence of any character was offered to prove either the actual or the market value of the stock at the time the representations were made, July, 1920, and no attempt was made to show the amount of business carried on by the company at that time.

[3] There is just one rule of law which

need be referred to, as it is determinative of this appeal. This rule is so aptly stated by Mr. Justice Henshaw in Ryder v. Banberger, 172 Cal. 791, 799, 800, 158 P. 753, 756, that we can do no better than quote the language there used, merely transposing the sentences:

> "For fraud must always be proved so that, when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and unrightness. For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing."

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

79 Cal. App. 203

FRITSCHI v. FRITSCHI. (Civ. 5532.)[*]

(District Court of Appeal, First District, Division 2, California. Aug. 20, 1926. Rehearing Denied Sept. 14, 1926.)

Descent and distribution 🔑82—Where plaintiff claimed property as gift and defendant claimed it passed to them in equal shares under will and threatened legal proceedings, agreement that defendant might deduct sum from her share in consideration whereof defendant, as executor under will, waived claim to property, held valid.

Plaintiff claimed testator had given her certain property. Defendant claimed it as part of estate under provision of will that residue of estate should pass to them equally, and threatened legal proceedings. Plaintiff authorized defendant to deduct stipulated sum from her distributive share, and defendant, as executor under will, waived claim on part of estate to property plaintiff claimed. *Held*, upon distribution, defendant was entitled to withhold agreed sum.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Anna Marie Fritschi against A. R. Fritschi to recover certain bonds. Judgment for defendant, and plaintiff appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

J. R. Pringle, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover four bonds of the par value of $4,000 to which she claimed to be entitled as distributee in the estate of Alfred R. Fritschi, deceased. Plaintiff and defendant were sister and brother, and the deceased was their uncle. On October 3, 1918, the uncle executed and recorded a deed conveying the home property in Piedmont, and a bill of sale transferred the household furniture and the personal property to the plaintiff. These documents were not delivered to the plaintiff, but they, as well as the personal property, remained exclusively in the possession of the uncle until after his death. By the terms of his last will the uncle provided that the entire residue of his estate should go to the plaintiff and defendant, share and share alike, "including any interest that I may have in certain real and personal properties as conveyed by me by deed and bill of sale to the hereinabove named Anna Marie Fritschi of Piedmont, Alameda county, California, under date of October 3, 1918."

Upon the death of the uncle the plaintiff took possession of the home, the household furniture, and other personal property, including an automobile, all of which she claimed had been given her by the uncle. A short time thereafter the defendant called her attention to the foregoing provision of the will, and informed her that he had been advised by counsel that because there had been no delivery to her of the deed or of the personal property in the lifetime of the uncle it would be necessary for the executor to claim the property as a part of the estate, and that, as he had been named executor by the will, he would be compelled to take legal proceedings against her if she resisted the claim. The plaintiff sought the advice of another brother, U. A. Fritschi, who was not interested in the residue of the estate, and upon his advice executed and delivered to the defendant a paper reading as follows:

> "Nov. 15, 1921. To Alfred R. Fritschi, as executor of the estate of A. R. Fritschi, you are authorized to deduct from my share of the estate ($4,000) four thousand dollars. [Signed] A. M. Fritschi Witness: U. A. Fritschi."

The sum of $4,000 mentioned in the paper was one-half the value which the parties then agreed should be placed upon the home property and furnishings. As consideration for the paper the defendant agreed to assumed the duties of executor of the estate and to waive all claim to this property on the part of the estate, as well as the claim to the automobile, jewelry, and a certain life insurance policy in the sum of $2,500. This agreement was performed in all respects by the defendant, but the plaintiff, on May 5, 1922, pretended to rescind the paper of November 15, 1921, without, however, offering to restore any consideration which may have passed to her.

On December 20, 1922, after due proceedings had in the estate, a decree of final dis-

---

[*] Hearing denied by Supreme Court October 18, 1926.

tribution was entered wherein, after certain special bequests were covered, all the residue of the estate was distributed equally between the plaintiff and defendant herein. This residue consisted of $100,000 in bonds and securities, of which the defendant delivered to the plaintiff $46,000, retaining from her share the four bonds in suit.

After the estate was thus closed and without restoring or offering to restore to the defendant individually or to the estate any portion of the consideration which she had obtained, the plaintiff commenced this action to recover the four bonds on a complaint which pleaded the facts of the probate proceedings and alleged that the defendant claimed the bonds as his own and refused to deliver them to the plaintiff. The defendant answered setting up the writing of November 15, 1921, in justification of his claim to the bonds. The cause was tried before the court sitting without a jury and resulted in findings and a judgment in favor of the defendant.

The statement of the case should be sufficient in itself to sustain the judgment. This is so manifestly just and proper that any discussion of the points raised by the appellant would seem to be of no advantage to either party. The appellant claims fraud, but she failed to prove any. All she proved was that her two brothers urged her to accept the settlement to avoid expensive and embarrassing litigation. She claims undue influence because of the relation of executor and beneficiary under the will, but the entire transaction was completed before this relation arose. She complains that the court failed to find specifically upon the issues of fraud and undue influence, but she fails to show any prejudice, because all the evidence would have required a finding adverse to her on both issues. She claims that the writing was not supported by a valid consideration, but the trial court held that it was, and, in view of the presumption arising from the writing itself, we may not disturb this finding. Keating v. Morrissey, 6 Cal. App. 163, 169, 91 P. 677. She claims that the writing was rescinded and annulled, but the writing was merely a memorandum providing a simple method for enforcing the obligation of an oral agreement which was neither rescinded nor annulled. This agreement was fully performed by the respondent, and the benefits were received and retained by the appellant. A reversal of this judgment would merely demand further litigation on the part of the respondent to reach the same end. She claims that the decree of distribution is a conclusive bar to respondent's claim, but this decree did not adjudicate the validity of the writing or of the agreement. It merely distributed to both parties all the residue of the estate, eliminating therefrom, in accordance with the terms of the agreement of the parties, all the property, both real and personal, claimed by the appellant.

We find no prejudicial error in the record. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

79 Cal. App. 164

HASKELL v. TITLE GUARANTEE & TRUST CO. et al. (Civ. 4828.)*

(District Court of Appeal, Second District, Division 1, California. Aug. 12, 1926.)

1. Appeal and error 🔑719(1)—Assignment of errors or specification held unnecessary, where parties stipulated question was one of law and set it forth.

Where parties stipulated that question involved was one of law and clearly set forth the question, an assignment of errors, or specification of insufficiency of evidence, was unnecessary.

2. Subrogation 🔑28—Purchaser's offer and tender of payment of indebtedness secured by trust deed held conditional, and hence there was no subrogation.

Offer and tender by property purchaser of payment of indebtedness secured by trust deed on property *held* conditional, where purchaser expressed desire to be subrogated to creditor's rights, demanded that sale under trust deed be postponed, and made no denial when creditor rejected tender because offer was conditional, and hence there was no subrogation; Civ. Code, §§ 2903, 2904, being inapplicable.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Herbert M. Haskell against the Title Guarantee & Trust Company and others for injunction against sale under trust deed. From an adverse judgment, plaintiff appeals. Affirmed.

Meserve & Meserve, of Los Angeles, for appellant.

Frank H. Snyder, of Glendale, for respondents.

YORK, J. This is an action prosecuted to enjoin the sale of certain real estate under a trust deed given to secure the payment of money. The plaintiff and appellant is a purchaser of the property, to whom the property was conveyed subject to 2 trust deeds, the first of which is the one under which the sale was proposed, which sale the plaintiff asked the court to enjoin. There are no questions of fact involved in this appeal, and there is but one question of law; that is whether a letter, hereinafter set forth in full, was an offer and tender of unconditional payment of the obligation referred to therein, or whether it was conditioned that plaintiff

*Hearing ied by Supreme Court October 11, 1926.

should be subrogated to the rights of W. W. Taylor in and to the note and trust deed referred to therein, and all rights thereunder as secured by a deed of trust also referred to in said letter. In other words, whether the payment to the Title Guarantee & Trust Company was intended to be, and actually was, a complete extinguishment of the debt, or whether it was an attempt to place the plaintiff, Haskell, in such a position that he could urge in his own behalf the lien created by said trust deed as a prior lien to the second trust deed held by W. W. Taylor.

[1] There is no merit in respondents' contention that there was no assignment of errors. The parties stipulated that the question involved was one of law, and clearly set forth what that question was. Under the circumstances, an assignment of error, or specification of insufficiency of evidence, would have been superfluous. The case depends entirely on the construction to be placed on the following correspondence:

"October 17th, 1922.

"To the Mortgage Guarantee Company, Title Guarantee & Trust Company, W. W. Taylor, General Petroleum Corporation, and All Parties Interested as Owners or Claimants in the Hereinafter Mentioned Note and the Trust Deed hereinafter described—Gentlemen:

"I beg to advise you that I am now the owner, by deed executed by Garry G. Layman and Willa N. Layman, his wife, of that certain real property situated, lying and being in the county of Imperial, state of California, together with the 80 shares of water stock in Imperial Water Company No. 8, appurtenant thereto, which are described in the trust deed, executed by said Laymans to the Title Guarantee & Trust Company, hereinafter mentioned and described.

"As such owner of said property, and holding said property subordinate and subject to the indebtedness hereinafter mentioned, and the trust deed securing the same, I desire to pay all indebtedness secured by said trust deed and, by virtue of said payment, become subrogated to the rights of the owner or owners of said indebtedness secured by said trust deed. Said indebtedness above referred to, and all of which I hereby offer to pay, hereby tendering the amount thereof to you and each of you, is all indebtedness secured by that certain deed of trust, made and executed by Garry G. Layman and Willa N. Layman, dated October 10, 1918, recorded October 31, 1918, in book 138, page 130, of Deeds, records of Imperial county, Cal.; the origin or foundation of which said indebtedness was and is represented by a promissory note, executed by said Garry G. and Willa N. Layman, dated October 10, 1918, to the Mortgage Guarantee Company, which said note is described and set out in said deed of trust, and which said note the above mentioned W. W. Taylor now claims to have purchased from said Mortgage Guarantee Company.

"The above-named Title Guarantee & Trust Company, at my request, has this day furnished me a statement showing that the amount now owing on account of the indebtedness secured by said trust deed, including the amount owing on said promissory note, is the sum of $5,924.79, and, acting on such information, I now have in my possession and as now physically tendering herewith said sum of money, legal tender of the United States, and now and at this time, in presenting this tender, I present and offer to pay said above-mentioned sum of money. I also now have in my physical possession, and am prepared to pay, any additional sum over and above said above mentioned sum of money, in the event the statement this day furnished to me by said Title Guarantee & Trust Company be not correct, hereby offering and tendering to pay all amounts of money now owing by said Garry G. Layman and Willa N. Layman, and secured by said trust deed; it being my desire and purpose, and the purpose of this tender and offer to pay, to fully reimburse the holder of said note and the owner of the indebtedness secured by said trust deed, for all sums now owing to him which are secured by said trust deed, and therefore, a lien on and against the above mentioned real property.

"I hereby at the same time also exhibit to you, for the purpose of proof, the deed from Garry G. Layman and Willa N. Layman to me, of the above mentioned real property, together with the appurtenances thereunto belonging.

"Yours very truly,
"Herbert M. Haskell,
"By Edwin A. Meserve.
"Meserve & Meserve, Attorneys for Herbert M. Haskell."

The acceptance of this money by the Title Guarantee & Trust Company is stipulated to, and a copy of its acceptance is as follows:

"Los Angeles, California, October 17, 1922.

"Received from Meserve & Meserve for Herbert M. Haskell, fifty-nine hundred twenty-four and 79/100 ($5,924.79) dollars, as payment in full of indebtedness secured by trust deed made by Garry G. Layman et ux. to Title Guarantee & Trust Company, to secure a note in favor of Mortgage Guarantee Company, which note was assigned by mesne assignments to General Petroleum Company, a corporation, as pledgee, which said trust deed was recorded October 31st, 1918, in book 138, page 130 of deeds, records of the county recorder of Imperial county, Cal.

"Said sum is accepted by Title Guarantee & Trust Company in accordance with a letter of Herbert M. Haskell, dated October 17th, 1922, and subject to the approval of said General Petroleum Company, a corporation, pledgee, and W. W. Taylor, owner of said indebtedness.

"Title Guarantee & Trust Company,
"By J. F. Keogh, Trust Counsel.
"Trustees' Sale No. 2967."

Thereafter, on the same day, the plaintiff, Haskell, claiming to be the subrogated owner of the note and deed secured by the trust deed, executed the following letter or instruction to the Title Guarantee & Trust Company:

"October 17, 1922.

"Title Guarantee & Trust Co., Title Guarantee Building, Los Angeles, California—Gentlemen: The undersigned, Herbert M. Haskell, successor of the Mortgage Guarantee Company, W. W. Taylor, and the General Petroleum Corporation, of that certain $5,000 note made and executed by Garry G. Layman and Willa N. Layman, dated October 10, 1918, secured by trust deed to yourself, dated of the same date, and recorded October 10, 1918, in Book 138, page 130, of Deeds, records of Imperial county, California, and the undersigned, Garry G. Layman and Willa N. Layman, the parties owing said debt, do hereby, jointly, request of you and direct that on Saturday, the 21st day of October, 1922, the time for which the sale is now advertised of the property under said trust deed, you continue said sale for a period of 60 days; namely, to Wednesday, the 20th day of December, 1922, at the hour of 10 o'clock a. m. of that day, and at the same place as now noticed in your notice of sale, which you are now running, and we hereby request and direct you to properly advertise such continuance of said sale, and the undersigned, Herbert M. Haskell, hereby advises you that Messrs. Meserve & Meserve, his attorneys in this matter, are authorized and empowered to give such further and full directions in the premises as, in their judgment, may seem best. Those gentlemen are also provided with money with which to pay such additional charges and expenses as may be incurred or occasioned by the continuance of such sale. It is our joint direction and request that the sale be not had on the 23rd day of October, the time for which the same is advertised, but that said sale be regularly continued as above directed.

"You are directed to retain in your possession, in accordance with your regular custom, the note secured by said trust deed until the sale of said property has been made under said trust deed or until the same shall be paid and discharged, or until further directions in regard thereto shall be jointly given by the undersigned.

"Very truly yours, Herbert M. Haskell.

"Subrogated owner of above mentioned note and debt, secured by said trust deed.

"Garry G. Layman.
"Willa N. Layman,
"By Garry G. Layman,
"Makers of Said Note and Trust Deed."

Thereafter, the defendant Warren W. Taylor signed and sent to Meserve & Meserve, said attorneys for plaintiff, the following letter:

"Long Beach, California, October 31, 1922.

"Messrs. Meserve & Meserve, 417 Union Oil Bldg., Los Angeles, Calif.—Gentlemen: I have your offer in writing in reference to the tender of Mr. Haskell of certain sums of money due upon the Garry G. Layman note and trust deed.

"The tender is hereby rejected upon the ground that the same is not made directly in extinguishment of the debt evidenced by said note, but, on the contrary, is based on the condition that Mr. Haskell be subrogated to the rights of a creditor under said note and trust deed, and further that the offer impliedly demands, as a condition, the assignment of said note and trust deed to Mr. Haskell.

"Very truly yours, Warren W. Taylor."

[2] The facts as alleged in the complaint were practically admitted by the answer, and were admitted in a stipulation of facts entered into on the trial which appears in the record herein. A short statement of the facts, as we view them, is as follows: That the defendant Taylor was the owner of the note and trust deed in controversy, and in addition thereto was the owner of an additional note secured by the second trust deed on the same property, and there was an apparent attempt on the part of the plaintiff Haskell to place the defendant Taylor in a position that would allow the plaintiff Haskell to enforce the lien, the right to do which he was claiming to have obtained by subrogation, as a prior lien to the lien of the defendant Taylor in his second trust deed.

The fact that plaintiff did not intend to make an unconditional payment is shown by the statement of plaintiff that he desired to pay the indebtedness secured by the trust deed, and "become subrogated to the rights of the owner or owners of said indebtedness secured by said trust deed." And this demand on the same day that the sale advertised be continued for a period of 60 days is a statement wholly inconsistent with any theory that the debt was extinguished by payment. Again, the fact that defendant W. W. Taylor, the real owner of the notes secured by the trust deeds, within 5 days after receipt of plaintiff's letter accompanying his alleged payment, notified plaintiff in writing that he rejected the alleged tender on the ground that the offer of payment was conditional on subrogation, and the fact that plaintiff made no effort to relieve any uncertainty indicates that the alleged payment was conditional. It is therefore apparent that because of the condition attached to the payment or deposit of the money it was not a payment of the indebtedness unconditionally, and the lower court correctly held that under the circumstances there was no subrogation.

The cases cited do not cover the facts and circumstances as they appear in this case, and Civil Code, §§ 2903 and 2904, are also not applicable. If the contention of the appellant is correct, it would never be safe for the owner of a second trust deed to purchase a first trust deed.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J

79 Cal. App. 171

KLENCH v. BOARD OF PENSION FUND COM'RS OF CITY OF STOCKTON et al. (Civ. 3108.)*

(District Court of Appeal, Third District, California. Aug. 17, 1926.)

1. Municipal corporations 🔑187.

Statute providing for police pensions (St. 1889, p. 56, as amended by St. 1897, p. 52), became part of ordinance enacted in pursuance of its provisions.

2. Municipal corporations 🔑78.

Matter of fixing compensation and providing for pensioning of policemen and firemen is strictly "municipal affair," within Const. art. 11, § 6, exempting such affairs from operation of general laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

3. Municipal corporations 🔑78.

In view of Const. art. 11, § 6, city operating under freeholders' charter is exempt from operation of general laws affecting "municipal affairs" covered by its charter.

4. Municipal corporations 🔑78.

City is subject to general laws relating to municipal affairs for which no provision is made in its charter.

5. Municipal corporations 🔑79—City's adoption of freeholders' charter held not to terminate pension rights of retired policemen under prior ordinance and statute.

City's adoption of freeholders' charter, under St. 1911 (Ex. Sess.), p. 254 et seq., *held* not to automatically terminate pension rights of retired policemen, under prior ordinance adopted under Pension Act 1889, as amended by St. 1897, p. 52, in view of saving clause, continuing in effect all ordinances not inconsistent with provisions of new charter.

6. Municipal corporations 🔑187—Absence of affirmative action in placing pensioner under old ordinance in pension list under new held not to affect his right to pension (St. 1889, p. 56, as amended by St. 1897, p. 52; St. 1911 [Ex. Sess.] p. 254).

Where city, after adopting freeholders' charter, under St. 1911 (Ex. Sess.), p. 254 et seq., containing saving clause, continuing in effect prior ordinances consistent with provisions thereof, including a pension ordinance adopted under St. 1889, p. 56, as amended by St. 1897, p. 52, adopted a new pension ordinance, failure of council by affirmative action to place pensioner under old ordinance on pension list under the new did not affect his right to pension so provided for.

7. Municipal corporations 🔑187—Policeman retired on pension held to have vested right to pension in amount paid those of his class.

When city established a retirement pension system for policemen, a policeman eligible to be retired on pension who met all requirements and was retired and enrolled on pension list had a vested right to draw pension in amount provided for those of class to which he belonged.

8. Municipal corporations 🔑187—Retired policeman held entitled to pension at one-half of salary of rank at time of retirement (Pension Act 1889, § 4, as amended by St. 1897, p. 52, § 2).

Under Pension Act 1889, § 4, as amended by St. 1897, p. 52, § 2, providing for pension to retired policeman equal to one-half "of salary attached to the rank which he may have held on such police force at the date of such retirement," a retired policeman is entitled to pension on basis of one-half of increased salary paid officers of rank held by him at time of retirement rather than at rate of one-half of salary which he was receiving at time of retirement.

9. Statutes 🔑181(2), 184, 205.

Legislative intent in using particular language must be ascertained from context of statute as a whole, its object, and the obvious consequences which would follow particular construction.

10. Municipal corporations 🔑220(9).

Pension statutes are to be liberally construed.

11. Municipal corporations 🔑220(9).

That meaning of ambiguous pension statute which will produce results intended will be adopted in preference to one having contrary effect.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by D. L. Klench for writ of mandate to be directed to the Board of Pension Fund Commissioners of the City of Stockton and others. From a judgment granting the writ, respondents appeal. Affirmed.

J. Le Roy Johnson and Clarence A. Grant, both of Stockton, for appellants.

William A. Kelly and Brittain & Weise, all of San Francisco, and Louttit, Stewart & Louttit, of Stockton, for respondent.

HART, J. The court below granted a peremptory writ of mandate to compel the appellants, as members of the pension board of the city of Stockton and the city auditor, as such, to allow, audit, and pay petitioner certain sums of money alleged to be due him from said city as for a pension as a duly retired member of the police department of said city of Stockton, holding at the time of such retirement the rank of patrolman. The appeal is by appellants from the judgment entered upon an order overruling a demurrer to the petition. The following brief general statement of the facts is taken from the opening brief of the appellants:

"The petitioner herein was a member of the police force of the city of Stockton on December 15, 1904, and prior thereto. In 1904 he incurred a disability in line of duty and was retired, pursuant to the Pension Law of 1889

---

denied by Supreme Court October 14, 1926.

and amendments thereto. Stats. 1889, p. 56. By virtue of the provisions of that act, as amended in 1897, he was, as such retired officer or pensioner, entitled during his lifetime to a yearly pension equal to one-half of the amount of salary attached to the rank he may have held on such police force on the date of such retirement. Stats. 1897, p. 52. The pay of the petitioner at the time of his retirement was $75 per month. The petitioner at the time of his retirement held the rank of patrolman. The salary of the rank of patrolman has at various times since the retirement of the petitioner herein been increased until at the present time a patrolman who has served for 5 years on the Stockton police force receives a salary of $162 per month. The petitioner herein had served over 5 years at the time of his retirement, and the disability which he suffered in 1904 has continued since then, and now exists."

The petitioner, it appears, when retired in 1904, was allowed a pension of $37.50 per month, said amount being one-half the monthly salary paid a police patrolman of said city. This amount he continued to receive, although several increases in the monthly compensation of patrolman had in the meantime been made, until August 1, 1921, at which time the pay of patrolman was increased to $150 per month, and from that date and until the present proceeding was instituted he has been paid $75 per month or one-half of the amount to which the pay of patrolman was increased on the 1st day of August, 1921. At the present time the salary of a patrolman of the city of Stockton is $162 per month.

The petitioner contends, basing such contention upon reasons hereinafter to be examined, that, as the compensation of patrolmen engaged in active service as such is or may be changed by the city council, either by increasing or diminishing the same in amount, the amount of the pension to which he is entitled as a duly retired patrolman is likewise changed. In other words, as to his own case, his contention is that whatever increase which has been made or any increase which may be made in the future or at any time during the period of his retirement in the compensation of patrolmen in active service constitutes the basis for the fixing of his pension as a retired patrolman. Upon this theory he, by this proceeding, seeks to secure "back pay," claiming, obviously, that he is entitled to be paid by the city of Stockton the difference between what he has received and what he would have been paid, had his pension been at all times regulated upon the basis above suggested.

On the other hand, the appellants contend:

"(1) That the adoption of the freeholders' charter by the city of Stockton in the year 1911 automatically terminated the right of the petitioner to thereafter draw a pension; (2) that while in 1919 a pension ordinance was adopted under the freeholders charter, no affirmative action was taken by the council under said ordinance to place the petitioner upon the pension list; (3) that the right of the petitioner to draw his pension is not a vested right, and therefore terminated in 1911 with the adoption of the freeholders' charter; (4) that the amount of the pension to be paid to the petitioner does not vary with the salary attached to his rank as a patrolman."

In the consideration of points 1 and 2, in the order in which the points made by appellants are above presented, it will be necessary to have before us the history of the legislation relating to the matter of pensioning police officers of said city.

[1] At the time that the petitioner was retired, in the year 1904, the city of Stockton was, as a municipal corporation, controlled by a charter adopted in pursuance of the provisions of a general law, passed by the Legislature of the year 1850, entitled "An act to provide for the incorporation of cities." Stats. 1850, p. 87. The charter so adopted contained no provisions authorizing the payment of pensions to police officers. In the year 1901 however, the governing board of the city of Stockton, acting under and in pursuance of the provisions of a general law of the state (Stats. 1889, p. 56, as amended by the act of 1897, p. 52, supra), entitled "An act to create a police relief, health, and life insurance and pension fund in the several * * * cities * * * and towns of the state," passed an ordinance, designated and numbered as "Ordinance No. 283," providing for the raising of revenue and thus the establishment of a "police relief and pension fund," the same to be used, as its designation implies, for the relief and pension of police officers upon the happening of certain conditions specified in the Pension Act of 1889. The first section of said ordinance expressly declares that its enactment or passage was in pursuance of the provisions of said act of the Legislature of 1889, and thus by such reference said act or statute was in its entirety adopted into and made a part of said ordinance. Cole v. City of Los Angeles, 180 Cal. 617, 623, 182 P. 436.

Section 4 of said Act of 1889 as amended by the Act of 1897, § 2, which section became in the manner just indicated a part of said Ordinance No. 283 of the city of Stockton, provided as follows:

"Whenever any person, while serving as a policeman in any such county, city and county, city, or town, shall become physically disabled by reason of any bodily injury received in the immediate or direct performance or discharge of his duty as such policeman, said board may, upon his written request, or without such request, if it deem it to be for the good of said police force, retire such person from said department, and order and direct that he shall be paid from said fund, during his lifetime, a yearly pension equal to one-half of the amount of salary attached to the rank which he may have held on such police force at the date of such retirement, but on the death of such pensioner his heirs or assigns shall have no claim against or upon such police relief or pension fund;

provided, that whenever such disability shall cease such pension shall cease, and such person shall be restored to active service at the same salary he received at the time of his retirement."

Ordinance No. 283 remained in full force and effect until the year 1911 when the city of Stockton adopted a freeholders' charter. Stats. 1911, Ex. Session, p. 254 et seq. Section 174 of article 16 of said charter provided:

> "All lawful city ordinances, resolutions, and regulations in force at the time this charter takes effect and not inconsistent with the provisions thereof are hereby continued in force until the same shall be duly amended or repealed."

Section 72, subd. 59 of article 8 of said charter authorized the establishment of "a pension and relief fund for policemen and firemen." The city council, while not passing an ordinance in pursuance of the provisions of the last-mentioned section of the freeholders' charter, did, as we have seen, on June 20, 1919, pass an ordinance designating and numbering the same as "Ordinance No. 698," whereby provision was made for the pensioning of members of the police and fire departments of said city. The provisions of this ordinance, in so far as members of the police department were concerned, followed substantially the provisions of the state law.

In the year 1923, the city adopted a new freeholders' charter, whereby a "city manager" form of government was established. See Stats. 1923, p. 1321 et seq. This charter, in section 58, article 5, empowers the city council to provide a pension and relief fund for firemen and other officers. Said charter (section 6, art. 30) also contains this provision:

> "All ordinances, resolutions, and regulations in force at the time this charter takes effect, and not inconsistent therewith, are hereby continued in force until amended, repealed, or rescinded."

In October, 1923, the city council passed Ordinance No. 854, which provides for the establishment, maintenance, and administration of a "relief, health, life insurance, and pension fund for the members of the police and fire departments of the city of Stockton." This ordinance, whose provisions are substantially the same as those of the state law as well as those of ordinance No. 698, superseded, of course, the last-named ordinance, and is at the present time the existing local law providing for the pensioning of members of the police department of said city.

[2] It is not disputed that from the time that the petitioner was retired in 1904 until the date of the adoption by the city of Stockton of the freeholders' charter of 1911, said city, in paying the petitioner a retirement pension, remained within the power with which it was invested by the Police Relief and Pension Act of 1889 and the amendment thereto in 1897. Indeed, the appellants do not contest that proposition. Their position is, though, as we have seen, that the adoption of the freeholders' charter in the year 1911 by said city operated, ipso facto, to "terminate the right of the petitioner to thereafter draw a pension." This proposition necessarily presupposes that the result of the adoption of said freeholders' charter was entirely to abrogate the effect of any law, in so far as it had been applied to the city of Stockton, under the provision of which said city had theretofore maintained and administered a police pension system, and proceeds from the theory that, since by article 11, § 6, of the Constitution, municipal corporations under a freeholders' charter are, as to "municipal affairs," declared to be wholly exempt from the operative effect of general laws, upon the adoption by the city of Stockton of the freeholders' charter of 1911 any general law providing for the regulation of any subject or matter falling within the meaning and scope of the phrase "municipal affairs," and by and under the authority of which the city of Stockton had administered certain of its "municipal affairs," immediately ceased to apply to and automatically wiped out any ordinance or resolution passed or adopted by said city by the authority of said general law upon the adoption of said charter. It is to be conceded, as counsel for the appellants declare to be true, that the matter of the fixing of the compensation and providing for the pensioning of policemen and firemen is strictly a "municipal affair." Popper v. Broderick, as Auditor, etc., 123 Cal. 456, 56 P. 53; Burke v. Board of Trustees, etc., 4 Cal. App. 235, 87 P. 421.

[3, 4] It is also to be conceded that the settled rule is that a city operating under a freeholders' charter is exempt from the operation of general laws with respect to all "municipal affairs" as to which such charter speaks. See section 6, art. 11, Const. On the other hand, the converse of that proposition is equally well settled; viz., that "a city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting." Fragley v. Phelan, 126 Cal. 383, 395, 58 P. 923; Civic Center Assn. of L. A., etc. v. Railroad Com., 175 Cal. 441, 445, 166 P. 351.

[5] But a complete answer to appellants' point 1 is afforded by the saving clause (section 174) of the charter of 1911 to the effect that all city ordinances, etc., "in force at the time this charter takes effect and not inconsistent with the provisions thereof are hereby continued in force until the same shall be duly amended or repealed." Manifestly, the purpose of such provision, as is true of such a provision in any new organic law adopted by a political entity, is to preserve intact, until there may be afforded time and op-

portunity for the amendment or repeal of the same, if such amendment or repeal be found necessary, the statutory or local legislative laws in force at the time such organic law was adopted or became operative, and which are essential to the proper administration of the affairs of the government for which the new fundamental law was adopted. In other words, the framers of the charter of 1911, to prevent what well might be termed a dangerous hiatus in the administration of the governmental affairs of the city of Stockton, properly inserted, as is generally done in all cases of the making of a new organic law for a government, the saving clause above referred to. Necessarily, that provision of said charter embraced or included all valid ordinances, etc., existing at the time the new organic law went into effect and not inconsistent with any of its (said charter's) provisions. As we have above pointed out, the ordinance adopted by the city of Stockton in the year 1901, under the terms of which the petitioner was retired, was founded on the statute of 1889 authorizing the pensioning by incorporated cities of members of their police departments, there not being in the charter under which the city of Stockton was then operating any provision for the allowance and payment of such pensions. As further likewise pointed out, the city council, in adopting that ordinance, necessarily adopted and made a part thereof the provisions of said statute of 1889. In other words, the provisions of said statute of necessity became a part of said ordinance by reference. There was nothing in the provisions of the ordinance inconsistent with any of the provisions of the charter of 1911. Indeed, said ordinance as so adopted was in harmony with the spirit and the intent of said charter, in so far as the subject-matter thereof was concerned, as evidenced by the power expressly granted by the charter to the governing board of said city to provide for a retirement pension for policemen and firemen.

[6] The point secondly urged by appellants is devoid of merit. The contention involved in that point is, as seen, that upon the adoption in 1919 by the council of the city of Stockton under the charter of 1911 of Ordinance No. 698, providing for a retirement pension for policemen, it was necessary for the council, to preserve petitioner's status as a retired pensioner, to take some affirmative action to that end. This contention, as we view it, also involves the question, suggested under the head of point No. 3, whether the petitioner's right to a pension was a vested right. We have shown that from 1901 to the year 1919 the city of Stockton, in so far as its police pension system was concerned, operated under the provisions of a general law of the state, and that it was by authority of the system so adopted that petitioner was retired on a pension as a patrolman and continued, without a break, as a pensioner thereunder. The provisions of Ordinance No. 698, as seen, were substantially, nothing more than a duplication of the provisions of the state law, and, while it is to be granted that its passage was in pursuance of the power granted to the city council by the charter of 1911 to adopt and pass a police pension system for said city, the intention thereof was merely to perpetuate under the direct authority of the charter the policy of the city which had existed continuously from the year 1901 down to the date of the passage of said ordinance to maintain and administer a pension system for the benefit of the members of the police department of said city or as in part compensation of such members for their services as such. In other words, Ordinance No. 698 was not intended to terminate rights properly acquired under the pension law existing prior to and at the very time it (said ordinance) was passed and became effective, but was simply intended as a direct recognition of the power which had been given to the city itself to establish a pension system for its police officers independently and regardless of any general law by which such city would be controlled in the matter of providing for such a system in the absence of authority from its own charter for doing so. Ordinance No. 698 gave the petitioner nothing that he did not already have, and it would amount to what well may be expressed as a solecism in logic to hold, as we are in effect here asked to hold, that the effect of the passage of a new ordinance or statute designed to preserve the right to enjoy a right created and its exercise vouchsafed by a preceding ordinance or law and existing when said new ordinance or statute was passed, would be to destroy the enjoyment of such right rather than to preserve it.

[7] Moreover, while no public officer or employee of the government is entitled as of right to a pension (Douglas v. Pension Board of the City of Sacramento et al. [Cal. App.] 242 P. 756), still, when once the government establishes a retirement pension system for its officers and employees and provides the funds and means for administering it according to its design, any such officer or employee, when the conditions arise or occur upon which, under the rules and regulations of the system, he becomes eligible to be retired and placed upon the pension roll, and he having met all the requirements entitling him to be so retired has in fact been retired and enrolled upon the pension list, has then acquired a vested right to draw his pension and to receive as such whatever sum or sums of money may be provided for such purpose for officers or employees of the class to which he belongs. The petitioner here, as the admitted averments of the petition disclose, had become eligible, under the terms of the Pension Act of 1889, to be retired. All the conditions upon which his retirement on a pension could be effected had occurred, and he was accord-

ingly legitimately retired and placed upon the pension roll. His right to be paid the money provided for police officers of his class or rank had become vested, and hence it does not lie within the power of the city council by ordinance, or by inaction with respect to the enforcement of such ordinance, in effect to destroy that right, until the conditions upon which he was retired and placed upon the pension roll have ceased to exist. Kavanagh v. Board of Police Com'rs, 134 Cal. 50, 52, 66 P. 36; Cohrn v. Henderson, 19 Cal. App. 90, 91, 124 P. 1037; Sheehan v. Board of Police Com'rs, 47 Cal. App. 29, 34, 190 P. 51; O'Dea v. Cook et al., 176 Cal. 659, 661 et seq., 169 P. 366.

The cases of Pennie v. Reis, 80 Cal. 266, 22 P. 176, and Clarke v. Reis, 87 Cal. 543, 25 P. 759, involved situations entirely different from that presented here. In the Pennie Case the statute authorizing insurance benefits for the widow or family of police officers was repealed before the death of the officer whose legal successor was attempting enforcement of the claim set up under the repealed statute. In the Clarke Case the officer was dismissed from the department before the happening of the contingency upon which, had it happened prior to his dismissal, he would have been entitled to a pension. In the Pennie Case it was held, as also it was held by the Supreme Court of the United States to which that case was taken (Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426), that the police officer concerned therein acquired no vested right in the moneys provided for the payment of police pensions or life insurance and that no such right could be acquired "until the event happens upon which the money was to be paid." It was also so held in the Clarke Case. These cases, however, at least inferentially support the view that, when the event or the contingency happens upon which the officer is entitled to receive the money provided for pensioning him as a retired officer, then, in that case, the right to be paid such money is a vested right. It is to be conceded, however, that it is within the power of the Legislature, state or local, to repeal, change, or modify a pension law passed for the benefit of its officers or employees, yet, until that is done, and there is a pension system duly established by law, either by direct action of the Legislature or by a local political subdivision under its charter, and the conditions or contingency happen upon which an officer or employee of the government becomes eligible to be placed upon the pension rolls and is actually so placed, such officer or employee then acquires a right to be paid the money provided for his relief under such law of which he cannot legally be divested.

The Minnesota cases of Stevens v. Fire Dept. Relief Ass'n, 124 Minn. 381, 145 N. W. 35, 50 L. R. A. (N. S.) 1018, and Gibbs v. Fire Dept. Relief Ass'n, 125 Minn. 174, 145 N. W. 1075, Ann. Cas. 1915C, 749, are cited as authorities for the position that pensions provided for police or other officers are a mere gratuity and can, therefore, be taken away at any time the law-making power sees fit to take such a course. The case first mentioned does not strictly so hold. It is therein stated that pensions allowed to disabled firemen or policemen, their disability occurring while they were pursuing the line of their duties as such, are unlike pensions granted by the general government to soldiers, in that the latter constitute a mere gratuity or bounty which may be taken away at any moment, citing a number of United States Supreme Court cases. In the Stevens Case the court said, "We therefore hold that the pension in question [for disabled firemen] is not, as contended by the appellant, a mere gratuity to be granted or withheld at the whim or pleasure of the association," referring to the association created by the pension law of the state of Minnesota to administer the provisions of that law within the city of Minneapolis. The Gibbs Case also had under consideration a law authorizing a pension to be paid to the widow or family of a fireman passing out of this life while he was connected with and performing his duties as a member of the city fire department. It is therein held that pensions provided for and paid to officers or employees (or their widows or their beneficiaries) of a government upon the happening of certain contingencies are mere gratuities, or bounties "springing from the graciousness and appreciation of sovereignty," and that, "as against the state there is no vested right in the pension accruing in the future from month to month." It is true, of course, as we have before stated, no vested right to a pension is created by the mere act of passing a law providing for pensions for public officers or employees, since, as pointed out, a right to such pension can vest only upon the happening of the contingency or event upon which the right thereto accrues. The conclusion in the Minnesota case secondly above mentioned, holding that a pension such as the one being considered here is a gratuity, is contrary to the theory of our own cases, which hold that a pension of the character of the one with which we are now dealing "is not a gratuity or a gift," as is declared by the Supreme Court in O'Dea v. Cook, 176 Cal. 659, 169 P. 366. "If it were," continues the court in that case, "all the provisions pertaining to it would be void under the constitution of the state. Article 4, § 31; Taylor v. Mott, 123 Cal. 497, 56 P. 256. A pension is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation. United States v. Teller, 107 U. S. 64 [2 S. Ct. 39] (27 L. Ed. 352); Mahon v. Board of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810; State v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607, Ann. Cas. 1912C, 542."

And herein lies an important distinction between pension laws which, like those we now have before us, provide for pensions for services performed for the government or disabilities occurring while rendering such services after the law has been passed, and a pension system designed to care for or reward soldiers for disabilities suffered or services rendered in the past while in the military service of the country. As before suggested, where, as in the former case, "services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself." O'Dea v. Cook, supra.

See, also, Hammitt v. Gaynor, 82 Misc. Rep. 196, 144 N. Y. S. 127; State v. Love, supra; People v. Abbott, 274 Ill. 380, 113 N. E. 696, Ann. Cas. 1918D, 450.

Thus have we considered and disposed of point 3, involving the question whether the petitioner acquired a vested right to a pension under the pension system maintained and administered in the city of Stockton since the year 1901, when first it invoked the application of the provisions of the general pension statute of 1889, not that we have regarded the determination of that question absolutely essential to a decision herein in favor of the petitioner, since we are convinced, as we think we have shown, that the city of Stockton has continuously and uninterruptedly operated under a valid pension system for all the years from 1901, and that petitioner, having been regularly retired and placed on the pension roll in 1904, was and is entitled to the benefits of said system, but because the question is of singular importance in that, to our minds, some misapprehension of the import of our decisions regarding the proposition seems to exist.

[8] We now reach the all-important legal issue presented by this appeal; viz., Whether the basis upon which amount of the petitioner's pension is to be computed varies with increases which may be made from time to time in the salaries or compensation of police patrolmen of said city or must remain as fixed at the time of his retirement at one-half of the salary then allowed and paid to officers of his rank, to wit: patrolmen.

In determining the question thus propounded, we are to keep in mind the italicized part of the following language of section 4 of the Statute of 1889, as amended in 1897 (the full text of the said section is hereinabove quoted); viz.:

> "Whenever any person, while serving as a policeman in any such * * * city * * * shall become physically disabled by reason of any bodily injury * * * said board may * * * retire such person from said department, and order and direct that he shall be paid from said fund, * * * a yearly pension equal to one-half of the *amount of salary attached to the rank which he may have held on such police force at the date of such retirement.* * * *"

[9, 10] It is contended that the italicized language is so ambiguous as to obscure its true meaning or the legislative intent at the bottom thereof. Conceding this to be true, the question then is: What did the Legislature intend to say by the use of said language? In other words, if the meaning of the language as it was intended to be understood by the Legislature be uncertain or doubtful, then a question of legislative intent is presented and that intention must be ascertained by a consideration of the language in connection with the context of the statute in which the language is employed in its entirety, the object which said statute was designed to attain, and the obvious consequences which would follow a construction either way. Douglas v. Pension Board of the City of Sacramento et al. (Cal. App.) 242 P. 756. It is said in O'Dea v. Cook, supra:

> "It is a firmly established principle of judicial construction that pension statutes serving a beneficial purpose are to be liberally construed. Walton v. Cotton, 60 U. S. [19 How.] 355, 15 L. Ed. 658; Hanscom v. Malden, etc., Gas Light Co., 220 Mass. 1, 107 N. E. 426, Ann. Cas. 1917A, 145."

To the same effect are Hurley v. Sykes, 69 Cal. App. 310, 317, 231 P. 748; Jackson v. Otis, 66 Cal. App. 357, 360, 225 P. 890; Whitehead v. Davie, 189 Cal. 715, 719, 209 P. 1008. In Hurley v. Sykes, Presiding Justice Tyler, writing the opinion, says, speaking of the San Francisco charter provisions for the pensioning and relief of members of the fire department of said city:

> "The spirit of these provisions is to protect all members of the fire department in the benefits which the fund insures, and they should * * * be interpreted on broad principles. Any other construction would result in a limitation of the beneficial provisions of the act, and render nugatory the manifest intention of the law-making power and do violence to its apparent purpose."

[11] Of course, these rules of statutory construction, as applied to pension laws, are of no consequence where the language itself of the statute is sufficiently clear or free from obscurity as to reasonably remove all doubt as to its meaning or the legislative intent with respect thereto. But, while we think that section 4 of the Statute of 1897, or the language thereof which is italicized in this opinion, clearly enough indicates that the word "salary" was intended to refer to the "rank" of the retired patrolman rather than to the *time* at which he may be retired under the statute, nevertheless, the same result would follow if its interpretation or construction were required, and controlled, as it should be controlled, by the liberal rules of statutory construction above referred to as applicable

to pension laws, and, further, by a consideration of the rule that where the language of a pension statute is of such ambiguity as to its true meaning as reasonably to afford two different and opposite conclusions, the one leading to its enforcement so that it will in full measure produce the beneficial results which its spirit and its purpose contemplate and its context will support, and the other to the frustration of its central purpose and desideratum, then the former construction must be given the statute or the particular language thereof whose meaning is enshrouded in doubt.

We have said that it is our belief that the word "salary" as used in section 4 of said act was intended to refer to the rank of the retired police officer and not to the time at which he was retired. In other words, the section as phrased seems clearly enough to indicate that what the Legislature intended thereby to declare was that, on being retired under said act, a member of the police department should be paid a pension based upon the salary which may be paid to police officers of the *rank held by him at the time of the retirement* of such officer. This conclusion is directly supported by the case of Rumetsch v. Davie, 47 Cal. App. 512, 514, 190 P. 1075, 1076, wherein it is said by Justice Brittain, speaking for the court:

> "While he is on the retired list, it would seem to be entirely consistent with the language, as well as the purpose of section 95, that he should receive as pension one-half the amount he would receive as a corporal if on active service. This court has no hestitation in determining that the amount of the pension is fixed by the salary attached to the rank of the retired man at the time of retirement provided he held that rank for the period of one year prior to the date of retirement."

Inferentially, the same view is entertained by the case of Whitehead v. Davie, 189 Cal. 715, 722, 209 P. 1008. Furthermore, the conclusion we have arrived at regarding the meaning and intent of the language of the section in question is fortified, indeed, it seems to us, conclusively settled, by two significant considerations, the one arising from the pension law itself under which the city of Stockton is operating and has practically operated since the year 1901, and the other arising from a judicial construction of the nature, in legal effect, of the pension granted by pension statutes. The first is the offspring of the provision of section 4 of the Statute of 1897, also incorporated into the Ordinance No. 698 as well as into the present city ordinance (No. 854) to the effect that when the physical disabilities suffered by the pensioner shall cease such pension shall cease, and such person be restored to active service as a member of the force of the rank held by him when retired. The second is the declaration by the Supreme Court in a number of cases, notably the case of O'Dea v. Cook, supra, to the effect that a pension granted to officers and employees of the government for services yet to be performed (and such statutes granting such pensions always operate prospectively) constitute a part of the compensation of such officers and employees and as such in a sense enters into the contract whereby such officers and employees are employed.

By the first of these considerations it is unquestionably established that, notwithstanding his retirement, a patrolman retired under the pension law of 1889 and the later statute and ordinances perpetuating the provisions thereof is still a member of the police department and is subject to such rules of the department as apply in such a case. From the second, considered in the light of the first, it irresistibly follows that a retired patrolman is subject to any changes which may be made in the compensation of patrolmen; that, therefore, an increase made at any time by the proper city authorities in the salary to be paid to such police officer or other members of the department after and pending the retirement of a member of such department under the pension laws operates to correspondingly augment the amount or basis upon which the pension compensation of the retired officer is to be computed. The conclusion thus announced coincides with the theory and the object of all laws authorizing the payment of pensions to officers and employees in the civil department of the government retired from active service by reason of the happening of contingencies or events which render such retirement conducive to the best interests of the department of public service with which they have for the prescribed time been connected.

One of the objects thus to be attained is "to encourage those public officers and employees who have by experience or otherwise demonstrated peculiar fitness for the performance of the public services to which they have been assigned to continue in the service of the government and at all times faithfully discharge the duties involved in such service. The hope held out for future additional reward or compensation for their public services to that which they receive concurrently with the period during which they are actually and actively engaged in performing such services is conducive to uniform faithfulness to and efficiency in discharging the duties which their offices or employments have exacted." Douglas v. Pension Board of the City of Sacramento (Cal. App.) 242 P. 756. Another consideration for pension allowances for retired civil officers, and not the least in importance, is to pay such retirement compensation as will provide for the retired officer or employee means of proper subsistence. An increase in the cost of living always justly calls for an increase in the compensation of those who labor to earn a livelihood, and this proposition obviously applies as well to those who labor for the public as those engaged in private employment, and, of course, equally so to those who, for reasons prescribed by law, have been retired from a public service to which they devoted many years of faithful adherence. We may add the observation that members of police and fire departments of a city are required, as such, to perform public duties always beset by imminent perils to their lives and limbs—indeed, more so than any other officers or employees engaged in the civil department of the public service. It is, therefore, not at all strange but gratifying to find that the government, as in the present instance, so far as police officers are concerned, has been just enough to make such provision for the compensation of such officers or employees as affords not only a fair reward to them while they are actively performing their public duties, but enough to insure them, according to possible varying conditions as to the cost of living, against want or penury after they have been compelled from their accumulated years or from physical disabilities incurred while in discharge of their public duties to "lay down the shovel and the hoe."

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 518

RYSTROM v. SUTTER BUTTE CANAL CO.

(Civ. 2874.)

(District Court of Appeal, Third District, California. May 6, 1925. Rehearing Denied, with Modifications, June 5, 1925. Hearing Denied by Supreme Court Aug. 3, 1925.)*

1. Trial ⇨260(5)—Refusal of instruction covered by instructions given not error.

In action to recover damages for loss of crops due to failure to furnish water for irrigation, refusal of instruction, substance of which was covered by instructions given, did not constitute error.

2. Waters and water courses ⇨263—Measure of damages for loss of crops due to failure to furnish water for irrigation stated.

Measure of damages for loss of crops from failure to furnish water for irrigation is market value of probable yield of land if water had been furnished as agreed, less reasonable cost of production and marketing crop, and net market value of crop actually produced.

3. Appeal and error ⇨1170(9)—Error in instructing jury, not prejudicial to complaining party, held not cause for reversal.

Under Const. art. 6, § 4½, prohibiting setting aside judgment or granting new trial for misdirection of jury, unless error complained of resulted in miscarriage of justice, where, in action for loss of crops from failure to furnish water for irrigation, jury did not follow erroneous rule of damages laid down by court and returned verdict less in amount than it might have found if it had followed rule setting forth true measure of damages, defendant cannot secure reversal of judgment.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Henry R. Rystrom against the Sutter Butte Canal Company for damages for loss of crops. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry Ingram, of Gridley, and W. H. Carlin, of Marysville, for appellant.

George F. Jones, of Oroville, for respondent.

PLUMMER, J. Action by plaintiff to recover damages for loss of crops due to the alleged failure of defendant to furnish water for irrigation purposes during the years 1921 and 1922. Plaintiff had judgment, and, the defendant's motion for a new trial being denied, the defendant appeals from the order and judgment entered in said action. It appears from the transcript that the defendant was under contract to furnish the plaintiff for irrigation purposes during the years mentioned 1.33 cubic feet per second of water for the use of plaintiff in the growing of rice. The plaintiff alleges that the defendant failed to furnish the water as contracted, and that by reason of such failure the plaintiff's crops of rice did not fill and mature as they would have had the quantity of water called for in the contract been furnished by the defendant to the plaintiff during the period of time when the rice on the plaintiff's lands was being cultivated and grown; that as a result of the defendant's failure to furnish water, the plaintiff suffered damages in the total sum of $3,329.58. The cause was tried before a jury, and a verdict returned in the sum of $2,500. This sum was thereafter reduced by the court by striking therefrom the sum of $500 to cover 17 acres of the rice lands belonging to the plaintiff not harvested on account of rains, and, consequently, any losses suffered thereby could not be attributed to the defendant.

There is no real question presented as to the sufficiency of the testimony to sustain the verdict for the plaintiff. The argument addressed to us upon this point is based upon the alleged ground that the court misdirected the jury as to the proper method for calculating or estimating damages, and that because of such misdirection a new trial should be ordered. One of the questions presented is rather unusual in this, that the instruction, as given by the court, tended to restrict rather than enlarge the amount of damages which the jury would be authorized to award the plaintiff in the event that the jury found that the plaintiff was entitled to a verdict.

---

*Reporter's Notice.—This case was published in 238 P. 954. It is reprinted here with corrections, and the rehearing opinion has been added.

[1] The first assignment of error is that the court failed to give the following instruction:

> "I instruct you that under the contract between plaintiff and defendant the latter was not required in the year 1921 or in the year 1922 to furnish to plaintiff all the water which he might desire to receive or use; it was only required to furnish to him through its gate in its canal on his lands water to the amount of 1.33 cubic feet per second; and, if it did furnish that amount at said place for either of said years, your verdict must be in favor of defendant for said year; and if defendant did furnish water at said place for both of said years, 1921 and 1922, your verdict must be in favor of defendant for both of said years."

The reason assigned for the refusal of the court to give this instruction was that the substance of the instruction was given elsewhere. It is insisted that such is not the case. In this insistence the appellant must have overlooked two instructions given at the request of the defendant. They are Nos. 3 and 4. No. 3 reads:

> "I instruct you that, under the contract existing between plaintiff and the defendant, Sutter Butte Canal Company, plaintiff (defendant) was required in the year 1921, and also in the year 1922, to furnish water to plaintiff through a gate at its canal in the amount of only 1.33 cubic feet per second flow, and, if defendant did so furnish said water during each and both of said years, plaintiff cannot recover, and your verdict must be in favor of defendant."

No. 4 reads:

> "Under the contract between plaintiff and defendant, the latter was not required to furnish water during the irrigating season, even at the rate of 1.33 cubic feet per second continuous flow, unless such continuous flow in such amount would be reasonably necessary to plaintiff for the growing of the rice crop on his land."

[2] The defendant requested no instruction upon the measure of damages. The court, however, at the request of the plaintiff, gave the following:

> "You are instructed that, in determining the amount of damage in this case, if you find from a preponderance of the evidence that any damage has been caused to the crop growing upon the land of the plaintiff in 1921 and 1922, or in either of said years, by reason of the failure of the defendant to supply water as agreed under the terms of the contract entered into between the parties in this case, if you find from the evidence that it failed to deliver water as agreed in either or both of said years, you are first to determine from the evidence the market value of the probable yield of rice from the land in each year if the water had been furnished as agreed, and you should then deduct therefrom the reasonable cost of producing and marketing such crop, together with the reasonable market value of the crop actually produced."

It is earnestly insisted by the appellant that this instruction is not a full and correct statement of the law for ascertaining damages when applied to the instant case. With this contention we agree. The latter portion of the instruction should have read:

> "And you should then deduct therefrom the reasonable cost of producing and marketing such crop, and also deduct therefrom the net market value of the crop actually produced."

As the instruction was given the jury was authorized to deduct from the reasonable market value of the crop that should have been produced the cost of producing and marketing the same, and also the total income received from the crop that was actually produced. It is evident that if the rule announced by the court were strictly followed the jury would twice deduct, from the damages allowed, the cost of production. It is apparent that the court and counsel, in the preparation and giving of the instruction under consideration, endeavored to follow the rule laid down in the case of Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, where it is held that the measure of damages for the total destruction of a growing crop is the value of the crop in the condition it was at the time and place of destruction, less the cost of production, marketing, etc., and that, to determine the same evidence is admissible of the probable yield and market value, and that when the probable yield and market value are ascertained, the cost of production being deducted therefrom, the remainder would indicate the damages to be awarded by the jury. In applying this rule the court erred, after instructing the jury to deduct the cost of production of the whole crop, to again deduct the total value of the crop actually produced. In doing so, it lost sight of the fact that the value of the crop produced was not the net value, but out of the returns of the crop produced the plaintiff was entitled to pay the costs thereof. To show that this is the true rule, we will take the figures as presented by the appellant for the first year, which also show that the giving of the instruction, as worded by the court, was in favor of the defendant, and, therefore, there is no just ground for complaint. In inserting the calculations about to be set forth, we have accepted the figures presented by the appellant. The result differs only because the appellant has not, to our minds, exhibited complete accuracy as a mathematician.

The total area of the rice crop involved included 71 acres. The testimony, which we are accepting, shows for the year 1921 a yield of 35 sacks per acre, or a total yield of 2,485 sacks. The accepted value of this rice for that year by both parties is the sum of $2.75 per sack, which gives the total value of the rice that would have been produced for the year 1921 of $6,833.75. The testimony set forth by the appellant in its calculations fixes the cost of production at $35 per acre, which gives a total cost for the year 1921 of $2,485. This sum, deducted from what should have been the value of the total yield, leaves $4,348.75 as the net value of the crop that should have been harvested by the plaintiff during the year 1921, had sufficient water been furnished by the defendant to permit of the rice field yielding a full crop. During the year 1921 the plaintiff actually harvested 1,795 sacks of rice and marketed the same at the above price of $2.75 per sack, receiving the total sum of $4,936.25, out of which, however, he had to pay the total cost of production, which, we have seen, amounted to the sum of $2,485, leaving a net profit of $2,451.25. This sum, deducted from the $4,348.75 which should have been his net profit leaves $1,897.50 as the net loss for the year 1921. A like process of reasoning and figuring shows the loss on the 54 acres for the year 1922 at about the sum of $1,100. For the year 1922, however, different figures are accepted, as presented by the appellant, as follows: Cost of production per acre $35; yield per acre 25 sacks, market value per sack $2.10. It thus appears that, had the rule been correctly stated as to the deductions to be made by the jury, the testimony presented by the appellant's own figures would have justified a verdict against the defendant in the sum of about $3,000, assuming, as we must, from the verdict of the jury that the shortage of the crop was due to defendant's failure to furnish water according to its contract.

[3] Notwithstanding this situation, the defendant strongly insists that, even though the jury did not follow the erroneous rule laid down by the court, and arrived at a verdict less in amount than it might have found under the testimony had it followed the rule setting forth the true measure of damages a new trial should be granted, irrespective of the fact that the erroneous instruction was favorable to the defendant. That this was once declared to be the law appears in one or two of the earlier California cases, but the decisions so declaring have long since been discredited. A number of cases might be cited, but the following quotation from Tousley v. Pac. Elec. Ry. Co., 166 Cal. 457, 137 P. 31, is sufficient to show the rule now followed, and the one which should be followed in all such cases:

> "It is claimed that the verdict and special verdict are against the law simply because they are in violation of two certain instructions given to the jury on the question of contributory negligence. It is manifest from a reading of these instructions that they could in no degree have prejudiced defendant's cause. An objection of this character assumes that an instruction relied on is not correct as matter of law, but that under it the party objecting was nevertheless entitled to a verdict, and that for the failure of the jury to observe it, he is entitled to a reversal. This was the rule declared by this court in Emerson v. County of Santa Clara, 40 Cal. 543, and one or two subsequent cases. This rule has been entirely discredited and overruled in later cases. The rule now is 'that while the jury should conform to the instructions of the court upon matters of law, if it appears to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such erroneous instruction.' See O'Neill v. Thomas Day Co., 152 Cal. 357, 14 Ann. Cas. 970, 92 P. 856. 'The fact that the court erroneously instructed the jury to the contrary does not make the verdict against law.' O'Neill v. Law Union, etc., Co., 166 Cal. 318, 135 P. 1124."

Irrespective of the decisions of the Supreme Court just referred to, we think that section 4½ of article 6 of the Constitution applies to this case, in that it directs that:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It is apparent from what we have said that the error complained of in this case did not and could not have produced a miscarriage of justice.

We agree with the appellant that in making the deduction for the 17 acres not harvested the judgment should have been reduced in the sum of $606 instead of in the sum of only $500. It follows from what has been said that the judgment should be modified by striking therefrom the further sum of $106, and in all other respects should be affirmed. It is therefore ordered that the judgment appealed from be modified by striking therefrom the sum of $106, and affirmed as to all other matters.

The appellant will be allowed its costs on appeal.

We concur: FINCH, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. On petition for rehearing, a re-examination of the transcript discloses that the order striking $106 from the judgment should not have been made. It was based upon the following state of facts: The trial court reduced the judgment allowed by the jury in the sum of $500, for and on account of the failure of plaintiff to harvest seventeen acres of rice, and the jury was not instructed to deduct that acreage in considering the amount of damages to be awarded. The plaintiff actually harvested, as disclosed by the record, seventeen sacks of rice per acre on the remainder of the land. Upon the same basis the seventeen acres would have produced 289 sacks of rice at the admitted price of $2.10 per sack, aggregating a total of $606. This was the sum which this court found should have been deducted from the total judgment. In making this calculation and the order based thereon, the cost of harvesting, threshing, sacking and marketing was overlooked. These items would have reduced the total sum below the amount directed to be stricken from the judgment by the trial court. A statement of these facts is all that is necessary to show that the deductions made by the trial court should remain as fixed by said court.

It is therefore ordered that the last paragraph of the opinion heretofore filed in this cause be stricken therefrom, that the order modifying the judgment of the trial court be vacated and set aside and the following entered in lieu thereof: It is hereby ordered that the judgment of the trial court be, and the same is hereby affirmed, and that the respondent recover his costs on appeal therein.

---

79 Cal. App. 139

WALKER v. RICH, County Auditor. *
(Civ. 3027.)

(District Court of Appeal, Third District, California. Aug. 6, 1926.)

1. Assignments 🔑13.

Where employment does not exist, but party may be employed by another in the future, a mere possibility not coupled with an interest exists, and the wages are not assignable by statute.

2. Assignments 🔑12.

Where employment already exists, but the wages are yet to be earned, a possibility coupled with an interest exists, and is assignable, under Civ. Code, § 1044.

3. Assignments 🔑15.

It is a rule of public policy that unearned salary of a public officer cannot be assigned.

4. Officers 🔑1—"Public office" is right, authority, and duty created and conferred by law, by which, for a given period, an individual is invested with portion of sovereign functions of government for the public benefit; "public officer."

A "public office" is the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public, and, unless the employment is a public office, incumbent is not a "public officer."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Office; Officer.]

5. Assignments 🔑15—Future earnings of one employed on highway held assignable as against judgment creditor's proceeding (Const. art. 4, § 19; Code Civ. Proc. § 710; Civ. Code, § 955).

One employed intermittently to render labor on public highway with his scrapers, wagons and horses, or mules, *held* not a public officer, in view of Const. art. 4, § 19, and hence assignment of future earnings, complying with Civ. Code, § 955, was valid, as against proceeding by judgment creditor, under Code Civ. Proc. § 710.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by D. M. Walker for writ of mandate, to be directed to John F. Rich, as County Auditor of the County of Colusa, to compel issuance of warrant to satisfy a judgment against an employee of the county. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. Walker, of San Francisco (Russell W. Cantrell, of San Francisco, of counsel), for appellant.

U. W. Brown, of Colusa, for respondent.

HART, J. The plaintiff, on the 7th day of November, 1923, obtained a judgment against one D. B. Smith and his wife, in the justice's court of Williams judicial township, in the county of Colusa, in the sum of $299.99, for money due plaintiff from the Smiths for groceries furnished the latter by the former. On June 19, 1924, an execution upon said judgment was duly issued and the same delivered to the constable of said judicial township for levy upon the property of defendants to satisfy said judgment, but said constable returned the execution unsatisfied. It appears from the findings that said D. B. Smith, from time to time during the times set out in the petition, was employed by the county of Colusa to work with his teams, wagons, and scrapers upon the county roads of said county, for which services and use of teams, wagons, etc., he was paid wages by said county, amounting, approximately, in the aggregate, so the complaint or petition alleges, to the sum of $150 per month, payable on or about the 1st day of each and every month.

Proceeding under, and in pursuance of, the provisions of section 710 of the Code of Civil Procedure, the plaintiff, on the 30th day of June, 1924, "at about the hour of 9:30 a. m. of said day," filed with the defendant or respondent, as auditor of the county of Colusa, a duly authenticated transcript of said judgment, and demanded of said respondent, as said auditor, that he issue his warrant upon said judgment for the sum of money then due from said county to said D. B. Smith, to wit, approximately the sum of $150, but that the respondent, as said auditor, refused and still refuses to issue to plaintiff his said warrant for said or any sum then due said D. B. Smith, the judgment debtor under said judgment. The plaintiff thereupon instituted in the court below this proceeding in mandate, praying that the respondent be compelled, as auditor of Colusa county, to issue his warrant

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court October 2, 1926.

in favor of the justice of the peace of said judicial township for such sums as may be due the said D. B. Smith from the said county as for the compensation earned by said Smith for the month mentioned and for other subsequent months, as will hereinafter be explained. The court denied the application, and the plaintiff appeals from the judgment thereupon entered, supporting the appeal by the judgment roll alone.

The findings tell the rest of the story, which stated in substance, is, that on the 15th day of June, 1924, and prior to the filing of the certified copy of said judgment with the auditor, said D. B. Smith by a writing assigned a claim due him from said county, in the sum of $135, which was earned for the labor performed, etc., for the period commencing on and with the 2d day of June, 1924, and ending on and with the 14th day of June, 1924, to the College City Rochdale Company, a corporation; that on the 24th day of July, 1924, in the early afternoon, the appellant filed a second authenticated transcript of said judgment with said auditor; that before the filing of said second authenticated transcript of said judgment, and on the 19th day of July, 1924, said D. B. Smith, by a writing, assigned to said Rochdale Company all moneys then earned by him for the services to said county during the said month of July and prior to said assignment; that, early in the morning of the 29th day of August, 1924, appellant filed with said auditor a third duly authenticated transcript of said judgment; that on the 19th day of August, 1924, and before the filing by appellant of said third transcript of said judgment, said D. B. Smith assigned in writing all moneys then due him from said county for labor of himself, teams, etc., and then earned prior to the filing of said third transcript, to said Rochdale Company, "and also all moneys that he might thereafter earn during the month of August, 1924, for the labor of himself, teams, wagons, and scrapers, for work on the roads and bridges in said Colusa county," which assignment was filed with defendant (auditor) on August 21, 1924; that on the afternoon on the 29th day of October, 1924, the appellant filed with said auditor a fourth duly authenticated transcript of said judgment; that on the 10th day of October, 1924, and before the filing of said fourth transcript of said judgment, said Smith, by a writing, assigned to said Rochdale Company "all moneys then earned during the month of October, 1924, prior to said assignment, for the labor of himself, teams, wagons, and scrapers, and also all the money that he might thereafter earn during the month of October, 1924, for the labor of himself, his teams, wagons, and scrapers."

The court further found, as the complaint or petition alleges, that the respondent, as auditor, etc., issued his warrant, in each of the instances above mentioned, to the said Rochdale Company, upon the assignment made by said D. B. Smith to said company and filed with said auditor. It is also found that the labor performed by said Smith for said county was upon the county roads and bridges in said county, "but that he was not a regular employee of said county; that for such services of himself and of his teams, wagons, and scrapers claims were presented to the board of supervisors of the said county of Colusa, and allowed by said board at its regular meetings in the month following the doing of said work." It is further found that all said warrants for wages earned by said D. B. Smith were assigned to said Rochdale Company "for the necessities of life, and that such necessities of life were furnished the said D. B. Smith by said Rochdale Company directly, and that said assignments, and each of them, were only for the amounts needed to furnish such necessities; that each of said assignments had attached to it the written consent of the wife of said D. B. Smith, consenting to the making of said assignments."

The court concluded, as a matter of law from its findings, that the money earned by said D. B. Smith in the manner indicated for the months named in the complaint and findings "became the property of the College City Rochdale Company upon the making and the filing of said assignments."

It will be noted that, in at least two instances, the assignments involved not only the transfer of money already earned by said Smith at the time of the making of the assignments, but also moneys to be earned by him in the future for the respective months covered by said assignments. Since, as to the time of the filing of the respective documents with the auditor, the assignments hold priority over the transcripts of the judgment, it is obviously true that, if the assignments are legally valid, the action of the auditor in issuing the several warrants to the assignee of D. B. Smith and consequently the action of the court below in refusing to grant a peremptory writ of mandate herein must be sustained. The appellant, though, contends, that the assignments were and are absolutely void in that they were and are in contravention of established public policy for this reason: That they involved an attempt to assign and transfer compensation, or wages, or salary to be earned and paid in the future to an officer of the government for services yet to be performed. The appellant maintains that this cannot legally be done, nor can such an employee assign a part of his claim only. The defendant, per contra, maintains that the said D. B. Smith, although an employee of Colusa county and the services performed and to be performed by him, compensation for which he assigned on the several occasions indicated to the Rochdale Company, were for the public, was not a "public officer," within the true meaning or concept of that phrase, but was, as such employee, only intermittently, or as the exigencies of his duties as such required of him from time to time, by the use of his own teams and other equipments necessary thereto, engaged in the performance of the work of the ordinary laborer, as the latter term is commonly understood to imply. As seen, the conclusions of law arrived at by the court below, from the facts harmonize with the position of the defendant.

[1, 2] Before taking up what is regarded as the pivotal point of decision here, these well established propositions may be stated: (1) That, as our Civil Code (section 1044) expressly provides, "property of any kind may be transferred, except as otherwise provided"; (2) that, as also the same Code likewise provides, a mere possibility not coupled with an interest cannot be transferred. In this connection, it may be explained that, where an employment does not exist but a party may be employed by another in the future, such situation presents a case of a mere possibility not coupled with an interest, and hence the element of negotiability is wanting, but where the employment already exists, the wages yet to be earned from such employment by the party employed, then, although we have a case of mere possibility, it is a possibility coupled with an interest, which is assignable under our Code and according to the authorities. See Cox v. Hughes, 10 Cal. App. 553, 557, 558, 102 P. 956; 2 Am. & Eng. Enc. of Law, p. 1031. The authority last named thus states the rule last referred to:

> "An assignment of wages to be earned under an existing employment made in good faith and for a valuable consideration is valid. It is immaterial in such a case, that the assignor works from day to day and is hired for no specified time, or that he works by the piece, and his wages per month vary, or that he is removable at any time."

Another rule of the Civil Code (section 955) is important to the present consideration in that therein it is declared:

> "No assignment of, or order for, wages or salary shall be valid unless made in writing by the person by whom the said wages or salary are earned and no assignment of, or order for, wages or salary made by a married person shall be valid unless the written consent of the husband or wife of the person making such assignment or order is attached to such assignment or order. * * * No assignment of, or order for, wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned, except for the necessities of life, and then only to the person or persons furnishing such necessities of life directly, and then only for the amount needed to furnish such necessities."

As has been shown, the court, in the instant case, expressly found that the assignments were made for, and in consideration of, necessaries of life furnished D. B. Smith by the assignee, and that the written consent of the wife of the assignor was attached to each of the assignments.

[3] It is, of course, conceded that it is a well-established rule of public policy that an unearned salary of a public officer cannot be assigned. Bangs v. Dunn, 66 Cal. 72, 4 P. 963. The rationale of the rule has been stated in various forms. Thus in 2 Am. & Eng. Enc. of Law, p. 1033:

> "The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the work, at the periods appointed for their payment. The assignment of such funds before they are due impairs the efficiency of the public service, and is void both in law and equity as being against public policy."

In Lewis v. Denver, 9 Colo. App. 328, 48 P. 317, the reason of the rule is thus explained:

> "The salary of a public officer is a provision made by law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office."

Again:

> "It would be very embarrassing generally, and under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted, and if the funds were thus allowed to be diverted from their legitimate object, by process of attachment in favor of creditors, or otherwise, the functions of the government might be suspended." Bank v. Dibrell, 3 Sneed, Tenn. 379; Ruperich v. Baehr, 142 Cal. 190, 194, 75 P. 782.

It is obviously true that prior to the enactment of section 710 of the Code of Civil Procedure the salary of a public official was not subject to the process of attachment or garnishment. Trow v. Moody, 27 Cal. App. 403, 405, 150 P. 77; Ruperich v. Baehr, supra. This conclusion was based upon the proposition that, until such enactment, the seizing thus of the salary of a public officer was contrary to public policy.

[4, 5] The single question here, then, is, Was the said D. B. Smith, while employed by the county of Colusa to perform the services indicated, a public officer of said county? In another form, the question may be put, Was his employment a public office? If the employment was not "a public office," then, obviously, Smith was not a "public officer." "A public office," says Mr. Mechem, in his work on Public Officers, in section 1, "is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions

of the government, to be exercised by him for the benefit of the public." Again that learned author declares (section 4, same work):

> "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being to be exercised for the public benefit. Unless the powers conferred are of his nature, the individual is not a public officer."

The cases generally have approved and accepted the definition of "public office" and "public officer" thus given by Mr. Mechem. See Curtin v. State of California, 61 Cal. App. 377, 214 P. 1030, and cases therein named. It is perfectly clear that the employment, in the performance of the duties of which said D. B. Smith was engaged, is far from coming within the description of a "public office" as given by Mr. Mechem. The employment merely involved a contract between him and the county, acting through its governing board, whereby he agreed to and did perform certain labor, which in no sense was concerned or connected with the exercise or administration of the sovereign powers of the government, except in so far as his employment for the purpose indicated involved the exercise by the board of supervisors itself of the general sovereign powers conferred upon it by law. There was neither expressly nor by implication the delegation of any of the sovereign powers of the government to Smith by virtue of the contract of employment. He was merely engaged to perform labor upon the public highway by the use of such mechanical and other equipments and means (scrapers, wagons, and horses or mules) as are commonly used in and necessarily required for the performance of such labor. The findings show that he was not employed for a definite term or period, but fairly and reasonably afford the conclusion that his employment was intermittent, or to be and was prosecuted from time to time, or as the necessity for work upon those of the public roads to which his employment was assigned might require, and that he was subject to be discharged at any time. In days agone, when the propelling power of fire department apparatus of cities was the horse, a contract, either of definite or indefinite duration, by a city with a farrier to shoe its "fire horses" would not for a moment be supposed to confer upon the farrier any of the sovereign functions of government. Nor would such a contract by a county with a machinist to repair the former's automobiles or heating machinery in its buildings have any such effect. No possible difference in the general character of the duties involved is discernible between the contract of employment in the instant case and those in the cases supposed. But it is unnecessary to proceed further with an independent discussion of the problem propounded here. An examination of the cases which have dealt with the precise question presented herein and a comparison of the facts of this with the facts of said cases will readily show the utter futility of the argument advanced, or any which may be advanced in support of the theory that the contract of employment involved charged Smith with the exercise or administration of any part of the sovereign powers of the state.

In Curtin v. State of California, supra, by the authority of a concurrent resolution adopted by the senate and assembly of the Legislature, the Governor appointed the plaintiff as an expert on the subject of revenue and taxation, to investigate the existing state system of taxation and report to the succeeding Legislature the results of such investigation, with the view of correcting the recognized deficiencies in said system. No express provision was made for compensating plaintiff for the services thus to be performed by him. After making the investigation and his report thereon, the plaintiff brought an action for the reasonable value of his services rendered under and by virtue of said employment. At the time of his appointment the plaintiff was a member of the state senate, and it was contended at the trial of the action and on appeal that said employment constituted a public office and the appointee a public officer, and that by reason thereof the appointment of plaintiff was absolutely void under the terms of section 19 of article 4 of the Constitution, making it unlawful for any member of the state senate or the assembly, during the term for which he shall have been elected, to be appointed to any civil office of profit "under this state which shall have been created, or the emoluments of which have been increased, during such term, except such offices as may be filled by election by the people." This court held that the duties involved in such employment did not appertain to the exercise or administration of any of the sovereign powers of the state, and hence the appointment constituted a mere contract of employment and not a public office. The question is fully examined in that case, and many authorities supporting the conclusion therein arrived at are cited. Among the cases so cited is that of Robertson v. Ellis County, 38 Tex. Civ. App. 146, 84 S. W. 1097, in which it was held, after an elaborate consideration of the question, that "official stenographers," authorized by law to be appointed by the judges of the district courts of said state, and whose duties were to report the proceedings of all trials and other business properly coming before said tribunals, while public employees were not "public officers" for the reason that the act authorizing their appointment did not confer upon them "any sovereign function of government." See, also, Mulnix v. Elliott, 62 Colo. 46, 156 P. 216.

If instances such as these do not involve the delegation of sovereign functions of government, then surely it cannot be held that the employment by the government of a party to perform for it the duties of a laborer confers such functions or powers. There are many cases to the effect that the act by a laborer or a contractor performing work for a county, or a city, or the state, of assigning, if necessary, unpaid moneys earned by him for labor or work so performed in payment for the necessaries of life to one furnishing him with such necessaries is not against public policy. Indeed, in many cases it has been said that the assignment of wages by the one earning them is often a benefit, rather than a handicap, to the employer, as well as the employee, even though the former be the public. See Cox v. Hughes, 10 Cal. App. 553, 561 et seq., 102 P. 956; Smith v. Atkins, 18 Vt. 461; Mallin v. Wenham, 209 Ill. 258, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233.

Our conclusion is that Smith, at the times of executing the assignments, had the right to assign any claims he then had against the county or which might accrue to him in the future, by reason of the existing contract of employment between him and the county, for necessaries of life to any party furnishing him such necessaries.

The judgment appealed from rests upon an impregnable legal foundation, and it is accordingly affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

79 Cal. App. 127

PEOPLE v. COLLINS. (Cr. 899.)

(District Court of Appeal, Third District, California. Aug. 6, 1926.)

1. Robbery 🔑24(1).

Evidence *held* sufficient to sustain conviction of robbery of the first degree.

2. Criminal law 🔑1170½(5)—Refusal to permit further cross-examination as to strength or weakness of memory held not prejudicial, where cross-examination as to witness' testimony before grand jury was permitted.

Where, in robbery prosecution, defendant cross-examined witness as to his testimony given before grand jury and thus placed before trial jury any variance between that and testimony given at trial, refusal to permit witness to be cross-examined further as to strength or weakness of his memory *held* not prejudicial.

3. Criminal law 🔑396(2), 1169(1)—Where collateral or immaterial conversation had been gone into without objection, there was no error or prejudice in permitting conversation to be brought out by examination of parties thereto.

Where subject-matter of certain conversation, though collateral or immaterial, had been gone into in robbery prosecution without objection by both sides, that court permitted subsequent examination of parties to conversation to bring out the full conversation *held* not error, and in any event not prejudicial.

4. Criminal law 🔑1137(2).

Defendant cannot complain of errors invited by him.

5. Criminal law 🔑1186(4).

Ruling of trial court will not warrant reversal unless it prejudiced defendant or resulted in a miscarriage of justice, under Const. art. 6, § 4½.

6. Criminal law 🔑730(3)—District attorney's question held not to require reversal, where court promptly sustained objection and admonished and instructed jury that question was not evidence.

Where defendant claimed that testimony of certain person would acquit defendant and introduced evidence of unsuccessful attempts to locate him, that district attorney asked witness if such person was "man you saw handcuffed in bank robbery charge" *held* not to require reversal, where court promptly admonished and instructed jury that question was not evidence.

7. Criminal law 🔑730(12)—District attorney's remark in argument that defendant was a desperate criminal held not to require reversal, in view of court's admonition and instruction.

That district attorney in argument declared that defendant was a desperate criminal to his knowledge *held* not to require reversal, where court promptly admonished jury to disregard it and thereafter instructed jury to consider only facts testified to by witnesses in arriving at verdict.

8. Criminal law 🔑1186(4)—That requested instruction on alibi was refused and instruction given omitted element of applicable law held not prejudicial under evidence (Const. art. 6, § 4½).

That court refused to give requested instruction upon question of alibi and instruction given omitted an element of law applicable thereto *held* not prejudicial error, under Const. art. 6, § 4½, where evidence against defendant was strong and convincing while testimony for defense failed to raise reasonable doubt in minds of jury as to guilt.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Mark Collins was convicted of robbery of the first degree, and he appeals. Affirmed.

Bond & Deirup, of Chico, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

NEEDHAM, Justice pro tem. The defendant was indicted by the grand jury of Butte county of the crime of robbery, alleged to have been committed on the 31st day of August, 1924. He was convicted of the crime of robbery of the first degree and was sentenced to state's prison. The defendant appeals from the judgment and from an order denying him a new trial.

[1] Leslie Meredith was charged with the same offense in a separate accusation, and he confessed to a participation in the crime, and at the trial gave evidence against the defendant, explaining how the crime was committed by the defendant and himself, and thus admitted he was an accomplice. The persons robbed were Cottrell, Bonynge, and Merriken, and during the robbery a pistol was used by the defendant in the consummation of the crime. The robbery took place in the early morning of August 31, 1924, somewhere between 2 and 3 o'clock a. m., on the public highway leading toward the town of Chico. In addition to the testimony of the accomplice, Meredith, Cottrell and Bonynge, two of the persons robbed, identified the defendant. The testimony of Cottrell, Bonynge, and Meredith made a complete case against the defendant, if believed by the jury. The defendant took the stand and denied in detail any participation in the crime, and there was submitted evidence in his behalf attempting to prove an alibi. However, the witnesses in behalf of the defendant whose testimony was relied upon to prove an alibi accounted for the defendant at his home in Chico up to a time between 11 o'clock p. m. and midnight, prior to the robbery, and it was in evidence that the scene of the robbery was a few miles only from Chico, and it would take but a brief period to go thereto from Chico. It will thus be seen that the evidence presented to the jury was conflicting, and is binding upon this court upon appeal. Counsel for the defendant, in their opening brief, state:

> "We realize that the evidence will probably support the verdict if it were not for the serious errors committed on the part of the court, and for the misconduct by the district attorney during the trial."

This being the situation, we are not called upon to review the evidence; it was amply sufficient to sustain the verdict, if believed by the jury.

[2] The appellant complains of a ruling made by the court sustaining an objection to a question propounded by counsel for the defendant to the witness, Meredith, the accomplice, and which question was by way of cross-examination, aimed to test the memory of the witness as to some differences in the testimony given by him before the grand jury and as given at the trial. The witness had stated that his memory was not quite as clear at the time he appeared before the grand jury as it was at the time of the trial, and he was asked the question: "Q. What has made it any clearer since?" To this an objection was made by the district attorney, which was sustained. Thereupon the following question was propounded to the witness by counsel for the defendant: "Q. Did anybody say anything to you about what happened?" To which an objection was interposed by the district attorney that it was in effect the same question to which an objection had just been sustained. This objection was also sustained by the court. A careful reading of the transcript shows that the testimony given by this witness before the grand jury was to the effect that the witness and the defendant were traveling north in the defendant's automobile at the time of the robbery, whereas his testimony at the trial was that they were going south. Subsequent to the ruling of the court, sustaining the objections above set forth, counsel for defendant propounded the following questions upon cross-examination:

> "Col. Bond (Counsel for Defendant): Q. All right; you testify now that you were coming south at the time of the holdup? A. Yes, sir.
>
> "Q. At the time you testified before the grand jury, did you know whether you were going north or south? A. I presume that I did.
>
> "Q. Will you just read that part of it, that part of this evidence? (Indicating evidence taken before the grand jury.) (Witness reads testimony.) A. Well; I was a little bit excited when I made that statement.
>
> "Q. Did you give that testimony: 'A. We came back out the road, and after some coercion why he induced me to help him in this holdup. Well; I forgot whether we was going north or south at the time, but I think we were coming south toward Chico'—Did you give that testimony? A. If it is written down there, that is what I said."

It will thus be seen that, although the court sustained the two objections above set forth, yet as a matter of fact, the defendant's counsel cross-examined the witness as to his testimony given before the grand jury, and was permitted to bring out and place before the trial jury the testimony given in each instance. Counsel for the defendant without objection cross-examined the witness as to his testimony given before the grand jury and placed before the trial jury any variance between the testimony given before the grand jury and that given at the trial, and the jury had full opportunity to observe the witness, his manner upon the stand, the strength or weakness of his recollection, and we cannot say that because the court did not permit counsel for the defendant to further cross-examine the witness as to the strength or weakness of his memory that such ruling was prejudicial to the defendant. Such a ruling would not warrant a reversal, in view of the strong case made out against the defendant.

[3, 4] The appellant complains that when the witness J. D. Collins, father of the defendant, when recalled for further cross-examination by the district attorney that error was com-

mitted by the court in permitting further cross-examination as to a conversation had at the noon hour during the trial between this witness and Sheriff Harries of Salt Lake, Utah. The record shows that the subject-matter of this conversation was brought out prior thereto for the first time by the district attorney when the same witness was first under cross-examination, and this testimony was elicited without any objection whatever from counsel for the defendant. In fact, the testimony shows that counsel for the defendant upon the redirect examination of the witness J. D. Collins sought to bring out this conversation himself. The ruling complained of was the action of the court permitting the matter to be cleared up by having Collins recalled for further cross-examination. We think the rule is that, even though the matter under inquiry is collateral or immaterial, yet, if it has been gone into without objection in the first instance, as appears by the record in the instant case, by both sides, or either side, it would not be error to subsequently clear the matter up and bring out the full conversation by further examination, and under this situation which was permitted by the court neither side is in a position to predicate error. The appellant also claims similar error in the rulings of the court in permitting the witness Sheriff Harries, the other party to the same conversation, over the objection of the appellant, to testify as to this conversation which took place in the courtroom at the noon hour, and complains that the action of the court was prejudicial error; but as we have seen, the subject-matter of this conversation was in the first instance gone into without objection, and there was no error committed by the court in permitting the conversation to be brought out by either party to the conversation. While we do not go so far as to say that the defendant invited the introduction of the evidence under consideration, it can be truly said that he acquiesced in its introduction in the first instance, as above shown. "It is well settled that a defendant cannot complain of errors invited by him." See 8 Cal. Jur. 564.

[5] In any view of the matter under discussion, we cannot say that the rulings prejudiced the defendant or resulted in a miscarriage of justice, and under section 4½ of article 6 of the Constitution, such ruling will not warrant a reversal of the case.

[6] Appellant's counsel argue that the district attorney was guilty of such misconduct during the trial as to require a reversal of the case, and cite as the first ground of misconduct the asking of the witness J. A. Light, a constable, the following question:

> "Q. Mr. Light, will you state whether or not this Jack Taylor is the same man that you saw handcuffed by Sheriff Moulton in the sheriff's office in Sacramento on a bank robbery charge?
>
> "Mr. Bond: We will object to that as being incompetent, immaterial, and irrelevant, and assign it as misconduct on the part of the district attorney, and will ask the court to instruct the jury to pay no attention to it.
>
> "Mr. Rothe: Col. Bond brought out by this witness the attempt made to find this man Taylor by Mr. Light, and I want to show by this witness where he saw this man Taylor.
>
> "The Court: The question of the district attorney and the answer will be stricken out; if there was an answer given, it is not evidence. The question asked by any attorney is not evidence, and particularly this question is not evidence. It is stricken out, and the jury will not consider that question. The witness has not answered it and therefore it just stands with the question stricken out, and you will not consider it. Now you may show by Mr. Light, if you desire, if he knows where this man is. Simply show if he can, or, if he knows, where this man is, and leaving out all reference to the matters you suggested before."

It seems from the reading of the record that appellant and his counsel claimed throughout the trial that if they could find Taylor his testimony would acquit the defendant, and throughout the trial defendant's counsel put before the jury the testimony of many witnesses as to efforts made to locate Taylor and have him subpœnaed, but without success, and Taylor did not appear and give testimony at the trial.

The counsel for appellant earnestly maintain that, notwithstanding the prompt action of the trial judge in sustaining the objection of appellant and the instruction and admonition to the jury, that the action of the district attorney was such misconduct as to require a reversal, and cite many cases where it is claimed Courts of Appeal have directed a new trial be had because of similar misconduct. We will not take the time and space to review the cases cited. It is sufficient to say that in our view, after a careful review of these cases and a comparison of them with the misconduct complained of in the particular now under review, that it cannot be reasonably claimed to be similar. We must assume that the jury was composed of individuals of ordinary intelligence and that the jury followed the admonition and instructions so promptly given by the trial judge, and we are of the opinion that the defendant's rights were not prejudiced to an extent demanding a reversal.

[7] It is next urged that the district attorney committed reversible error in his argument to the jury, and the following language used by that official cited:

> "Now, as to Mark Collins—you have seen him a good deal, ladies and gentlemen, as he sits here; you know that he is a good looking man and he probably knows that himself—but I want to tell you in all sincerity that Collins as sits over there next to his attorney—and I say this with a good deal of thought—Mark Collins is one of the most desperate and heartless and cold-blooded criminals that has ever been tried in this court, to my knowledge, and I say that absolutely because—
>
> "Col. Bond (interrupting): Wait a minute.

To the remarks of the district attorney stating that he is a desperate criminal to his knowledge we take exception, and we ask the court to instruct the jury to pay no attention to it, and we assign it as error.

"The Court: Ladies and gentlemen of the jury—

"Mr. Rothe (interrupting): I am simply referring to this case. (At the request of the Court the remarks by the district attorney are read by the reporter.)

"The Court: That remark of the district attorney will not be considered; it is not in the case, and it is not evidence.

"Mr. Rothe: I am basing it solely on the evidence in this case and am referring to nothing else except the evidence that has been brought out in this case."

Here, again, the trial judge promptly in effect sustained the objection of appellant's counsel and properly instructed the jury. The appellant very earnestly argues that the language above quoted by the district attorney is such that the action of the court above set forth did not cure the alleged injury done to the defendant, and cites many cases where language of prosecuting officers used in argument was held to be reversible error, notwithstanding the court at the time properly and promptly admonished the jury to disregard it. We find that the record discloses, in addition to the admonition given by the court just above referred to, that the court at the end of the case, in the general instructions given the jury, gave the following:

> "Under your oaths as jurors, you are to take into consideration only such evidence as has been admitted by the court, and you should disregard and discard from your minds every impression or idea by question asked by counsel which were objected to and to which objections were sustained."

And also:

> "The defendant is to be tried solely upon the evidence which is before you and not upon suspicions that may have been excited by questions of counsel, answers to which were not permitted by the court. You are not to consider evidence which has been excluded by the court in determining any fact in the case."

And again:

> "You are cautioned to distinguish carefully between the facts testified to by witnesses and the statements made by counsel or contained therein in their arguments as to what facts have been proved, and you must in arriving at your verdict consider only the facts testified to by the witnesses."

After a careful examination of the cases called to our attention, we do not need to say more than that in our view any injury done to the defendant, if any, by the language used by the district attorney was removed by the very full and clear instructions of the court, and a reversal would not be warranted.

[8] The last ground urged for a new trial is that the court erroneously refused to give an instruction requested by the defendant upon the question of alibi, and gave an instruction omitting an essential element of the law applicable thereto. The instruction requested was the following:

> "The defendant has introduced testimony to prove an alibi. In order to entitle the defendant to an acquittal at your hands, it is not necessary that the defendant prove an alibi by a preponderance of evidence but it is sufficient to entitle him to a verdict of 'not guilty' if such proof raises in your minds a reasonable doubt as to the presence of the defendant at the place where the crime is alleged to have been committed and at the time referred to in the indictment." People v. Visconti, 31 Cal. App. 170, 160 P. 410.

The court did, however, give the following:

> "One defense interposed by the defendant is known in law as an alibi—that is, that the defendant was at another place at the time of the commission of the alleged crime. All the evidence bearing upon the question of an alibi should be carefully considered by the jury, and if, in view of all the evidence, the jury have a reasonable doubt as to whether the defendant was in some other place when the alleged crime was committed, they should give the defendant the benefit of such reasonable doubt by an acquittal."

It will be observed that the instruction given and above set forth omitted language informing the jury that evidence of an alibi is sufficient to entitle a defendant to an acquittal if it raises in the minds of the jury a reasonable doubt as to the presence of the defendant at the time and place of the alleged crime. The given instruction is also claimed to be erroneous for the reason that the language used refers to "in some other place," when it should have been "at the scene of the crime," or language of similar import. In the case of People v. Visconti, 31 Cal. App. 169, 160 P. 410, 411, the case was reversed because of the refusal of the court to give a requested instruction upon the question of alibi, and no instruction was given upon that subject. A petition to have this case heard in the Supreme Court after judgment in the District Court of Appeal was denied by the Supreme Court in the following words:

> "The Court: The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied. In denying the application we deem it proper to say that we are not to be understood as intimating that the refusal to give such an instruction as was refused in this case would in all cases be deemed by us sufficient cause for reversal. Especially is this true in view of the provisions of section 4½ of article 6 of the Constitution. In denying the application for hearing in this court we assume that the District Court of Appeal concluded, in view of the circumstances of this particular case as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendant."

The record shows that counsel for the defendant do not assign any errors as to the instructions except as to the one given and the one refused upon the question of an alibi. Upon all other subjects the instructions given were free from error. The Supreme Court, in denying a hearing in the case of People v. Visconti, supra, which was a case in which no instruction whatever was given upon the subject of an alibi, although such a request was made, stated:

> "We are not to be understood * * * that the refusal to give such an instruction * * * would in all cases be deemed by us sufficient cause for reversal. Especially is this true in view of the provisions of section 4½ of article 6 of the Constitution."

In the instant case, we believe, under section 4½ of article 6 of the Constitution, that the court did not commit prejudicial error in instructing the jury.

The learned counsel for the appellant, in closing their brief, state:

> "We submit that the errors should be considered wholly irrespective of the provisions of section 4½ of article 6."

We do not, of course, believe that counsel intended that this request should be taken literally. We assume that counsel meant by this that the errors committed during the trial were such that they cannot be cured under this provision of the Constitution. After a most careful consideration of the record and the briefs of counsel and the law applicable to the case, we are irresistibly brought to the conclusion that, although certain errors were committed during the trial, that these errors were not prejudicial to that extent as to require a reversal of the case and the granting of a new trial.

As stated, the evidence against the defendant was exceedingly strong. The accomplice, Meredith, related in detail how and when the crime was committed by the defendant and himself. The defendant was positively identified by the witnesses Cottrell and Bonynge. The testimony introduced in behalf of the defendant to prove an alibi outside of the evidence of the defendant himself accounted for the defendant as being at his home in Chico up to a time between 11 o'clock p. m. and midnight. The evidence is undisputed that the crime was committed some time between 2 and 3 o'clock a. m. following, and that the scene of the crime was but a few miles from the home of the defendant. It is significant that the wife of the defendant, while on the stand, gave no testimony in support of an alibi other than that given by the other witnesses.

We find the following in California Jurisprudence, vol. 8, § 382:

> "When the time of the alleged crime is narrowed to a particular hour, proof of alibi need not include the whole of the day when the alleged offense is claimed to have been committed, but is sufficient if it creates a reasonable doubt of defendant's presence at the commission of the offense. People v. Morris, 3 Cal. App. 1, 84 P. 463. In such case it has been said, the court, if requested, should confine the jury's consideration of the evidence to the hour, or about the hour fixed by the prosecuting witness."

The evidence of the prosecution narrowed to a particular time of the alleged crime as somewhere between 2 and 3 o'clock a. m. The testimony for the defense upon the subject of an alibi outside of the testimony of the defendant, accounted for him, as stated, up to the time between 11 o'clock p. m. and midnight prior to the commission of the alleged crime. As stated, the testimony of the prosecution was strong and convincing, while the testimony for the defense failed to raise a reasonable doubt in the minds of the jury as to the guilt of the defendant, as shown by their verdict.

Upon a review of the whole case, including the evidence, we are satisfied the defendant was fairly tried and justly convicted, and it is ordered that the judgment and order be and they are hereby affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

199 Cal. 357

PEOPLE v. SLATER. (Cr. 2851.)

(Supreme Court of California. Sept. 7, 1926. Rehearing Denied Oct. 7, 1926.)

1. Criminal law ⚷1159(4)—Verdict will not be disturbed because of discrepancies in testimony, since jury are sole judges of credibility of witnesses.

In prosecution for murder, where discrepancies between testimony of witnesses as given upon trial and testimony as related upon preliminary examination were expressly called to attention of jury, their conclusion will not be disturbed since jury who saw and heard witnesses were sole judges of credibility of witnesses.

2. Homicide ⚷166(4) — In prosecution for murder of constable, evidence of defendant's connection with burglary previously committed was admissible to show that motive of defendant was to commit murder.

In prosecution for murder, where defendant shot constable who detained him for purpose of investigating his identity and connection with burglary previously committed, it was not error to admit evidence of burglary to show that motive of defendant was to murder constable to escape arrest.

In Bank.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

William J. Slater was convicted of murder in the first degree, and he appeals. Affirmed.

Fred Duffy, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Edwin W. Widney, Deputy Atty. Gen., for the People.

RICHARDS, J. This appeal is prosecuted by one William J. Slater, who, with one James R. Brown, was charged with the murder of one James M. West, alleged in the information to have been committed on the 2d day of July, 1925, at Needles, in the county of San Bernardino, both of said defendants being convicted upon said charge of murder in the first degree, the punishment of Brown being fixed by the jury at imprisonment for life, but the punishment of Slater being, by the silence of the jury in that respect, fixed at death. The defendant, Slater, appeals, and upon said appeal urges a reversal of said judgment of conviction as to him upon several grounds.

[1] The first contention of the appellant is that the evidence was insufficient to justify the verdict of the jury finding him guilty of murder in the first degree. In support of said contention the appellant directs our attention to a number of alleged discrepancies between the testimony of certain of the main witnesses for the people as given upon the trial of the cause and the testimony of said witnesses as related upon the preliminary examination. It is not necessary to deal with these alleged discrepancies in detail, since it is sufficient to say that the jury who saw and heard said witnesses, and whose attention was expressly called to said discrepancies, were the sole judges of the credibility of said witnesses and of the importance to be assigned to whatever discrepancies may have appeared in connection with their testimony, and their conclusion thereon will not be disturbed by this court upon appeal.

The next contention of the defendant is that the trial court committed prejudicial error in permitting the prosecution to introduce evidence of other alleged crimes committed by said defendants shortly before the commission of the capital offense with which they were charged, said former offenses consisting in the burglarizing of certain filling stations and the taking and carrying away therefrom of certain property, consisting of tires, tubes, oils, etc., during the course of the defendants' travel by automobile across the states of Arizona and California, in the course of which these defendants arrived at the city of Needles, carrying with them the said fruits of their recently committed crimes, reports of which had reached Needles just before their arrival and had led the peace officers to investigate the identity of the defendants and their connection with said crimes, in the course of which investigation the defendant Slater had fired the shot which killed Constable West, who was one of the peace officers, and who at the moment of his murder was seeking to detain the defendants in the course of said investigation. Immediately after said murder the defendants fled in their automobile, but, being followed and captured and questioned as to their motive for committing said murder, the defendant Slater made a number of excuses which were intended to convince the arresting officers that the firing by him of the fatal shot was the result of accident and mistake rather than of a murderous intent.

[2] The purpose for which the prosecution introduced at the trial evidence of the commission by the defendants of said former crimes was that of proving the motive which existed in the mind of Slater at the time he fired the fatal shot; namely, that perceiving that he was in imminent danger of arrest for the recent commission of said former crimes, he slew the arresting officer in order to facilitate his escape from such arrest and his further flight from the scene of the commission of such former crimes. The trial court in the admission of such evidence, and also in its instructions to the jury, carefully and correctly limited the purpose of its admission, and that, so limited, such testimony was admissible for the purpose of showing that the motive of the defendant Slater was that of committing a willful murder, we entertain no doubt. People v. Cook, 148 Cal. 334, 83 P. 43; People

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

v. Argentos, 156 Cal. 720, 106 P. 65; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Bringhurst, 192 Cal. 748, 221 P. 897; People v. Wolfgang, 192 Cal. 755, 221 P. 907; People v. Yaeger, 194 Cal. 452, 229 P. 40.

The next several contentions of the defendant are that the trial court committed reversible error in the giving of certain instructions to the jury. We have examined the entire body of instructions given by the trial court and we find that, taken as a whole, such instructions were very full and fair and that, read as a whole, they are not to be held subject to the criticism which the appellant aims at particular instructions; nor do we find that the particular instructions against which the appellant directs such criticism are fairly subject thereto; nor that the jury, in considering the same, would have been or were misled thereby.

It is our conclusion from a careful reading of the entire record herein that this appellant was accorded a fair and impartial trial and that he was properly convicted of a most foul, unprovoked, and utterly unjustifiable murder. The verdict of the jury herein meets with our full approval, and it follows that the judgment herein must be, and the same is hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

---

199 Cal. 380

ORD LAND CO. v. ALAMITOS LAND CO.
(L. A. 8239.)

(Supreme Court of California. Sept. 21, 1926.)

1. Navigable waters ⚷36(3).

California when admitted to Union as state became vested with title to all tidelands within borders as attribute of sovereignty.

2. Navigable waters ⚷37(2).

California may, subject to constitutional limitations, provide for sale of, and sell, all tidelands within borders, title to which it has at time of issuance of patent.

3. Navigable waters ⚷37(2).

State patent of tidelands is valid only as to such lands, title to which is in state at issuance thereof, and is void as to uplands not within tidelands.

4. Navigable waters ⚷36(3).

Ex parte adjudication by state or state officers that certain lands are tidelands is not conclusive on federal government and may be collaterally attacked.

5. Navigable waters ⚷36(3).

Prior issuance of state patent describing lands as tidelands is not determinative of their character as against federal government or its patentee claiming under patent subsequent in time.

6. Public lands ⚷142.

Where conflicting patents are issued by different sovereignties, neither conclusively determine character of land involved; it should be adjudicated by court of competent jurisdiction.

7. Navigable waters ⚷36(3).

As claimant under state patent to alleged tidelands and one claiming under government patent, whether lands were tidelands must be determined as of September 9, 1850, when California became state.

8. Navigable waters ⚷36(3).

In controversy between patentee claiming under state patent to tidelands and patentee claiming under government patent, evidence *held* to support decision that land in question was never tideland.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the Ord Land Company against the Alamitos Land Company to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus, of Santa Ana, and W. R. Bacon, of Los Angeles, for respondent.

PER CURIAM. The Ord Land Company instituted this action against the Alamitos Land Company to quiet its title to an irregularly shaped strip of land which stretches along a peninsula of sand dunes between the shore of the ocean and certain marshy tidelands adjacent to Anaheim Landing in Orange county. Plaintiff bases its claim of title upon a patent issued January 13, 1916, by the United States government to one John C. Ord, the plaintiff's predecessor in interest. The defendant's adverse claim, on the other hand, is founded upon a tideland patent issued to it by the state of California on April 4, 1901. As these two patents overlap, this action was commenced to adjudicate the respective rights of the parties to the strip of land which is common to both patents. The sole and only issue tried in the lower court was whether or not the controverted strip of land, now covered by sand dunes, was originally tideland. Upon the conclusion of the trial, at which both oral and documentary evidence was introduced, the court found that the strip in question was never tideland; that the state of California was therefore without right or title thereto and could not issue a patent therefor; and that said land was a part of the public domain of the United States and consequently passed to the plaintiff's predecessor in interest by virtue of the federal patent. Judgment in accordance with these findings was entered in favor of the plaintiff quieting its title as prayed for in the complaint. This appeal is prosecuted from said judgment.

[1, 2] Before taking up and considering the contentions advanced on appeal it will be well to state a few general propositions upon which the parties are in accord. It is conceded by both sides that California, when admitted to the Union as a state on September 9, 1850, became vested with title to all tidelands within its borders as an attribute of sovereignty; that the state of California, as an exercise of the sovereign prerogative, may, subject to constitutional limitations, provide for the sale of and sell into private ownership all tidelands within its borders title to which is in it at the time of the issuance of the patent; and that if the land in controversy in the instant case was tideland at the time of the admission of California as a state then the state could properly dispose of said land by patent.

The appellant contends:

> "(1) There is no evidence to support the finding of the court that the lands in controversy were never tidelands. (2) That the findings of the county surveyor, charged with the duty of making the survey for the purpose of ascertaining and locating the tidelands offered for sale, is conclusive as against the United States government as well as all other parties."

If appellant's second contention is found to be meritorious the necessity of considering the first will not present itself. With this in mind, therefore, we will treat of the appellant's contentions in inverse order.

In support of its second contention the appellant urges that:

> "The [trial] court had not the power to go back of the state tideland patent which is the senior patent; that the state had vested in the surveyor general, acting through county surveyors, the power to ascertain and locate the tidelands of the state, and, having done so, in this instance through the survey and the issuance of the patent, that determination is conclusive, and the patent therefor could not be impeached by evidence tending to show that the surveyor had erroneously included lands which are not tidelands."

In short, the appellant contends that as between a state and the federal government the patent first in point of time is binding and conclusive in determining the character of land covered thereby. Or, stated concretely, it is urged that the issuance of a state tideland patent precludes the subsequent issuance of a federal patent covering the same land even though the prior state patent was founded on an erroneous conclusion of a county surveyor and did not in fact cover tidelands.

[3-5] We cannot subscribe to such a doctrine. A state patent purporting to cover tidelands can have no greater force or effect than to transfer tidelands to the patentee named therein. Such a patent is valid and effective only so far as it concerns tidelands, title to which is in the state at the time of the issuance thereof. On the other hand, it is invalid and void in so far as it attempts to transfer uplands not within the tidelands of the state. An ex parte adjudication by the state or state officers that certain lands are tidelands is not conclusive upon the federal government and may be collaterally attacked in any action. Therefore, the prior issuance of a state patent describing the lands covered thereby as tidelands is not determinative of the character of the lands as against the federal government or its patentee claiming under a patent subsequent in point of time.

The following principles announced in 26 Am. & Eng. Ency. of Law (2d Ed.) at pages 347, 348, though concerned with swamp and overflowed lands, would seem equally applicable to tidelands:

> "A patent from the state for lands determined by it in ex parte proceedings to be swamp and overflowed lands and inuring to it under the Swamp Act of 1850 is not conclusive as to the character of the lands patented as against one who connects himself with the title of the federal government. Such person may show that such lands were not in fact swamp and overflowed lands, and that, therefore, the state could grant no title thereto, and the patent is neither presumptive nor prima facie evidence that such was the character of the land as against one claiming under the federal government. * * *
>
> "The federal government has no power by ex parte proceedings in the land department to determine what were and what were not swamp and overflowed lands so as to pass to the states under the Swamp Act of 1850 and bind thereby the state and persons claiming under the state. Therefore, a survey at the instance of the federal government by which particular land is designated as high land is not conclusive as against the state or its grantees that the land was not in fact swamp and overflowed land"—citing authorities.

In the syllabus to the case of Edwards v. Rolley, 96 Cal. 408, 31 P. 267, 31 Am. Rep. 234, also concerned with swamp and overflowed lands, it is stated that:

> "A state patent issued for land which the state has no authority to dispose of is void, and may be collaterally attacked in any action, and its operation as a conveyance defeated. * * *"

[6] The fact that the title to swamp and overflowed lands within their borders came to the several states by virtue of a grant from the federal government (9 U. S. Stats. 519 [U. S. Comp. St. §§ 4958-4960]), judicially interpreted to be a grant in præsenti, where, as title to tidelands within their borders inured to them as an attribute of sovereignty upon their achieving statehood, does not, in our opinion, call for the application of different principles in this respect. It would be a novel doctrine and not in accord with

accepted principles to declare that the prior issuance of a patent by one sovereignty is conclusive upon another sovereignty as to the character of the lands included therein. As stated in Knight v. U. S. Land Association, 142 U. S. 161, 176, 12 S. Ct. 258, 262, 35 L. Ed. 974, "a patent is void at law if the grantor state had no title to the premises embraced in it. * * *" Where conflicting patents are issued by different sovereignties neither should be held to conclusively determine the character of the land involved. That question should be adjudicated by a court of competent jurisdiction.

The authorities cited by appellant are not at variance with this conclusion, for they merely hold that a patent is, in the absence of collusion or fraud, conclusive as to the character of the land involved upon the sovereignty issuing it and subsequent patentees claiming under said sovereignty. Appellant is correct, therefore, in stating that if "the controversy here was between patentees claiming under the same source of title—that is, either from the state or the federal government—it would not be denied that the senior patent takes precedence and would be conclusive." As already indicated, however, we are of the opinion that this latter principle is inapplicable where the patentees claim under different sovereignties. This being so, appellant's second contention must be held to be without merit.

There remains for consideration the appellant's first contention, namely, that there is no evidence to support the finding that the land common to both patents was not tideland at the time California became a state.

Appellant's witnesses testified in substance that they knew and were more or less familiar with the land in question from the year 1877 to the time of the trial; that the topography of the strip of land in controversy and the sand dunes in close proximity thereto is changing constantly and materially from the effects of winds and the other elements; and that the greater part of the winds blow from the ocean toward the tideland and bay, causing the sand dunes to move perceptibly inland and to encroach upon said tideland and bay.

Respondent's witnesses, on the other hand, testified to the effect that no noticeable or material change has occurred in the position or height of the sand dunes from the year 1877; that the width of the sand spit has not varied to any appreciable extent during the period from 1877; and that the width of the tideland marsh between the bank of the slough and the sand dunes had remained practically constant throughout the years.

The trial court, after personally viewing the controverted strip of land in company with counsel for both sides, found on this conflicting evidence that said land was not and never had been tideland.

It is urged by appellant that there is no evidence tending to show the condition or character of the land on September 9, 1850, when California became a state, and that the evidence touching the condition of the land subsequent to 1850 was not admissible. The authorities referred to by appellant indicate that the condition of the land at the time California achieved statehood determines its character. Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; Doe ex dem. Barbarie v. City of Mobile, 9 How. 451, 13 L. Ed. 212.

[7, 8] We are in accord with these authorities, and are of the opinion that the character of the controverted land must be determined as of September 9, 1850. However, we are not prepared to hold, in the absence of direct evidence bearing on the character and condition of the land on said date, that evidence tending to show either a constant or changing condition of the land from 1877 to the time of the trial would not be admissible to assist in arriving at a conclusion as to its character and condition in 1850. Such evidence was tendered by both sides, and the trial court correctly allowed it in to ascertain whether the character of the land had changed with the years. The evidence being in conflict upon this point, and the trial court having personally viewed the premises and concluded that the strip was never tideland, we are of the opinion that such conclusion must stand.

The judgment appealed from is affirmed.

199 Cal. 344

KIMBRO v. KIMBRO. (L. A. 8463.)

(Supreme Court of California. Sept. 4, 1926.)

1. Husband and wife ⇨14(3)—Husband, buying property before marriage and taking title in name of wife, held not to create joint tenancy (Civ. Code, § 161).

Under Civ. Code, § 161, fact that husband before marriage bought land and took title in name of wife, who paid part of purchase price, did not create, expressly or impliedly, joint tenancy.

2. Husband and wife ⇨49½(7)—Payments by husband on land, title to which was taken in wife's name before marriage, presumed a gift (Civ. Code, § 164).

Under Civ. Code, § 164, where husband bought land before marriage and took title in name of woman he afterward married, who paid part of purchase price, any payments by him before or after marriage would be presumed intended as gift.

3. Husband and wife ⇨49½(7).

Relatively slight acts, such as payment of taxes, expenses, or repairs, and occupancy by family, do not overcome presumption of gift to wife as separate property from conveyance to her, under Civ. Code, § 164.

4. Husband and wife 🔑119(1).

Fact that, when man bought land, title to which was taken in name of wife, he expected to occupy property with her for remainder of life, *held* not sufficient to void deed to wife.

5. Deeds 🔑208(1)—Evidence held to sustain judgment that no title passed by husband's deed to wife subsequently destroyed.

In action to quiet title, evidence of husband's execution of unacknowledged deed to wife, believing it did not pass title, and of its subsequent return and destruction, *held* sufficiently to show lack of intention to pass title to sustain judgment that no title passed.

6. Acknowledgment 🔑1.

Provisions relating to acknowledgment of deeds are made to protect creditors and purchasers.

7. Acknowledgment 🔑5.

In absence of statute, acknowledgment is not necessary, and adds nothing to validity or effect of instrument as between parties thereto and persons having actual notice of it.

8. Husband and wife 🔑47(1).

No statute makes acknowledgment of husband's deed to wife essential to give it validity.

9. Deeds 🔑56(7).

In determining question of intent with which deed from husband to wife was delivered, voluntary surrender of deed by wife to him on request was circumstance to be considered.

10. Appeal and error 🔑877(2).

In action to quiet title, where appellant asserted no title in certain lot, decree of trial court adjudging respondent to have title to it will be affirmed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by R. L. Kimbro, also known as Robert L. Kimbro, against Minnette S. Kimbro, to quiet title. From a judgment for plaintiff, defendant appeals. Reversed in part and affirmed in part.

Page & Hurt, Arthur F. Coe and Page, Nolan, Rohe & Hurt, all of Los Angeles, for appellant.

Willedd Andrews, of Los Angeles, for respondent.

SEAWELL, J. Respondent and appellant intermarried in 1909 at the ages of 66 and 44 years, respectively. Each had previously been married, and respondent, during the period covered by the transactions involved in this controversy, was the father of two children, a son and married daughter, issue of a former marriage. Prior to his marriage with appellant he had acquired real property in the state of Illinois, from the sale of which in 1912 he realized the sum of $10,000. This separate fund was used by him in the purchase of three lots or parcels of real property situate in the city of Los Angeles. Appellant having asserted her ownership of lots 61 and 62, known as the Normandie avenue tract, and also lot 12, block 1, Vermont square, and known as the home place, respondent brought an action against her to quiet his title thereto. As to lots 61 and 62, which were improved income properties, and by far the most valuable of his estate, he alleged absolute ownership in himself, and as to lot 12, block 1—the domicile—he alleged ownership to the extent of an undivided one-half interest therein. By her answer appellant claimed said lots as her separate estate. The court caused its decree to be entered adjudging respondent to be the owner in fee absolute of said lots 61 and 62, and as to lot 12, block 1, it decreed each to be the owner of an undivided one-half interest thereof. The appellant has appealed from the whole of said judgment, claiming that the evidence impels a judgment in her favor as to the separate character of said property, and, further, there is no evidence whatsoever in the record supporting the findings of the court that respondent was the owner of or had any interest in or to any part of said real property.

Lot 12, block 1, the home place, was purchased from third parties as a domicile January 28, 1909, about one month prior to the intermarriage of respondent and appellant. Appellant, whose name before marriage to respondent was Minnette S. Kuster, was named solely as the grantee in the antenuptial instrument of conveyance, which was an ordinary grant, bargain, and sale deed. The purchase price was $3,700. An initial payment of $500 was made upon the passing of title. A flat contradiction exists in the evidence as to whether respondent paid any part of said initial payment. It is, however, admitted that appellant furnished from her separate estate at least $400 of said sum. A subsisting mortgage of $2,000 against said property was assumed by the purchaser, and the sum of $1.200, secured by a trust deed, was borrowed to raise the full amount of the purchase price. This latter sum was afterwards paid by moneys received as rentals from lots 61 and 62, which were respondent's separate property. The mortgage indebtedness remains undischarged.

Section 161, Civil Code, provides:

> "A husband and wife may hold property as joint tenants, tenants in common, or as community property."

[1, 2] Clearly a joint tenancy was not created expressly or impliedly by any agreement or by the conduct of the husband and wife, nor do we think the evidence offered to establish a tenancy in common was sufficient to overcome the presumption which

the law directs to be made from the fact that appellant was named in said deed upon the procurement of respondent as the sole grantee.

"Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." (Civ. Code, § 164).

[3] We have here the case of the respondent procuring the execution of a deed in which a *single* woman, with whom he contemplated and soon thereafter consummated matrimony, is named as grantee. Any moneys furnished by the husband before or after marriage in payment of the purchase price, in the circumstances of the parties to this action will be presumed intended by him as a gift. This familiar rule is stated in a broad sense in Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657, and we doubt not that the presumption of gift should be indulged with equal force to the facts of this case as in the case of coverture. Relatively slight acts which may ordinarily be regarded as acts indicating ownership, such as payment of taxes, expenses of repairs, and the occupancy of the residence by the family, are not of themselves sufficient to overcome the presumption of gift, when satisfactorily established. Estate of Klumpke, 167 Cal. 415, 423, 139 P. 1062. The reasons assigned by respondent for making his intended wife the grantee in said antenuptial deed, as related by appellant, were natural and entirely proper and seemingly just in the circumstances of the contracting parties. Her testimony is, substantially, that the husband directed that the deed be made to run in her name as a matter of protection to her against any claim that his heirs might subsequently assert to the property and also as a protection to her in the event financial misfortune should overtake him. As a matter of fact, respondent's testimony is not inconsistent with his wife's claim as to the husband's purpose of having her made the grantee. The following brief quotation taken from his cross-examination fairly discloses the purpose of procuring the deed to be made in appellant's favor:

"Q. You said you put this home place, which you regard as your and her home, into her hand so that if you died she would have it—that is, if you died before she did—or if you should be unfortunate in your other property, your creditors could not get it away from her? A. Well, I told her if I was unfortunate to lose my other property, they could not take it away from her, yes; she would have it for a home. If I passed away before she did, there would be no question about that."

[4] The fact that the husband, at the time he caused the deed to be made and delivered, expected to occupy the domicile in conjugal happiness with his wife to the end of his days, is not a sufficient ground to void the instrument.

During a large part of the 15 years of married life, respondent was physically incapacitated by extreme age, and the wife greatly assisted in managing and caring for his estate. She was industrious and frugal, and observed rigorous rules of economy, considerations not to be lightly regarded by the interpreter of the antenuptial transaction or agreement. The sum of $1,200 was paid in small amounts in discharge of the trust debt. The mortgage indebtedness of $2,000 remains unliquidated. Her equity, deducting the $400 of her own money which she put into the $3,700 investment, would amount to but $1,300, making an annual average of less than $100 during her entire marital period with respondent.

Without pursuing this subject further, we are satisfied that the finding of the court that respondent is a tenant in common in ownership of lot 12, block 1, with the appellant, is not supported by the evidence.

[5-7] This brings us to a consideration of a destroyed deed which was signed and delivered by respondent but not acknowledged, purporting to convey lots 61 and 62, which constituted the most valuable portion of respondent's estate. In 1915, respondent fell very ill with pneumonia, and his physician despaired of his life. While thus ill a deed was at the suggestion of his wife, drawn which by its terms conveyed the title of lots 61 and 62 to his wife. It was delivered to her unacknowledged. Some time thereafter the husband requested the redelivery of said deed to him, and intimated in the conversation that she had obtained his signature and the possession of the deed by employing questionable methods. Incensed by the implication, the wife with a feeling of indignation, returned the instrument to him, and he immediately destroyed it. Appellant takes the position that by signing and delivery of the deed, though unacknowledged, the grantor passed title to the grantee, and it was not revived in the grantor by a redelivery or by the destruction of said instrument. The provisions relating to the acknowledgment of deeds are made for the protection and security of creditors and purchasers. Title vested in a grantor passes by his deed to the grantee as completely as it would if the conveyance had been acknowledged and recorded. Devlin on Real Estate (3d Ed.) p. 817. In the absence of a statute providing otherwise, an acknowledgment is not necessary to and adds nothing to the validity or effect of an instrument as between the parties thereto and persons having actual notice of the execution of it. 1 Cal. Jur., p. 222.

[8] We have no statute in this state making the acknowledgment of a husband's deed essential to give it validity. Granting the rule of law as above stated, we do not think that it should control the instant case, but that the questions of intent and delivery

are the major considerations. The redelivery of said deed and its destruction occurred in 1915. No reference whatever is made to said deed or its contents by the pleadings of either party to the action. No attempt was made at the trial to reproduce its contents or give its effect. The husband admitted the physical preparation of a deed purporting to convey to his wife said lots 61 and 62. At the time the deed was signed, a will had been drawn, at the request of his wife, which he refused to execute. His testimony is that he signed the deed while ill to "gain his peace," which was disturbed by the importunities of his wife. In relating what transpired at and immediately prior to the signing of the deed, respondent, although his wife gives an entirely different version, testified:

"* * * And she [his wife] comes up to town to my lawyer, Mr. Fairall, who was my attorney then, and she had him make a will—there was a sketch made of it, she said afterwards; I didn't see the will—and also had him make a warranty deed to this property, lots 61 and 62, Normandie avenue tract; and she had my attorney come to the house and stayed around there for, I guess, an hour very near, and I thought he had come to call on me, I was pretty well acquainted with him; and, when he started to go away, she says, 'Ain't you going to have Mr. Fairall make your will?' I said, 'No; I don't care about making a will now; probably make one when I get well.' Well, he went away, and the next evening we were alone, the nurse was out for the evening; she came to the bed with a warranty deed, and she says, 'Now, I want to know if you think more of me than you think of your daughter, I want you to sign this deed.' Well, Your Honor, I was in no condition to put up any arguments, so far as that was concerned, at that time; and I looked at the deed and I saw it was not acknowledged, I says, 'Well, I will sign the deed, but it won't benefit you any for it is not acknowledged,' the words I expressed. After I got well, I persuaded her to give up the deed, and I destroyed it.

"Q. After you signed the deed, did you hand it to her? A. Yes; she took the deed after I signed it.

"Q. How long did she have it in her possession before you persuaded her to give it up? A. Well, after I got well, probably a couple of weeks; I don't remember the dates."

Later he testified that, if there had been any one present to take his acknowledgment, he would not have signed the deed. Asked why he signed, he made the following reply: "Well, it was not acknowledged, and I knew it was no good." While there exists a sharp conflict in the evidence as to what was actually said by the parties at the time the deed was signed we are of the opinion that the testimony of the respondent, which, it appears, must have been given full credit by the trial court, is sufficient to sustain the judgment on the theory that there was no intention on the part of respondent to make a delivery of the deed in the sense that title was to pass. His position is that he insisted the deed was invalid unless acknowledged by him and he would have refused to take the final step necessary to give it validity. He believed that the deed would be of no effect until acknowledged. Under that belief the manual tradition was but one step in the process of execution.

In Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, the test to be applied to given facts as to whether a delivery has been effected is fully discussed and the authorities cited. We there said, quoting from Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703:

"It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether, in parting with the possession of the conveyance, the grantor intended to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely upon the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." See authorities cited.

[9] In determining the question of intent, the voluntary surrender of the deed by the wife was a circumstance to be considered in connection with all the other facts of the case.

The evidence being sufficient to support the judgment as to said lots 61 and 62, under the familiar rule, it must stand affirmed. It is therefore ordered that that portion of the judgment decreeing respondent to be a tenant in common with appellant in the ownership of said lot 12, block 1, Vermont square is reversed; that portion of the judgment decreeing respondent to be the owner in fee simple of lots 61 and 62, Normandie avenue tract, is affirmed.

[10] It being conceded that appellant asserts no interest or title whatsoever in lot 17, Somerville place, the decree adjudging respondent to be the absolute, sole, and separate owner thereof is also affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

199 Cal. 351

In re GRIVEL'S ESTATE.

BASS v. WARDLAW.

(L. A. 9096.)

(Supreme Court of California. Sept. 4, 1926.)

1. Executors and administrators 🔑**508(1).**

Order charging administrator with assets not accounted for *held* too vague and indefinite.

2. Executors and administrators 🔑**526.**

Appellate court, reviewing order charging administrator's account, cannot presume, in absence of evidence, that ancillary proceedings were pending or that ancillary administratrix was authorized to confer on administrator power to act as her attorney in fact.

3. Executors and administrators 🔑**526.**

Domiciliary administrator has duty to report and account for all moneys and property belonging to estate which he receives, regardless of their source, whether some of them came to him as agent or attorney in fact for alleged ancillary administratrix.

4. Executors and administrators 🔑**526.**

Superior court sitting in probate may compel domiciliary administrator to account for property coming into his hands which he claims to have remitted to ancillary administrator, but may not charge his account with property for which he has accounted in proper forum.

5. Executors and administrators 🔑**468.**

Mere suspicion as to existence of fraud will not justify court in summarily ordering administrator to account, but foundation for its existence must be established by competent and sufficient evidence.

6. Partnership 🔑**244.**

Partnership between decedent and third party should be expeditiously closed, and, if surviving partner unnecessarily delays, administrator has duty to bring matter to attention of court.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

In the matter of the estate of Rene Grivel, deceased. Proceeding by Thirza Bass, guardian, against C. T. Wardlaw, administrator, for an accounting. From an order charging the administrator with certain property, he appeals. Reversed and remanded, with directions.

D. L. Ault, C. S. Anderson, and Ault & Anderson, all of Calexico, for appellant.

Edgar T. Fee, of Los Angeles, for respondent.

SEAWELL, J. This appeal is taken from an order made by the judge of the superior court of the county of Imperial, this state, sitting in probate, charging appellant, who is the administrator with the will annexed of the estate of Rene Grivel, deceased, with the following property not accounted for or reported by him as said administrator: 1,600 head of cattle of the value of approximately $65,000; an undivided one-half interest in a harvested crop of cotton, the gross receipts from which were found by the court to be approximately $60,000; an "interest in a bank account in Los Angeles under a fictitious name," amounting to approximately $14,000; $3,000 received by appellant upon accounts due decedent from "persons in Mexico"; also farm machinery, trucks, and mining machinery located in Mexico and unaccounted for by appellant. The last finding reads, "The court further finds that there *may be other assets* not inventoried or accounted for by said administrator," and, further, that a greater part of the property herein mentioned was sold and disposed of in the county of Imperial by said administrator. The concluding paragraph of the order follows:

> "It is therefore ordered that Charles T. Wardlaw, administrator of said estate, be and he is hereby charged in his account with all of the above-mentioned personal property as came into his hands, as administrator of the estate of Rene Grivel, wherever situated, and which was the property of the decedent at the time of his death. It is further ordered, adjudged, and decreed that said administrator, Charles T. Wardlaw, make and file with the clerk of this court forthwith, a full, accurate, true, and complete inventory and accounting under oath of all the assets of the estate of Rene Grivel, deceased, and that a copy of this order be served upon said administrator."

The situs of the greater portion of the estate was the republic of Mexico, and it is claimed by appellant that said property was subject to the control of the ancillary administratrix, who, it is further claimed, had qualified as such in a Mexican court and had assumed to administer upon all of the property of the estate found to be within Mexican territory at the time of decedent's death. The first important question submitted for our consideration, waiving for the present the question of situs, is whether the evidence adduced at the hearing was legally sufficient to support the court's finding to the effect that all or a considerable portion of the property and moneys above mentioned had come into the hands of the administrator as property of the estate and he was chargeable therewith.

Appellant was the only witness examined at the hearing had upon the application of one of the persons interested in said estate to compel said appellant to render a full, correct, and complete report and account of all moneys and property collected by him or which came into his hands as administrator. The court accepted, as the basis for its order holding the administrator responsible for said property and as evidence fix-

---

ing the value thereof, the averments of an affidavit which was filed by the applicant and her attorney in support of the petition for an order citing and requiring said administrator to appear and render a full account and report of his administration.

[1] If the affidavit, such as was attempted be be used in this proceeding, cannot be regarded as possessing sufficient evidentiary value to support the findings, and we are of the opinion that it cannot be so regarded, no evidence is left in the record to support the finding that the decedent owned an interest in a bank account standing in a fictitious name in the sum of $14,000, or any other sum, or to support the finding that decedent owned an undivided interest in a harvested cotton crop of the approximate gross value of $60,000, or that the value of said herd of cattle that was ranging upon Mexican soil and which was sold in Mexico was of a value greater than $61,000. It is also obvious that a portion of the order is too vague and indefinite to constitute the basis of a charge against the administrator on account of property or moneys received by him and not reported.

The proceeding was initiated by Thirza Bass, a former wife of the testator, Rene Grivel, who was given a bequest of $5,000. The five children of herself and said testator, issue of their former marriage, and the surviving widow, Emily Hunt Grivel, were given the residuum of the estate. The wife was nominated as the executrix, but waived her right to administer, and appellant, C. T. Wardlaw, became administrator with the will annexed. It is vigorously asserted by appellant in his brief, and equally as vigorously denied by respondent, that said Emily Hunt Grivel was duly appointed by a court of competent jurisdiction of the republic of Mexico ancillary administratrix of that portion of the deceased's estate which had its situs in the republic of Mexico, and that said Emily Hunt Grivel, by virtue of the authority vested in her as such administratrix by the laws of the republic of Mexico, appointed C. T. Wardlaw to act as her agent or attorney in fact in the settlement and administration of said estate having its situs in said republic of Mexico.

[2, 3] No documentary or other competent evidence whatever tending to establish the claim that ancillary proceedings were pending in Mexico was offered at the hearing, and we are not permitted to presume that any such proceedings were pending or that said Emily Hunt Grivel was authorized by any court of competent jurisdiction to confer upon another the power to act as her attorney in fact in the administration of said estate. Appellant admits that he did sell about 1,600 head of cattle, collected debts owing decedent from persons residing or doing business in Mexico, and transacted other business in said foreign territory, but claims that in so doing he acted solely as attorney in fact for said administratrix, and not in his official capacity as administrator of said estate. He further admits that moneys derived from the sales of property made in Mexico, and which passed into his hands, were deposited by his direction in a bank situate in Calexico, county of Imperial, where the business of the estate was transacted by him. It is the insistent claim of appellant that he was acting in two separate and distinct capacities in handling the funds and property of an estate of which he was the domiciliary administrator, to wit, as agent or attorney in fact of the ancillary administratrix of all property which had its situs in Mexico at the time of decedent's death, and as administrator only of such property as had its situs in the state of California at the time of decedent's death, and to no further extent. We question the soundness of this contention. Appellant was the administrator of the entire estate and of all the funds and property which came into his hands which was admittedly property and moneys belonging to the estate, and it was clearly his duty as such officer to report and account to the court which had appointed him for all moneys and property belonging to the estate which he received into his possession, and it does not matter what the source may have been.

[4] We think as a general proposition that the court has inherent power to compel a report of the property which has passed into the hands of the domiciliary administrator, even though he claims to have remitted it to the ancillary administrator Undoubtedly the court would not be justified in charging him with such property in cases where he has accounted for it in the proper forum, but it may require him to account for it. In re Ortiz's Estate, 86 Cal. 306, 24 P. 1034, 21 Am. St. Rep. 44, and a number of text-book writers sustain our conclusion in this respect. To hold that an administrator may collect and hold the funds and property of the estate which he is commissioned to administer in any capacity other than as administrator would be to weaken the salutary safeguards which have been wisely established for the protection of persons whose property is held in trust. We have adverted to this important question with some reluctance, for the reason that the issue is not squarely presented by the record. As stated in the outset no competent evidence was adduced at the hearing below to show that Emily Hunt Grivel was appointed ancillary administratrix, or that ancillary proceedings were at any time initiated in Mexico, or that appellant was the duly authorized agent or attorney in fact of said administratrix, if such a power may by the laws of Mexico be delegated to another. Therefore the record in its present form would compel us to approve that portion of

the order requiring the administrator to account for funds having their situs in Mexico. We think, however, that appellant should be permitted to show by competent evidence, upon a rehearing of the entire matter, all that he claims by way of defense, whether the issues be questions of fact or law.

[5] There does not appear to be anything in the nature of the situation that would render it at all difficult to establish by satisfactory proofs the extent, character, or value of the property of the estate. If any moneys belonging to the estate have been concealed or deposited by the administrator or by any other persons connected with the estate in the name of a fictitious person, it would not be difficult under the remedial provisions of the statute to discover the same. The difficulty that we have had with this proceeding arises from a lack of thoroughness of investigation into the affairs of the estate and also a lack of legal evidence establishing with some degree of definiteness the facts brought in issue. A suspicion merely as to the existence of fraud will not justify a court in resorting to summary action, but foundation for its existence must be established by competent and sufficient evidence.

[6] The partnership relation existing between the decedent and a third party should be expeditiously closed, and, if the surviving partner has unnecessarily delayed the winding up of the partnership affairs, it is the duty of the administrator to bring the matter to the attention of the court.

The evidence being insufficient, as it is brought to us, to support the findings of the court as to the estate's ownership of much of the property involved in this proceeding, and there existing much uncertainty as to the amount of funds and property with which the appellant is charged by the court, the order is reversed, with the right granted each party to place before the court such legal evidence as is obtainable, both in the prosecution and defense of the issue joined. The matter is therefore remanded to the court below to proceed in the manner herein directed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.

---

199 Cal. 361

PEOPLE v. ADAMS. (Cr. 2843.)*

(Supreme Court of California. Sept. 14, 1926.)

1. Homicide 🔑354.

Verdict of guilty of murder in first degree, without fixing punishment at life imprisonment, requires death sentence.

2. Homicide 🔑253(1).

Evidence *held* to sustain conviction for murder in first degree.

3. Criminal law 🔑811(6).

Refusal of instruction calling special attention to testimony of defendant *held* proper.

4. Homicide 🔑304.

Failure to instruct that accident and misfortune are valid defenses to murder charge, *held* not error, where defendant contended that deceased accidentally shot herself, in view of Pen. Code, § 195.

5. Criminal law 🔑957(2).

Affidavit that juror said that jury agreed with prosecuting attorney's closing argument, believed crime due to lax law enforcement, and wished to deter others from committing such crime, *held* not to impeach verdict.

6. Criminal law 🔑957(1).

Verdict of jury cannot be impeached by affidavit of one to whom juror spoke after trial.

7. Homicide 🔑332(1).

Jury's failure to relieve defendant of death penalty cannot be reviewed.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Sydney Adams was convicted of murder in the first degree, and he appeals. Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and James S. Howie, Deputy Attys. Gen., for the People.

SEAWELL, J. [1] Appellant was accused by an information filed against him by the district attorney of the county of Los Angeles, August 28, 1925, with the crime of having on August 2, 1925, murdered Annie Adams, who was shown by the evidence to have been his wife. The jury returned a verdict of guilty of murder of the first degree, without exercising its discretion by fixing the punishment at confinement in the state prison for life. Such a verdict in homicide cases, under the law of this state, leaves the court with no discretion in the matter of fixing the punishment as the law prescribes the penalty, which is death. Such a penalty was, therefore, adjudged and imposed by the court in the instant case.

The appeal herein is taken from the judgment and the order denying appellant's motion for a new trial. The incriminatory facts leading up to, attending, and following the murder are, briefly, these:

Appellant and his deceased wife had been living separate and apart for several months prior to Sunday, August 2, 1925. On the day last named the deceased left her apartment at 1234 East Twenty-first street, in the city of Los Angeles, and was visiting her husband's sister and husband, Mrs. Julia and Major T. Harris, who resided at 1129 East Twelfth street. Other friends were also visit-

*Rehearing denied October 14, 1926.

ing the Harris family on this day. During the afternoon appellant entered the Harris home, where a small company of friends were gathered, but he had little to say and soon departed. He returned again in the early evening between 6 and 7 o'clock. He seemed to be in a belligerent frame of mind and, after entering the room where his sister, Mrs. Harris, and her husband, his deceased wife, and others were gathered, called his wife out of the room and spoke aside with her for a few moments. The wife, who seemed to fear him, was soon seen backing into the room where the others were gathered, calling upon Major T. Harris "to make Syd behave." Mr. Harris, sensing the situation, remonstrated with appellant, who kept his hand suspiciously at his hip pocket. He finally grappled him and a struggle ensued during which Harris took occasion to satisfy himself that appellant was armed with a revolver. He succeeded in ejecting him from his home, and as appellant was leaving he exhibited a revolver in a threatening manner.

Thereafter his wife went to her apartment at 1234 East Twenty-First street, and, at about 11 o'clock p. m., appellant called her to the telephone. A brief conversation followed. The wife immediately called up the police department, and two officers afterwards presented themselves at her apartment. They remained but a short time, and very soon after they departed appellant appeared. He entered the house, and, passing the door which led into the bedroom which Mrs. Cohen, the landlady, was occupying, spoke to her. Mrs. Cohen, who was in bed, heard voices issuing from the adjoining room occupied by appellant's wife immediately after he passed her door, but she was not able to hear what was said. Within a short time after appellant entered his wife's apartment, Mrs. Cohen heard the sound of two pistol shots and heard Mrs. Adams scream twice. She then sprang from her bed, and, in going into Mrs. Adams' room, she met her in a small narrow hall that connected the two rooms. Mrs. Adams reached Mrs. Cohen's room where she fell upon the floor mortally wounded, and soon thereafter expired. Mrs. Cohen testified that Adams was advancing upon his wife, after he had shot her, with the smoking pistol in his hand and with his eyes fixed upon her. Mrs. Cohen, as she puts it, was "pleading with him," and he commanded her to get out of his way. He then left the premises with his wife lying upon the floor in Mrs. Cohen's room. Two cartridge shells, which fitted appellant's revolver, were picked up after the shooting. These were automatically ejected from the pistol as the cartridges exploded. Appellant disappeared and was not located until the night following the shooting, when he was found at his lodging house. He had with him the same pistol, doubtless, that he had used the night before. Appellant afterwards made a confession in which he gave, with some particularities, the circumstances of the murder.

[2] The evidence against the defendant was so clear, convincing, and overwhelming that the jury, as rational beings, could not have returned any other verdict than one of murder of the first degree. In fact, every avenue of escape was foreclosed against him, and, as a last resort, he interposed the defense that his wife shot herself accidentally while attempting to hand him his pistol. He did not, however, attempt to explain the second shot. His explanation as to the manner in which his wife shot herself proves its own absurdities. He testified that he was unarmed when he entered his wife's apartment; that, as he was taking his leave, she reminded him that she had previously taken his revolver and wished to return it to him. She got it from beneath the pillows or between the mattress, and in attempting to hand it to him it struck against some piece of furniture and was discharged. It then fell from her hand to the floor, and as he picked it up it was discharged the second time. One bullet entered his wife's right side, pierced both lungs, and came out at a point on the left side. Appellant did not attempt to assist his wife in any way after she was shot, but fled from the premises. He made no inquiry as to whether she was dead or alive.

Complaint is made to the admission of the confession prior to proof made of the corpus delicti. Without the confession at all the proof was amply sufficient to establish both the corpus delicti and the guilt of the appellant. Witness Green, by whom the confession was established, was the people's last witness. In the order of proof the corpus delicti had been proved some time before witness Green was called.

[3, 4] Complaint is also made that prejudicial error was committed by the court in refusing to instruct the jury as to the degree of consideration and the effect that should be given to the testimony of the defendant, and otherwise calling special attention to his testimony. The law is so well settled to the effect that it is proper to refuse instructions calling special attention to the testimony of a defendant, or any other witness, that it is no longer necessary to cite authorities to sustain the court's refusal in the instant case. Appellant also assigns as error the failure or neglect of the court to instruct the jury that accident and misfortune are valid defenses. There was no such defense interposed in this case. The appellant testified, and counsel here contends, that Mrs. Adams accidentally shot herself, and that appellant was in nowise responsible for the injury. Had the appellant admitted that he shot and killed his wife by accident or misfortune, or that he in any way contributed to her death, there would be some merit in his

claim that an instruction as to what constitutes excusable homicide should have been given. Section 195, Pen. Code. We have no such question before us.

[5, 6] There is no merit in the attempt by affidavit to impeach the verdict of the jury. First, the affidavit is not sufficient in substance to justify the court in granting the motion for a new trial; and, second, the verdict of a jury cannot be impeached in the manner here attempted. All that is averred in the impeaching affidavit is that one of the jurors, after being dismissed from jury duty, remarked to affiant that the jury agreed with what the prosecuting attorney said in his closing argument without stating what was said by the prosecuting attorney. Nor do the isolated averments that the juror further said to affiant that all the jurors felt that the crime was due to laxity in law enforcement, and that the jury decided that it must do something to stop young people from "committing such crimes," tend to impeach the verdict. One of the purposes of punishment is to deter others from committing crime. Many persons, too, and with considerable show of reason, believe that laxity in law enforcement tends to encourage lawlessness.

We have examined the entire record and find no reversible error in it.

[7] Whether the jury should have relieved the appellant of the death penalty was a question entirely within its discretionary power, and, we, as a court, have no right to review its reasonable exercise of discretion in capital cases.

The judgment and order are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

199 Cal. 286

ARONSON & CO. v. PEARSON. (L. A. 8378.)

(Supreme Court of California. Aug. 28, 1926. Rehearing Denied Sept. 27, 1926.)

1. Attachment 🔑11—Stockholder's liability for proportion of corporation's debt held to be on his direct, primary, independent contract, unsecured by mortgage, so that there could be attachment in action thereon (Const. art. 12, § 3; Civ. Code, § 322; Code Civ. Proc. § 537).

Liability of stockholder, arising under Const. art. 12, § 3, and Civ. Code, § 322, declaring him individually and personally liable for his proportion of every debt contracted by corporation during time he is stockholder, is one on contract of stockholder, arising from his implied offer when he becomes stockholder, accepted by creditor when he extends credit, and is direct, primary, and independent of that of corporation, and so unsecured by mortgage, though corporation's debt is so secured, so that in action thereon stockholder's property may, under Code Civ. Proc. § 537, be attached.

2. Attachment 🔑11.

That stockholder owns all but three of corporation's 5,000 shares does not make her and it the same entity and its mortgage hers, and so prevent attachment in creditor's action on her stockholder's liability.

In Bank.

Appeal from Superior Court, Los Angeles County; Merle J. Rogers, Judge.

Action by Aronson & Co. against Elizabeth Pearson, also known as Elizabeth B. Pearson. From an order denying her motion to dissolve an attachment, defendant appeals. Affirmed.

Rehearing denied. Curtis, J., dissenting.

See, also, 249 P. 191.

W. I. Gilbert, of Los Angeles, for appellant.

Page & Hunt, of Los Angeles, for respondent.

FINCH, Justice pro tem. This is an appeal by the defendant from an order of the trial court denying her motion to discharge an attachment. The action was brought to recover on defendant's liability as a stockholder of the Pearson Ranch company, a corporation, having a capital stock of $500,000, divided into 5,000 shares of the par value of $100 each, of which the defendant is alleged to be the owner of 4,997 shares. The corporation created an indebtednes of $188,000, evidenced by 188 first mortgage bonds, secured by a trust mortgage upon 1,803.6 acres of land in Glenn county. Plaintiff is the owner of 91 of these bonds. Upon the filing of the complaint the plaintiff procured the issuance of a writ of attachment, which was thereafter duly levied upon certain real property of the defendant. In appellant's opening brief it is said:

> "The only question presented * * * is this: Is a creditor of a corporation, upon a debt incurred by such corporation, which debt is secured by a mortgage or lien upon property of the corporation, entitled to the issuance of an attachment against the property of a stockholder of such corporation in an action instituted by such creditor upon a stockholder's liability based upon such debt of such corporation so secured, without showing by affidavit that such security has become valueless?"

[1] The only case cited or discovered that is directly in point is Foreign Mines Development Co. v. Boyes (C. C.) 180 F. 594. The decision in that case supports appellant's contention. It is there said:

"It is *held* in Kennedy v. California Sav. Bank, 97 Cal. 93, 96, 31 P. 846, 847 (33 Am. St. Rep. 163) that the corporation acts as the agent of its stockholders in the making of contracts and creating the liability by which they are bound, and that an action against a stockholder for such liability is essentially an action founded upon the contract. * * * And if, * * * the corporation was the agent of the defendant in making the contracts sued on, it was equally his agent in securing those contracts by a mortgage of its property, in which he had at least an equitable interest; and, being bound by the act of his agent in creating the obligation, he should enjoy the protection of its act in giving the security—at least to the extent of protecting him against so harsh a remedy as that here sought."

In the Kennedy Case (page 96 [31 P. 847]), it is said:

> "The first ground stated in the motion presents the question whether an action against a stockholder for his proportion of the debt of a corporation of which he is a member is upon a contract, within the meaning of section 537 of the Code of Civil Procedure, relative to attachment; and that it is such an action, we entertain no doubt. In a general sense, the action is founded upon a contract, and it is none the less so because under the provisions of section 3 of article 12 of the Constitution of this state and section 322 of the Civil Code the stockholder is made liable to perform the contract in part. The Constitution, in the section above referred to, declares: 'Sec. 3. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association.' This section prescribes the terms upon which individuals are permitted to transact business through the medium of a corporation, and the necessary legal effect of the conditions thus prescribed is, that a corporation when created becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named. * * * It would seem, therefore, that an action against a stockholder to recover his proportion of the amount due upon a contract made by a corporation, which is only an agency adopted by him for the transaction of business, was essentially an action founded upon a contract."

There may be some uncertainty in the foregoing language, and in similar expressions in other decisions as to whether it was intended to hold that an action to recover on a stockholder's liability is an action to enforce a contract made by the corporation as the agent of the stockholder or an action to enforce the subscription contract made by the stockholder in his purchase of stock. The meaning of the language quoted is clarified in County of San Luis Obispo v. Gage, 139 Cal. 398, 405, 73 P. 174, 177, involving the right of a county to recover from the state for the maintenance of orphan children. It is there said:

> "The claim in controversy does not arise upon any express formal contract inter partes, between the plaintiff on the one hand and the state of California on the other. It arises, if at all, from the effect of the act of 1880 [St. 1880, p. 13] and the subsequent performance by the respondent of the conditions which bring it within the terms of the statute. It is, in one sense, a liability arising from a statute; but it does not follow that it may not nevertheless be a contract. Contracts may be made or evidenced by a statute, and by conduct ensuing thereupon, as well as by other means or evidence. Thus, it is held in Kennedy v. California Savings Bank, 97 Cal. 93 [31 P. 846] 33 Am. St. Rep. 163, that the statutory liability of a stockholder in a corporation to pay his proportion of a debt due from the corporation itself is a contract within the meaning of the law which limits the right of attachment to actions upon a contract. * * * It must be conceded upon principle that the obligation here in controversy is an obligation arising upon a contract. The state by the act of 1880, in effect promised to each county in the state that if it should thereafter maintain and support persons of a class mentioned in the act, the state would appropriate and pay to such county the sums of money therein stated. This was the equivalent of an offer upon condition, and upon the performance of the condition by any county the offer became a promise, and binding as such upon the state. * * * It is analogous to the case where a natural person offers a reward for the performance of some particular act, as the recovery of property or the apprehension of a criminal. The offer is made to no person in particular; but when the act upon which it depends is performed, the offer and the act combined make a complete contract between the person making the offer and the person who performs the act."

The same principle is expressed in Thompson on Corporations (2d Ed.) § 4790, as follows:

> "This liability is not imposed upon stockholders without their consent, for the reason that where such a statute or constitutional provision exists when a person becomes a stockholder in a corporation, he impliedly at least agrees to become liable to the extent prescribed. In other words, such a provision, under familiar principles, becomes incorporated in, and a part of, the undertaking of the stockholder, and is therefore said to be the result of his stockholder's agreement, and is contractual in its nature."

The constitutional and statutory provisions relating to the liability of stockholders become essential terms of the subscription agreement of a stockholder as fully as if they were set forth at length therein. By accepting ownership of stock in a corporation, the stockholder in effect offers to make payment, to the extent of his stockholder's liability, to any person who may extend credit to the corporation during the period of his ownership. Whenever, during such ownership, any person so extends credit to the corporation, "the offer and the act (of extending credit) combined make a complete contract" between the stockholder and the creditor. It thus appears that the stockholder's liability to the creditors of the corporation is not based upon the agency, in any general sense, of the corporation to impose such liability upon him but upon his own agreement, implied from his acceptance of the ownership of stock. His "liability arises by operation of law from the creation and existence of the debt, not through any power of the corporation to bind him to personal liability for its obligations." Ellsworth v. Bradford, 186 Cal. 316, 319, 199 P. 335, 336. The liability of the stockholder "is primary, and is conditional or contingent only in this: That there must be a subsisting debt against the corporation." Young v. Rosenbaum, 39 Cal. 646, 654.

The principle upon which a stockholder becomes liable for corporate debts is analogous to that which binds the writer of a general letter of credit which contemplates "a course of future dealing," as provided by section 2864 of the Civil Code. When such a letter of credit is accepted by giving credit in compliance with its terms, "there springs from the letter and its acceptance a distinct contract, * * * which is binding upon the writer of the letter. And this writer is upon the default of the debtor liable to those who gave credit in accordance with its terms." Lafargue v. Harrison, 70 Cal. 380, 384, 9 P. 259, 261 (59 Am. Rep. 416). In an action against the writer of a letter of credit, it is necessary to prove a contract between the person in whose favor the letter is drawn and the one who gave the credit to him, but the suit is not upon such contract, on the theory that such person secured the credit as the agent of the writer of the letter, but upon the letter itself and its acceptance, which constitute the contract between the writer and the person who gave the credit.

While all the rules relating to the liability of a guarantor are not applicable to a stockholder's liability, the obligation of the latter is in the nature of a continuing guaranty of payment of debts contracted by the corporation during his ownership of stock and to the extent provided by the Constitution. The liability of a guarantor is distinct and independent of that of the principal debtor. Cooke v. Mesmer, 164 Cal. 332, 340, 128 P. 917; Adams v. Wallace, 119 Cal. 67, 71, 51 P. 14; Kelley v. Goldschmidt, 47 Cal. App. 38, 42, 190 P. 55.

> "The stockholder's liability is direct, immediate and enforceable independently of proceedings against the corporation. In equivalent phrase, the liability is primary or original, and not secondary. Under the California law the liability is as distinct and separate as it would be if the act had made no provision for any other liability than that of the stockholder for the debts of the corporation, the direct relation of debtor and creditor being established between the stockholder and the creditor by the statute." 6 Cal. Jur. 995, and cases there cited.
>
> "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property." Code Civ. Proc. § 726.
>
> "An independent action at law cannot be maintained for a debt, whatever the form, if it is secured by a mortgage." Western Fuel Co. v. S. G. Lewald Co., 190 Cal. 25, 27, 210 P. 419.
>
> "The guarantor's obligation rests solely upon its contract of guaranty. The mortgage is looked to merely to interpret and measure the extent of the guaranty. The guarantor's obligation is not secured by the mortgage, and suit may be maintained upon it without reference to any proceeding against the principal debtor or the security." S. F. T. Seminary v. Monterey County G. & E. Co., 179 Cal. 166, 172, 175 P. 693.

In Knowles v. Sandercock, 107 Cal. 629, 641, 40 P. 1047, 1050, the plaintiff sued to enforce the liability of stockholders for corporate debts, evidenced by a promissory note of the corporation and secured by its mortgage. The court said:

> "The note was due but the mortgage had not been foreclosed. This fact constitutes no defense for defendants. They are not affected by the fact that because of the mortgage only an action to foreclose could be brought against the corporation. The mortgage only affects the remedy against the mortgagor—the corporation. The liability of the stockholder, as has already been said, is primary in the sense that he is not a surety. He is not injured nor is he benefited by the fact that the corporation has given security."

To the same effect is the decision in Niles State Bank v. Jennings, 22 Cal. App. 66, 133 P. 329. In Martin v. Becker, 169 Cal. 301, 306, 146 P. 665, 667, Ann. Cas. 1916D, 171, after quoting the foregoing language from the Knowles Case, it is said:

> "We have quoted this language because it succinctly declares the principle vital to this consideration. 'The mortgage only affects the remedy against the mortgagor' or primary debtor."

In Kelley v. Goldschmidt, 47 Cal. App. 38, 42, 190 P. 55, 57, the plaintiff sued the defendant as the guarantor of a debt secured by a trust deed and procured a writ of attachment to be issued and levied upon the property of the defendant. The defendant moved to discharge the attachment on the ground that the debt was secured by the trust deed. The motion was denied and, in affirming the order, the court said:

> "A guaranty is * * * an independent contract—that is, entirely independent of any contract of debt the payment of which is thus assured, and it follows that an action on a guaranty such as the one involved herein is upon an independent contract of the guarantor with which the principal debtor has nothing to do."

Section 537 of the Code of Civil Procedure provides that the property of a defendant may be attached "in an action upon a contract, express or implied, for the direct payment of money, where the contract * * * is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property." In this case the corporation and the defendant stockholder had assumed independent obligations to pay the corporate debt. While the contract of the corporation was secured by the mortgage, the contract of the defendant as a stockholder was not so secured. A corporation and a stockholder thereof are not jointly liable for a corporate debt. They may be sued jointly, but only several judgments may be rendered. Avery v. Chucawalla Development Co., 175 Cal. 644, 166 P. 1002; The G. & S. Co. v. The M. & H. F. C. Co., 107 Cal. 378, 40 P. 495. It would not be contended that in a separate action to enforce a stockholder's liability a mortgage given by the corporation to secure the corporate debt for which the stockholder is liable could be foreclosed. To the extent of the defendant's liability as a stockholder, she and the corporation stand in the relation of two persons who, by independent contracts, have agreed to pay a single debt to be thereafter incurred, one of them having given a mortgage to secure his own contract. In a suit against the person whose contract was not secured, he could not successfully contend that a writ of attachment was not available to the plaintiff on the mere ground that the other person had given a mortgage to secure his contract; and it matters not whether the debt be that of one of such persons or of a third person. The obligations of the defendant and the corporation being primary and independent, the mere fact that the latter gave a mortgage to secure its contract is not a ground for discharging the writ of attachment.

[2] In appellant's closing brief it is suggested that, since she owned 4,997 shares of the capital stock of the corporation out of a total capitalization of 5,000 shares, she and the corporation were one and the same entity, and that, therefore, the mortgage of the corporation was in effect her individual mortgage.

"When necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, * * * and deal with the corporation and stockholders as identical entities with identical duties and obligations." Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 696, 227 P. 723, 731.

"In some instances that consequence follows, but only to secure justice to creditors and not to defeat it." Oliver v. Brennan (D. C.) 292 F. 197, 200.

"Any one who enters into business relations with a corporation organized in this state may well be presumed to contract with a view to the individual liability of stockholders." Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 510, 153 P. 939, 943.

When credit has been given to a corporation in reliance upon its liability and the security given by it and the individual liability of its stockholders, it would be unjust to "cast aside the legal fiction of independent corporate existence" to the detriment of the creditor.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J., SEAWELL, J.; SHENK, J

---

199 Cal. 781

ARONSON & CO., Plaintiff and Appellant, v. Elizabeth PEARSON (also known as Elizabeth B. PEARSON), Defendant and Respondent. (L. A. 8591.)

(Supreme Court of California. Aug. 28, 1926. Rehearing Denied Sept. 27, 1926.)

In Bank.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Rehearing denied. Curtis, J., dissenting.

See, also, 249 P. 188.

Page & Hurt and Eugene D. Williams, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

PER CURIAM. This is an appeal by the plaintiff from an order granting defendant's motion to discharge an attachment. The facts leading up to the issuance of the attachment are stated in the opinion this day filed in the same action on the defendant's appeal from a prior order denying her motion to discharge the same attachment. L. A. No. 8378, 249 P. 188. At a time subsequent to the denial of such motion, the defendant again moved the court to discharge the attachment, basing her motion upon the grounds stated in her first motion, and the court thereupon made the order from which this appeal is taken.

Upon the grounds stated in the said opinion, the order appealed from herein is reversed.

---

199 Cal. 295

ARONSON & CO. v. PEARSON. (L. A. 9014.)

(Supreme Court of California. Aug. 28, 1926. Rehearing Denied Sept. 27, 1926.)

1. Pleading 🔑121(1)—Defendant's allegation that she had not sufficient knowledge or information on which to base a belief and therefore denied certain facts held insufficient denial (Code Civ. Proc. § 437).

Defendant's allegation that "she has not sufficient knowledge or information upon which to base a belief, and, placing her denial upon that ground, denies" certain facts, is insufficient as a denial, under Code Civ. Proc. § 437, providing that if defendant has no information or belief upon the subject sufficient to enable him to answer an allegation he may so state and place his denial on that ground.

2. Pleading 🔑34(7).

Defendant's allegation that he has not sufficient knowledge or information on which to base a belief and therefore denies will not be held fatally defective on appeal if treated by parties at trial as creating an issue.

3. Corporations 🔑268(2)—Denial of allegation that bondholder requested trustee to declare bonds due held insufficient because allegation was immaterial (Civ. Code, § 322).

In action against stockholder based on bonds of corporation, allegation that plaintiff requested trustee to declare principal of bonds due was immaterial, where trustee was authorized to do so without request, in view of Civ. Code, § 322, and hence denial of allegation without denial of further allegation that trustee gave notice declaring principal due was insufficient.

4. Corporations 🔑268(2).

In action against stockholder based on bonds of corporation, denial that trustee gave notice "declaring principal of all bonds secured by the aforementioned trust indenture," being incomplete, failed to deny that trustee declared bonds to be due.

5. Appeal and error 🔑994(3).

In action against stockholder based on bonds of corporation, whether defendant's testimony by deposition in another action or that given at trial correctly stated the facts was exclusively for trial court.

6. Appeal and error 🔑931(1)—Where plaintiff had judgment against stockholder, that court believed evidence tending to show that she was a stockholder rather than contrary testimony must be presumed.

In action against stockholder based on bonds of corporation, where judgment was for plaintiff, that court believed defendant's testimony in another action tending to show that she was a stockholder rather than her contrary testimony at the trial must be presumed.

7. Appeal and error 🔑996—In action against stockholder, where inference might be drawn that defendant was equitable stockholder, finding to such effect was conclusive.

Where conflicting inferences can be drawn from the evidence, finding of trial court is conclusive, and hence in action against stockholder based on bonds of corporation, where inference that defendant was equitable stockholder might be drawn, trial court's finding to such effect was conclusive.

8. Appeal and error 🔑931(1).

Evidence must be viewed in light most favorable to the findings and judgment.

9. Pleading 🔑8(11).

Except when evidentiary facts stated are necessarily inconsistent with general allegation of ownership, such allegation is one of ultimate fact and sufficiently pleads ownership in a complaint.

10. Trial 🔑404(3).

Finding should be of ultimate facts rather than evidentiary facts, and finding of ultimate facts includes finding of evidentiary facts necessary to sustain it.

11. Trial 🔑404(3)—Finding that defendant was owner and holder of stock was sufficient finding of ownership in action based on bonds of corporation.

On issue of ownership, finding thereon is good without finding of particular facts on which title or want of title depends, and in action against stockholder based on bonds of corporation, finding that defendant was owner and holder of stock was sufficient.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action upon stockholder's liability by Aronson & Co. against Elizabeth Pearson, also known as Elizabeth B. Pearson. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 249 P. 188.

W. I. Gilbert and M. M. Gordon, both of Los Angeles, for appellant.

Page, Nolan, Rohe & Hurt and Eugene D. Williams, all of Los Angeles, for respondent.

FINCH, Justice pro tem. This is an appeal by the defendant from the judgment herein against her, based upon her alleged liability as a stockholder of the Pearson Ranch Company, a corporation, having a capital stock of $500,000, divided into 5,000 shares of the par value of $100 each.

In May, 1922, 4,749 shares of such stock were issued to W. J. Pearson, the husband of defendant, they having been married in the year 1909. This action is prosecuted on the theory that the defendant was at all times the equitable owner of such shares of stock, and the court so found. The principal question presented by this appeal is whether the evidence sustains such finding.

June 1, 1922, the Pearson Ranch Company created an indebtedness of $188,000, evidenced by 188 bonds of the face value of $1,000 each, bearing interest at 7 per cent. per annum, payable semiannually; the earliest date of maturity of any of the bonds being June 1, 1927. On the day of their issue, the plaintiff purchased 91 of these bonds, and this suit is based thereon. At the time of the creation of the indebtedness the corporation was the owner of 1,803.6 acres of land in Glenn county, and as security for the payment of the bonds it conveyed the land to the Hellman Commercial Trust & Savings Bank, as trustee. By the terms of such conveyance, the company agreed that, upon default in payment of the principal or interest of any of the bonds, "the trustee may, and upon the written request of the holders of twenty-five (25) per cent. in interest of the bonds then outstanding, * * * shall, by notice to the company, declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon such declaration * * * the said principal shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding." No part of the principal or interest has ever been paid.

[1-4] The complaint alleges that subsequent to the 1st day of January, 1923, the plaintiff requested the trustee to declare all of the bonds then outstanding to be due and payable immediately, and that "thereafter and prior to the commencement of this action the said trustee executed under its corporate seal and delivered to the said Pearson Ranch Company a notice and demand in writing declaring the principal of all bonds secured by the aforementioned trust indenture and then outstanding, to be due and payable immediately." The court found the allegation to be true. Appellant contends that such finding is without support in the evidence. It is true that there is no evidence in the record tending to prove or disprove the allegation, but there is no sufficient denial thereof in the answer. The attempted denial thereof is as follows:

> "Defendant admits that no part of the interest payable on any of said 188 bonds on the 1st day of December, 1923, and represented by the coupons payable on said day, has been paid. Defendant alleges she has not sufficient knowledge or information upon which to base a belief, and, placing her denial upon that ground denies that subsequent to the 1st day of January, 1923, plaintiff requested or required by a writing delivered to the trustee named in said indenture, that said trustee by notice to said Pearson Ranch Company declare the principal of all bonds secured by said indenture and then outstanding, to be due or payable immediately, and denies that thereafter or prior to the commencement of this action, the said trustee executed under its corporate seal or delivered to the said Pearson Ranch Company a notice or demand in writing, declaring the principal of all bonds secured by the aforementioned trust indenture."

For 68 years the form of denial adopted by the defendant has been held insufficient. Relative to the denial of the allegations of a verified complaint, section 437 of the Code of Civil Procedure provides:

> "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground."

Section 46 of the Practice Act (St. 1851, p. 57), as amended in 1854 (St. 1854, p. 60), permitted a defendant to deny an allegation of a verified complaint "according to his information and belief." In Curtis v. Richards & Vantine, 9 Cal. 34, 38, the defendants based their denial upon the averment that "they have not sufficient knowledge or information to form a belief." The court said:

> "By the forty-sixth section of the Practice Act, as originally passed in 1851, it was provided, that an allegation of the complaint might be controverted by a denial 'of any knowledge thereof sufficient to form a belief.' In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts, upon the existence of which they did not hesitate to act in other matters. In 1854, the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case."

The same construction has been placed upon the foregoing provision of section 437 of the Code of Civil Procedure. Naftzger v. Gregg, 99 Cal. 83, 87, 33 P. 757, 37 Am. St. Rep. 23; Turner v. Watkins, 36 Cal. App. 503, 504, 172 P. 620; Nave v. Graham, 37 Cal. App. 332, 334, 174 P. 76. Such a denial will not be held fatally defective upon appeal if it was treated by the parties at the trial as creating an issue, but, since in this case neither party offered any evidence bearing upon the question, there is no ground for holding that it was so treated. The denial is further insufficient in that it does not deny any material fact stated in the allegation. The allegation that the plaintiff requested the trustee to declare the principal of all the bonds due and payable is immaterial, because the trustee was authorized to so declare without any request by the bondholders, and the last clause of the denial is incomplete and therefore fails to deny that the trustee declared the principal of the bonds to be due and payable immediately or that the trustee so notified the defendant.

W. J. Pearson, who then held the record title to 1,560 acres of the Glenn county land, on the 14th of January, 1916, conveyed the same to the defendant, "to her sole and separate use and to her separate estate." May 1, 1919, W. J. Pearson acquired title to 243.6 acres of adjoining land. November 12, 1919, he and the defendant joined in the execution of a deed conveying both tracts of land to Alva F. Page and Willard W. White. In exchange for such lands, Page and White conveyed to defendant certain real property and to W. J. Pearson other real property, and also gave their promissory note for $106,000 to W. J. Pearson, secured by a trust deed of the Glenn county lands. Page and White defaulted in their payments, and the trustee sold the land under the terms of the trust deed, W. J. Pearson becoming the purchaser, and a deed was made to him by the trustee on the 25th of April, 1921. On the same day, W. J. Pearson and the defendant executed a deed in the usual form, purporting to convey the same lands to the Citizens' Trust & Savings Bank. While the latter deed was absolute in form, it appears to have been given as security for an indebtedness of W. J. Pearson to the grantee. May 19, 1922, the Citizens' Trust & Savings Bank conveyed the lands to the Pearson Ranch Company. The minutes of the company of May 10, 1922, show that the Pearson Ranch Company agreed to purchase all of the Glenn county lands and the personal property thereon for 4,999 shares of its capital stock. The minutes of May 19, 1922, show that in pursuance of such agreement the company issued to W. J. Pearson 4,749 shares of its stock and the remaining shares to other persons. July 3, 1923, W. J. Pearson formally transferred 4,748 shares of the stock standing in his name to the defendant. January 28, 1924, the defendant herein commenced an action to quiet her title to certain real property in the county of Los Angeles. The defendant therein, a creditor of W. J. Pearson, alleged that the property there in question was either community property or the separate property of W. J. Pearson. In a deposition taken in that action April 18, 1924, defendant herein testified as follows:

"Q. At the time of your marriage, were you the owner of any property? * * * A. Yes, I was. * * * I must have had about in the neighborhood of $20,000. * * * I was very young at the time, and I let Mr. Pearson take care of all my money for me. * * * I allowed Mr. Pearson to handle it for me, and I never paid very much attention to how he did handle it. * * *

"Q. Did he (your father) give you other sums since your marriage? A. Yes; he has. * * * In different ways; sometimes one way and sometimes another. * * * This was before I came to Los Angeles that it amounted to about $20,000.

"Q. Since you came to Los Angeles, has he given you some more? A. Yes, he has. * * * It was at different times. * * * At one time he gave me $6,000. * * * I used that in buying the house at Seventh and New Hampshire, * * * where I live now. * * *

"Q. Is that one of the properties that is described in the complaint? * * * A. It is. * * *

"Q. When was the ranch in Glenn county acquired? * * * A. * * * 1915 it was taken in Mr. Pearson's name. * * * Mr. Pearson gave it to me in January, 1916. * * * I deeded it to Page and White. * * *

"Q. What did Page and White give you for this ranch? A. They gave me a trust deed back on the ranch and some property in Oakland. * * *

"Q. Do you remember when the Pearson Ranch Company was organized? * * * A. I think it was in 1921.

"Q. Were you one of the stockholders of that company? A. No; I was not.

"Q. Did you have any interest in that company? A. I thought I did.

"Q. In what respect did you think you had an interest? A. Well; I thought I still had all of the interest in the ranch. * * *

"Q. Did you at any time after the ranch was deeded to Page and White claim to be the owner of the ranch? * * * A. Yes.

"Q. Out of what circumstances did your claim of ownership arise after it was deeded to Page and White? A. Well; I held a trust deed."

A few days later, at the time the defendant signed the deposition, she struck out this answer and answered the question as follows:

"I claimed it under an assignment of stock."

The deposition was read by the defendant in her attorney's office before she signed it, and no other correction was made therein. The deposition continues as follows:

"Q. Was it necessary for you to foreclose on the trust deed? A. It was.

"Q. And you did foreclose on the trust deed? A. Yes.

"Q. At the time you foreclosed on the trust deed, did you bid the ranch in? A. Mr. Pearson bid it in for me.

"Q. And after that did you deed it to anybody? A. Yes. * * * To the Citizens' Trust & Savings Bank. * * *

"Q. For what purpose did you deed it to the Citizens' Trust & Savings Bank? A. Mr. Pearson owed the Citizens' Trust & Savings Bank some money, and I had guaranteed this money that he owed them; I had given my personal guaranty, and in order to cover that objection I deeded the ranch to the Citizens' Trust & Savings Bank. * * *

"Q. You say you never became a stockholder in the Pearson Ranch Company? A. Yes; I did later.

"Q. When did you become a stockholder of that company? A. In 1922.

"Q. How many shares of stock did you acquire at that time? A. I couldn't tell you the exact number, but more than 4,800 shares I believe. * * *

"Q. Who caused those shares to be put in your name? A. Mr. Pearson.

"Q. At your request? A. At my request; yes.

"Q. That was what time in 1922? A. I do not recall the month.

"Q. Do you remember whether it was the early part of the year or the latter part of the year? A. No; I do not. * * *

"Q. Did you sell the stock to anybody? A. No. * * *

"Q. You state in your complaint in this action that you are the owner of the property which I will briefly describe as the St. Francis Court? A. Yes, sir.

"Q. Who deeded that property to you? A. F. W. Hinyan. * * *

"Q. August 23, 1923? A. 1923; yes.

"Q. What did you give him for the property known as the St. Francis Court? A. The ranch in Glenn county. * * *

"Q. Did your husband participate in the negotiations? A. In advising me he did. * * *

"Q. Did you transfer any of your stock to Mr. Hinyan in connection with this deal? A. No.

"Q. Did you transfer or deed to him anything at all—any property, real or personal, other than this ranch property? A. No.

"Q. Do you claim now that this property is your own property, this property known as the St. Francis Court? A. Yes, sir.

"Q. And that your husband has no interest in it at all? A. No; he has not. * * *

"Q. You spoke of Messrs. Page and White as persons to whom you sold the ranch property. * * * They fell down on making payments to you, and you foreclosed on that property there? A. Yes, sir."

Alva F. Page testified that at the time he and White purchased the Glenn county lands they gave "Mr. and Mrs. Pearson a second mortgage of $106,000, which Mr. Pearson took in his own name," and that Mr. Pearson, in the presence of the defendant, "said the reason he was taking it in his own name was because it was more or less unfinished business, and he didn't want Mrs. Pearson to take any in her name that was in any way hazardous; in other words, he didn't want her to get behind any mortgage, he didn't want her to take this mortgage until it was paid off and cleaned up, and in better shape." Rex B. Goodcell testified that, in the latter part of 1921 or early in 1922, Mrs. Pearson "spoke to me then about a little trouble she was having with Mr. Pearson; that in the event it terminated in a separation between them, all she would have left would be the ranch and the home place."

[5-8] The defendant testified at the trial that she operated the Glenn county ranch from January, 1916, until it was sold to Page and White in 1919; that her husband advanced money for the operation of the ranch during that time and to a large extent gave up his own business and devoted his time to managing the ranch; that upon the sale of the land to Page and White she and her husband made an equitable division of the proceeds of the sale; that the property then conveyed to her husband by Page and White and the note for $106,000 constituted his part of the division and that she had no interest therein; that her husband did not purchase the land for her at the trustee's sale but for himself; that she never owned any stock in the corporation prior to July 3, 1923, when her husband transferred his stock to her in settlement of an indebtedness of $80,000 then owing by him to her. Her husband testified to substantially the same effect. The defendant also testified that at the time her deposition was taken she "got out of a sick bed to come down to give that testimony"; that her "mind was confused." On cross-examination, however, she testified that, a few days after the deposition was taken, "it was read over and corrected by me in Mr. Gilbert's office with Mr. Gilbert present. We went over it, and after that I signed it. * * * Nobody was present representing Aronson & Co. at the time I went over the deposition with Mr. Gilbert." Mr. Gilbert was acting as attorney for the defendant herein at the time the deposition was taken, as well as at the trial of this action. Under such circumstances, it is a justifiable inference that the statements contained in the deposition were not the result of misapprehension or inadvertence. It was within the exclusive province of the trial court to determine whether the defendant's testimony set out in the deposition or that given at the trial correctly states the facts. It must be presumed in support of the findings and judgment that the court believed the testimony contained in the deposition rather than that given by the defendant at the trial. The most that can be said then in favor of appellant is that conflicting inferences can be drawn from the evidence upon the issue as to her alleged ownership of the stock. But where the evidence is sufficient to support conflicting inferences, the finding of the trial court either way thereon is conclusive on appeal. The evidence must be viewed in the light most favorable to the support of the findings and judgment. So viewing it, it appears therefrom that the defendant "allowed Mr. Pearson to handle" her money for her; that she "never paid much attention to how he did handle it"; that Page and White gave the defendant, in her husband's name, "a trust deed back on the ranch"; that when the land was sold under the trust deed, the husband "bid it in" for her; that thereafter and prior to the conveyance of the land to the corporation she stated, in effect, to Goodcell, that the ranch was her separate property; that the only property acquired by the corporation was the ranch and the personal property thereon, in exchange for which the corporation gave all but one share of its capital stock, the certificates for 4,749 shares thereof being made out in the name of the husband; that the defendant thought that she "still had all of the interest in the ranch"; and that after the indebtedness involved herein had been incurred the husband made a formal transfer of the stock to the defendant. If the facts were as so stated, then it may be inferred therefrom that the defendant was the equitable owner of the ranch at the time it was conveyed to the corporation and, at all times thereafter, the equitable owner of the stock standing in the name of her husband on the books of the corporation. Section 322 of the Civil Code provides:

> "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. * * * The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another."

[9-11] The court found, in the language of the complaint, "That at the time the said bonds, and all of them, were executed and delivered the defendant * * * was the owner and holder of 4,749 shares of the subscribed capital stock of said Pearson Ranch Company." Appellant contends that this finding is but a conclusion of law, and that it "is insufficient for the reason that

it does not show how or in what manner appellant was the owner of said stock at the time in question." The corresponding allegation of the complaint is the only averment therein relative to the defendant's ownership of the stock, and the defendant's answer thereto consists only of a specific denial of such allegation. "Except * * * when the evidentiary facts stated are necessarily inconsistent therewith, such a general allegation of ownership is always recognized as an allegation of the ultimate fact, and a complaint containing it sufficiently pleads plaintiff's ownership." Robinson v. City of Glendale, 182 Cal. 211, 214, 187 P. 741, 742. "It has been frequently observed that findings should be of ultimate facts, and that it is unnecessary to state the probative or evidentiary facts, for a finding of ultimate facts includes a finding of all the probative facts necessary to sustain it." 24 Cal. Jur. 968.

Upon an issue raised by a mere allegation of ownership and the denial thereof, "a finding upon the fact of title or ownership is good without a finding of the particular facts upon which such title or want of title depends." Cooley v. Miller & Lux, 156 Cal. 510, 523, 105 P. 981, 986.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J; SHENK, J.; SEAWELL, J.

199 Cal. 366

SATREN v. SPONHEIM et ux. (L. A. 8467.)

(Supreme Court of California. Sept. 16, 1926.)

1. Equity ⚿65(2)—Contention that plaintiff had placed himself beyond pale of equity by putting insufficient stamps on deed, defrauding government, held satisfactorily met by evidence and finding, notwithstanding preliminary agreement as to exchange value.

Contention that plaintiff defrauded the government by putting insufficient revenue stamps on his deed, and thus placed himself beyond the pale of equitable relief, *held* satisfactorily met by evidence and finding as to value, notwithstanding preliminary agreement of parties as to exchange value of their respective properties.

2. Equity ⚿65(2).

Claim of false swearing, excluding plaintiff from equitable relief, because of variance between complaint and evidence, is defeated by showing variance was unintentional.

3. Parties ⚿80(5)—Objection to complaint for defect of parties held waived, there having been only general demurrer and special demurrer on other ground (Code Civ. Proc. § 434).

Objection to complaint on ground of defect of parties must, under Code Civ. Proc. § 434, be deemed to have been waived, not having been before trial court by demurrer or answer, there having been only a general demurrer and special demurrer on another ground.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Martin H. Satren against Haldor P. Sponheim and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Herbert Moore, of Long Beach, for appellants.

Louis N. Whealton, of Long Beach, for respondent.

SHENK, J. Three causes of action are set forth in plaintiff's complaint. In the first count he seeks the rescission, on the ground of fraud, of a certain agreement of exchange of real and personal property, of date February 15, 1922. In the second count he asks to have the same contract canceled on the ground of partial failure of consideration. In the third count, as an alternative, he seeks damages on the ground of alleged fraudulent representations growing out of the same transaction set forth in counts 1 and 2. Upon the trial of issues joined by the complaint and the amended answer of the defendants, the court found in favor of the plaintiff, and rendered judgment wherein it was decreed that the said agreement of exchange be canceled, that reconveyances be executed by the respective parties, and that certain moneys be paid by the one to the other, to the end that the parties be placed in statu quo. From this judgment the defendants have appealed.

The plaintiff was the owner of lot 9, block 1, of Pride of Alamitos Tract, in the county of Los Angeles, together with improvements and certain personal property thereon. The defendants were the owners of 320 acres of farming land in Beltrami county, Minn. Pursuant to said agreement conveyances were exchanged and recorded in March, 1922. In July of the same year, the plaintiff went to Minnesota and for the first time saw and examined the land deeded to him by the defendants. He returned to California in September, notice of rescission was served on the defendants on October 26, and this action was commenced on November 2, 1922.

[1] Preliminarily the parties agreed on an exchange value of $8,000 on their respective properties. The plaintiff placed revenue stamps on his deed to the defendants in the amount of $6. It is the first contention of the defendants that the plaintiff thereby defrauded the federal government out of the sum of $2 and placed himself beyond the pale of equitable relief. Assuming the point to be material, the plaintiff satisfactorily meets the contention by reference to evidence to the ef-

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fect that for the purpose of fixing revenue stamps it was later the mutual understanding of the parties that the actual value of their respective properties was $6,000 and to the further fact that the court found the value of the combined properties to be $11,500, one-half of which would require revenue stamps in an amount less than those actually attached. Furthermore, no issue was made by the pleadings as to the alleged deficiency in revenue stamps.

[2] The complaint alleges that the plaintiff first went upon the land and learned of the fraudulent representations on the part of the defendant Haldor P. Sponheim in October, 1922. In the testimony of the plaintiff, it appears that he first went upon the land in the latter part of July, 1922. Upon these facts the defendants charge the plaintiff with false swearing and his consequent exclusion from relief in equity. An examination of the record supports the conclusion that the variance between the allegation and the proof was unintentional. The plaintiff satisfactorily explains the delay in his return to California, and no laches is shown in serving his notice of rescission.

[3] Finally, it is contended that the court erred in overruling the demurrer to the complaint for the reason mainly that it appears that there was a defect of parties plaintiff in that the wife of the plaintiff was not made a party, and therefore adequate relief could not be decreed. An examination of the demurrer discloses that it was not directed to any defect or misjoinder of parties plaintiff, but consisted of a general demurrer to each count with a special demurrer on the ground that the first and third causes of action were improperly united. The objection now urged was not before the trial court either by demurrer or answer and must be deemed to have been waived. Code Civ. Proc. § 434. Furthermore, at the trial, the wife of the plaintiff offered to join in any conveyance ordered by the court. Also, the plaintiff waived his action for damages and elected to stand on his claim for rescission. No prejudice, therefore, was suffered by the defendants by reason of the overruling of the demurrer.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

---

199 Cal. 318

STEWART v. STEWART. (L. A. 9131.)

(Supreme Court of California. Sept. 2, 1926. Rehearing Denied Sept. 30, 1926.)

1. Statutes 🔑226.

That other states deriving or mediately adopting their laws from Spain and Mexico adopted a different interpretation of those laws and statutes based thereon, relative to wife's interest in community property, is not controlling.

2. Courts 🔑93(3)—Where, since early statehood days, courts have consistently adhered to interpretation that wife did not have present vested interest in community property during continuance of marriage relation, Legislature only may depart therefrom.

Where, since early statehood days, courts have consistently adhered to interpretation that wife did not have a present vested interest in community property during continuance of marriage relation, so as to render interpretation a fully established rule of property, it is for the Legislature, but not for the court, to depart therefrom.

3. Husband and wife 🔑265.

Respective interests of husband and wife in community property, as to whether vested, must be determined by law at date of acquisition of property.

4. Husband and wife 🔑265—Wife's interest in community property during continuance of marriage relation vests only on death of husband or other severance of marriage relation, but is much more definite and present than that of ordinary heir (St. 1917, p. 880; Civ. Code, § 172, as amended, and section 172a, as added by St. 1917, p. 829).

Wife's interest in community property during continuance of marriage relation is not vested, and vests only on death of husband or other severance of marriage relation, but is a much more definite and present interest than that of an ordinary heir, in view of Code Civ. Proc. § 1660, Const. 1849, art. 11, § 14, Schedule, § 1, St. 1850, pp. 219, 254, Civ. Code, § 1401, Civ. Code, § 172, as amended by St. 1891, p. 425, and St. 1901, p. 598, Inheritance Tax Act (St. 1905, p. 341) St. 1861, p. 310, St. 1850, p. 255, § 11, amended by St. 1863–64, p. 363, St. 1917, p. 880, Civ. Code, § 164, amended by St. 1917, p. 827, Civ. Code, § 172, as amended, and section 172a, as added by St. 1917, p. 829.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action to quiet title and to determine community rights in real property by Frances Lee Stewart, sometimes known as Fannie Lee Stewart, against Ernest A. Stewart. From a judgment for plaintiff, defendant appeals. Reversed.

Ernest A. Stewart, in pro. per.

F. A. Jeffers and Burrel D. Neighbors, both of Los Angeles, amici curiæ.

Ida May Adams, of Los Angeles, for respondent.

Ingle Carpenter and Chas. W. Fourl, both of Los Angeles, Devlin & Devlin, of Sacramento, and Robbins, Elkin & Van Fleet, Dunne, Dunne & Cook, John W. Preston, and Allen G. Wright, all of San Francisco, amici curiæ.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the county of Los Angeles in the plaintiff's favor and in an action brought by her against the defendant, her husband, to quiet her title to the piece of real property described in her complaint; and to determine the rights of the parties to the action thereto, and declare the same, under the provisions of section 1060 of the Code of Civil Procedure.

In her complaint, the plaintiff alleged that the parties to said action had intermarried in the city of Los Angeles, state of California, on the 19th day of June, 1907, and that they had ever since been husband and wife; that neither of said parties had at the time of their said marriage any separate property; that ever since April 27, 1918, said plaintiff has been in possession of that certain piece of real estate described in her complaint under and by virtue of a deed of the same to her, which deed is attached as an exhibit to her complaint; that said property was wholly paid for from community funds of the parties hereto while living together as husband and wife and acquired by them since July 27, 1917. The plaintiff further alleged that she claims ownership of and title to "an undivided one-half valid present vested interest" in and to the said community property; that the defendant denies that said plaintiff has or had ownership of, or title to, an undivided one-half, or any valid or vested or present interest in said property, and claims adversely to plaintiff that said property belongs wholly and entirely to the defendant, and that by virtue of the community property laws of California said defendant is invested with the sole ownership of said property. Wherefore the plaintiff prays that the defendant be required to set forth the nature of his adverse claim, and that the same may be determined by said court; and that it be declared and adjudged that the plaintiff is the owner in fee simple of an undivided one-half valid present vested interest in and to said property, and for such other and further relief as to the court may seem just and equitable.

The defendant answered admitting in the main the allegations of said complaint, with the exception of those wherein the plaintiff asserted that she has or is entitled to any valid or present or vested interest in said property; and in that behalf alleged that the defendant has and is entitled to the ownership of, and title to, the whole of said property, and that whatever interest the plaintiff has therein is a mere expectancy, and is not property nor any vested right therein entitled to legal protection, at least, until such time as the community is dissolved by death or divorce. Wherefore he prays that the plaintiff take nothing by her action.

The cause went to trial upon such issues as were thus made up, and, upon its submission, the trial court rendered and entered its judgment in the plaintiff's favor, based upon findings embodied therein in substantial accord with the averments of the plaintiff's complaint, to the effect that the plaintiff's title to an undivided one-half interest in the said property be quieted as against said defendant, and the said plaintiff be decreed to be the owner of "an undivided one-half valid present vested interest" in and to the said property. From such judgment the defendant has taken this appeal.

Since the taking and presentation of this appeal to this court for decision, numerous amici curiæ have appeared, represented by able counsel in support of and in opposition to the claims asserted by the said plaintiff upon which said judgment is predicated; and it is the vigor with which these amici curiæ have supported their respective contentions by argument and by briefs which has prevailed upon the court to indulge at this time in a general review of the subject of community property under the laws of California, as interpreted by the past decisions of this court, and as affected by comparatively recent legislation.

The Constitution of California, adopted in 1849, contained the following provision:

> "Sec. 14. All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." Const. of 1849, art. 11, § 14.

The said Constitution also contained in the schedule thereto the following provision:

> "All rights, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted." Schedule, § 1.

It may be assumed that, in the adoption of these provisions of that early Constitution, the framers thereof had in mind the provisions and stipulations of the treaty of Guadalupe Hidalgo, which had been entered into in the month of February of the previous year between the governments of the United States and Mexico, by virtue of which the territory which embraced the present state of California had been ceded to the former, and which contained certain provisions intended for the protection of private property rights owned by Mexicans within the territory thus ceded at the time the treaty was made. It may also be assumed that the members of the first Legislature of the state of California organized presently under the provisions of said Constitution had the like provisions of said treaty in mind in the formulation of those laws which said Legislature proceeded to adopt in obedience to the mandate of said organic law; for, while said Legislature during the course of its session adopted an act providing that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the state of California, shall be the rule of decision in all the courts of this state" (Stats. 1850, p. 219), it also a few days later enacted a statute entitled, "An act defining the rights of husband and wife." Stats. 1850, p. 254. Section 1 of said act provided that:

> "All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise, or descent, shall be his separate property."

Section 2 of said act provided that:

> "All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property."

Section 6 of said act provided that:

> "The husband shall have the management and control of the separate property of the wife, during the continuance of the marriage."

Section 9 of said act provided that:

> "The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate. The rents and profits of the separate property of either husband or wife shall be deemed common property."

Section 10 of said act provided that:

> "No estate shall be allowed to the husband as tenant by courtesy upon the decease of his wife, nor any estate in dower be allowed to the wife upon the decease of her husband."

Section 11 of said act provided:

> "Upon dissolution of the community by the death of either husband or wife, one half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment."

Section 12 of said act provided:

> "In case of the dissolution of the marriage, by the decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require."

The first judicial reference to the foregoing provisions of this act occurs in the case of Panaud v. Jones, 1 Cal. 488. In that case, the plaintiff was guardian ad litem of certain minor children of Anastasio Alviso and his wife. Alviso died a widower in 1846, his wife having predeceased him several years before. On the eve of his death Alviso made a will purporting to dispose of certain property which had been acquired by himself and his wife during marriage by purchase or through their labor and industry. This class of property was known to the Spanish and Mexican law as Gananciales, which corresponds to our term "community property." By his will Alviso undertook to direct his executor to sell the whole of said property, and devote the proceeds thereof to the payment of certain debts contracted during his marriage. It was the contention of the guardian ad litem of the said minors that, under the Spanish and Mexican laws, the interest of the wife during the lifetime of her husband and herself in the Gananciales was such a definite and vested interest that upon her death it passed by succession to these her heirs, and that the power of her surviving husband to dispose of the interest of his deceased wife in such property was terminated by her decease. The learned writer of the opinion in that case referred to and quoted at length from the provisions of the said act of 1850, declaring the same to be founded in the main upon and to be a correct exposition of the Spanish and Mexican laws defining the rights of husband and wife in the Gananciales during marriage, but pointed out that as to section 11 of said act it made a wide departure therefrom by providing that:

> "Upon the dissolution of the community by the death of either husband or wife, one half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife."

The opinion refers to the said act of 1850 as, with the exception above stated, containing a clear and succinct statement of the Spanish law respecting the community property of husband and wife. It then proceeds to show that, under the Spanish and Mexican law quoted from several authorities which purport to give the text thereof, it was provided that the husband during the continuance of the marriage might freely alienate and dispose of the community property without the consent of the wife, and that such alienation should be valid unless it be proved that it was made with intention to defraud her. Among these authorities, the author of the opinion quotes from Febrero as follows:

> " 'The wife,' says Febrero (1 Feb. Mej. 225, § 19), 'is clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the marriage; but after his death, it is transferred to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner in property and possession of the half which he left.' "

He further quotes:

> "'The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the Gananciales, since, even during the marriage, he has in effect the irrevocable dominion, and he may administer, exchange, sell and alienate them at his pleasure, provided there exist no intention to defraud the wife. For this reason, the husband living, and the marriage continuing, the wife cannot say that she has any Gananciales, nor interfere with the husband's free disposition thereof, under pretext that the law concedes the half to her, for the concession is intended for the cases expressed and none other.'"

The next case wherein the provisions of the act of 1850 were considered by this court was that of Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125. In that case the sole question presented related to the power of the husband to alienate the community property by devise or will and thus defeat the right of the surviving wife therein. The court held that under the terms of said statute this could not be done, and in so holding used this language:

> "The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it, for such a conveyance can only operate after death, upon the very happening of which the law of this state determines the estate, and the widow becomes seized of one-half of the property."

The next case engaging the attention of this court touching this subject was Estate of Buchanan, 8 Cal. 507, wherein the court, after referring to the provisions of the act of 1850, said:

> "The law of Mexico, in force here until our statute took effect, was the same, so far as relates to the merits of this question. The property belonged to the community, and upon the death of the husband, the widow took one-half. The husband had the power of disposition while living, but not by will, which could only take effect after his death."

It is to be noted that Field, J., was counsel for the prevailing party in the foregoing case. It is also to be noted that in each of the last-cited cases the question presented to the court related to the power of the husband to dispose of the common property by devise or will so as to defeat the rights of the surviving wife in the same, as defined in the Spanish and Mexican laws, and as set forth in the provisions of the statute of 1850. In Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533, and Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538, in each of which cases the opinion was written by Mr. Justice Field, the law embraced in the act of 1850 is referred to as derived from Mexico, and the doctrine stated in Beard v. Knox and Estate of Buchanan, supra, is approved. In the case of Scott v. Ward, 13 Cal. 458, in which the opinion was also written by Mr. Justice Field, the previous decisions of the court touching the respective rights of the spouses in the community property were reviewed with reference to the laws of Mexico, from which our statute was derived, the learned author of the opinion being careful to point out that there was no conflict between the decisions in Estate of Buchanan and Panaud v. Jones, in the course of which both Febrero and Escriche, also a learned commentator upon the Spanish and Mexican laws, were commented upon, showing the intimate familiarity of the learned writer of the opinion with both. Again, in the case of Noe v. Card, 14 Cal. 577, in an opinion also written by Mr. Justice Field, the condition of the Spanish and Mexican laws relating to the property rights of married persons is elaborately reviewed, with passing references to the decisions of this court referring to those laws.

We are thus brought down to a consideration of the decision of this court in the case of Van Maren v. Johnson, 15 Cal. 308, in which case the opinion was also written by Mr. Justice Field. The action was one wherein creditors of the wife previous to her marriage sought to enforce their claim against the separate property of the wife and the common property of both. The consideration of the case involved an inquiry as to the basis of the right of such creditors to have recourse to the community property for the satisfaction of their claims. In determining this question, the author of the opinion apparently felt called upon to decide that the basis of such right was not to be found in the existence of such a vested interest of the wife in the common property as would render that interest subject directly to the lien and execution of a judgment against her for her debt created before her marriage. The conclusion of the court upon this phase of the case was therefore germane, and was made doubly so by the fact that the marriage of the defendant had occurred after the inception of the suit and during its pendency, and the question whether her husband was properly to be made a codefendant arose in the case. It will thus be seen that if the wife's interest in the community property was a vested interest and as such subject to the lien and execution of the judgment, her husband, while he might possibly be made a formal, would not be a necessary, party to the action; while, on the other hand, if the husband was invested with the ownership of the whole of the common property, he would be a necessary party to any action the judgment in which for his wife's antenuptial debt was to be enforced against the common property. The following language of Mr. Justice Field in deciding the case was not, therefore, obiter, as insisted by and on behalf of the respondent herein, but was directly involved in the determination of both of the foregoing questions in the case:

> "The objection taken is the subjection, which the judgment authorizes, of the common property to its payment. The statute in terms provides, that the separate property of the wife shall be liable for her debts contracted previous to the marriage, and at the same time, that the separate property of the husband shall not be thus liable. It is silent as to the liability of the common property for such debts, and also as to the liability of that property for the previous debts of the husband. Yet the common property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor. Guice v. Lawrence, 2 La. Ann. 226. The objection must then be solved by considerations arising from the rule of the common law."

Upon petition for rehearing apparently the question was directly presented as to whether the husband of the defendant was a necessary party to be brought into the action, and in denying that petition the court said:

> "The liability of the common property of the defendants, and the necessity of making Johnson [the husband] a party, arise from the subsequent marriage."

We must therefore regard the foregoing language of the court in its main opinion as not only not obiter dictum, but as expressing the seasoned conclusions of the learned writer of the opinion, derived from a profound familiarity with the Spanish and Mexican laws, as evinced by those previous decisions to which reference has above been made.

The next decision of this court touching the nature and extent of the respective rights of the spouses in their community property was the case of Packard v. Arellanes, 17 Cal. 525. The questions which were discussed in that case related to the issue as to whether upon the dissolution of a marriage by the death of the wife one-half of the common property became subject to administration under the provisions of the act regulating the settlement of the estates of deceased persons. In the briefs of counsel the sources of the act of 1850 in the Spanish and Mexican laws relating to the property of the community were elaborately treated, the previous decisions of this court upon the subject were cited and commented upon, and the court accordingly felt itself called upon to go deeply into the question as to the nature of the wife's interest in the common property; and while it may be true that the question as to the rights of the respective spouses in the common property while each was living may not have been directly involved in that decision, nevertheless the thoroughness with which that question was discussed in the argument and treated in the decision renders the latter not subject to the criticism of being obiter; and this especially in view of the fact that the same members of the court who participated in the decision of the case of Van Maren v. Johnson, supra, concurred in the language of the decision in Packard v. Arellanes. In the latter case the court cited Van Maren v. Johnson with approval as to its holding that the wife had no vested estate or interest in the community property during the existence and continuance of the marriage relation, the court saying:

> "During the marriage the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact, its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community, and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity. This was held in Van Maren v. Johnson, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. The same doctrine prevails in Louisiana, and appears to be an established principle of the civil and Spanish law."

It is, however, contended by certain of the amici curiæ herein that this court departed from the doctrine laid down in Van Maren v. Johnson and Packard v. Arellanes, supra, in the case of Ord v. De La Guerra, 18 Cal. 67, and also in Payne v. Payne, 18 Cal. 292. We have given careful consideration to both of those opinions. In each the questions dealt with related to the rights which arose under the act of 1850 in the property of the community after the death of one or other of the spouses. No reference is made in either of said cases to the case of Van Maren v. Johnson, nor is any disposition evinced, so far as we can discover, to depart from either that decision or from the decision in the case of Packard v. Arellanes, to which but one scant reference, and that not by way of criticism, is made. The same justices who decided the two earlier cases concurred in deciding the two later ones, and there is no indication that they had in any degree altered their views as expressed in those earlier decisions. Nor do we find any such change of view intimated in the decision two years later, by the same members of the court, in Hart v. Robertson, 21 Cal. 346. That no change had in fact occurred in the attitude of the court touching this subject is made further evident by the decision of this court in the case of Fuller v. Ferguson, 26 Cal. 546, wherein, although the personnel of the tribunal had entirely changed, the court undertook to restate the principles of the Spanish and Mexican laws upon the subject, quoting from Febrero the language already adopted from that commentator in Panaud v. Jones, supra, to the effect that during the marriage and while both spouses were living the wife had no vested interest in the community property, but that such right came into being only after her husband's death, when her interest in the common property passed to her irrevocably and effectively. While in this case the court also quotes some language from Schmidt's Civil Law of Spain and Mexico to the effect that the relation of the husband and wife as to the property acquired during marriage was in the nature of a partnership, the court otherwise evinces no disposition to disturb the course of its earlier decisions, more precisely dealing with the nature of the respective rights of each in the common property during the lifetime of both.

During the next 20 years this court had frequent occasion to pass upon the rights of the husband and wife in the property of the community when by death or divorce the issue of the resultant rights of the parties came into question, the cases touching thereon being: Morrison v. Bowman, 29 Cal. 337; Dow v. Gould, etc., 31 Cal. 620; Peck v. Brummagim, 31 Cal. 442, 89 Am. Dec. 195; Galland v. Galland, 38 Cal. 265; De Godey v. De Godey, 39 Cal. 157; Broad v. Broad, 40 Cal. 493; Broad v. Murray, 44 Cal. 228; Johnston v. Bush, 49 Cal. 198; Cook v. Norman, 50 Cal. 634. In none of these cases, with the single exception of De Godey v. De Godey, supra, were the earlier decisions of the court defining the interest in the property of the community during its continuance reviewed, nor the doctrines laid down in anywise disturbed. In the De Godey Case, which was an action for an injunction commenced some time after a divorce had been adjudged between the parties but in which judgment the community property rights of the parties had not been determined, Mr. Justice Wallace, in deciding the case, referred to the case of Van Maren v. Johnson, supra, as stating that "the interest of the wife therein pending the marriage has been termed 'a mere expectancy,'" but, continues Judge Wallace:

> "While, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her, as that husband cannot deprive her of it by his will (Beard v. Knox, 5 Cal. 256 [63 Am. Dec. 125]), nor voluntarily alienate it for the mere purpose of divesting her of her claims to it. Smith v. Smith, 12 Cal. 226 [73 Am. Dec. 533]). The theory upon which the right of the wife is founded * * * is, that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court."

The foregoing or the further statement of Mr. Justice Wallace in that case with reference to the nature of the rights of the wife in the common property, while apt and accurate with respect to the facts of that particular case, cannot be held to have disturbed or diverted the course of the court's consistent line of decision relating to the rights of husband and wife in the property of the community when neither death nor other dissolution of the marital relation has occurred to change that relation. This is made plain by the later decisions of this court to which we shall presently advert. The case of Greiner v. Greiner, 58 Cal. 115, is not of much value to either of the litigants in the instant case, for the reason that the members of the court were in such disagreement as to render it doubtful as to whether there was a majority decision upon the main issues in the case. It may be said, however, that the division did not arise over the correctness of the earlier cases above referred to, but over their applicability to the facts of the case at bar. In the case of In re Rowland, 74 Cal. 523, 16 P. 315, 5 Am. St. Rep. 464, it was stated by Mr. Chief Justice Searls in deciding the case that, under the changes made in section 11 of the act of 1850 by its subsequent amendments embodied in section 1401 of the Civil Code, upon the death of the wife the entire community property belongs to the surviving husband, who does not take by succession. In the language of the Chief Justice:

> "The estate in expectancy of the wife in the community property is dependent upon her survivorship; and in the event of her death before her husband, it is deemed never to have existed. If we are correct in this, the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed."

Certain amici curiæ herein make a vigorous assault upon the foregoing statement of Mr. Chief Justice Searls, particularly with respect to the capacity in which the surviving husband takes and holds the property upon the death of his wife; but, with respect to the foregoing statement of the learned author of the opinion as to the interest of the wife in the common property while both spouses are living in the marriage relation, it is to be noted that the views of Chief Justice Searls upon that subject were those which had been long and consistently held by him, since it appears that he was counsel for the prevailing party in the first appeal brought to the Supreme Court involving this question, viz., the case of Panaud v. Jones, supra; and hence that the language employed by him in Estate of Rowland, supra, is not to be lightly regarded as mere dictum, or as inadvertently employed. The decision, while originally in department, was adopted by the full court through its unanimous denial of a petition for rehearing.

In the case of In re Estate of Burdick, 112 Cal. 387, 44 P. 734, the court again had occasion to consider the nature of the estate of the wife in the community property upon the death and distribution of the estate of her deceased husband. The probate court in the settlement of the latter's estate and in its decree of distribution undertook to determine the extent of the interest of his widow in the community property and to distribute the widow's portion thereof to her. The appeal was presented upon the theory that the estate of the wife in the property of the community was such a vested interest therein as that she did not take the same by succession, and hence that the probate court had no jurisdiction or power to deal with such interest in the course of the probate and distribution of the estate of the deceased husband. In disposing of this claim, Mr. Justice Temple held that the title to the community property was in the husband, and that the wife's interest in it during his lifetime was a mere expectancy. He bases that conclusion upon Packard v. Arellanes, supra, from which he quotes as follows:

> "It is true the wife is a member of the community and entitled to an equal share of the acquests and gains; but so long as the community exists, her interest is a mere expectancy and possesses none of the attributes of an estate, either at law or in equity."

And the learned justice goes on to say:

> "The legal title to the community property is in the husband. He has the absolute dominion and control of it, and the wife has no right or title of any kind in any specific property, but a possible interest in whatever remains upon a dissolution of the community otherwise than by her own death. This cannot be classified as any species of estate known to the law."

In the foregoing opinion Justices McFarland, Van Fleet, and Henshaw concurred; but Justices Harrison and Garoutte, while concurring in the judgment of affirmance, disagreed with the reasoning and conclusions of the majority membership of the court as to the nature of the wife's interest in the property of the community being "a mere expectancy," or being derivable by succession upon her husband's death. In that portion of the minority opinion in which Justice Harrison dissents from the foregoing conclusions he refers to the cases of Van Maren v. Johnson and Packard v. Arellanes, supra, but maintains that the language of those cases holding the interest of the wife to be "a mere expectancy" during the existence of the marital relation was modified by the later decision of the court in the case of De Godey v. De Godey, supra, wherein it was stated with reference to that phrase that:

> "While, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her, as that the husband cannot deprive her of it by his will * * * nor voluntarily alienate it for the mere purpose of divesting her of her claims to it."

The minority justices, therefore, concluded that the interest of the wife does not upon the death of the husband come to her by succession, but that nevertheless the probate court has, under the express provisions of the Code, power to deal with the entire property of the community in the course of administration of the deceased's husband's estate and to assign the widow her share of the remainder thereof, after such administration by its decree of distribution.

Following this decision, and in the next year, and while the personnel of the court remained the same, came the decision in the case of Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, the opinion in which was also written by Mr. Justice Temple and was fully concurred in by Justices Henshaw, Harrison, and McFarland, and qualifiedly concurred in by Chief Justice Beatty. In the main opinion in that case, Justice Temple goes more fully into the sources of our laws respecting community estates than was done by him in his former opinion and also into the state of the decisions and statutes regarding the same. In so doing, the learned justice points out that, while the system of the community law was inherited from Spain and Mexico by California, Louisiana, and Texas and was later adopted by Washington, Nevada, Idaho, and Arizona, variations therein had arisen in these separate sovereignties according to local conditions or opinions which had resulted in divergent views as to the nature of the wife's interest in the property of the community during the continuance of the marital relation. Mr. Justice Temple proceeds to review and reconcile the decisions of this court upon the subject, citing Panaud v. Jones, supra, with its quotation from Febrero, and the later leading cases of Van Maren v. Johnson and Packard v. Arellanes in harmony with it; and further showing that Beard v. Knox, De Godey v. De Godey, and Smith v. Smith, supra, are, when properly interpreted, not out of line with these earlier cases. The learned writer of the opinion also calls attention to the fact that the Spanish commentators, Febrero and Escriche, are not at variance in stating that the wife's interest in the community, under the Spanish and Mexican laws, was merely a nominal or "feigned" interest which did not become an actual estate until the dissolution of the marriage. He also quotes from Ballinger, our leading text-writer on community property, as declaring that, under the Mexican law as above stated, the wife had only a feigned or fictitious estate which ripened into a legal estate upon the termination of the marriage. With respect to the phrase "a mere expectancy," employed by Mr. Justice Field in Van Maren v. Johnson, Justice Temple says:

> "I doubt if a happier phrase could have been devised to express the interest of the wife in the community. * * * It may be said to be a right—not to property, but, as against the community—to take one-half of the residue after payment of debts in case the marriage be dissolved during her life. A somewhat similar state of things exists in France under the Code, and it has been there said that the wife is not 'proprie socia, sed speratur fore. She has une simple esperance to share in such property as may be found at the dissolution of the community undisposed of by the husband.' 1 Burges' Colonial Law, 368."

It is to be noted that the court in treating the interest of the husband in the community property as a vested interest in the whole thereof during the existence of the community was doing so prior to the amendment to section 172 of the Civil Code in 1891 (St. 1891, p. 425), and as to that interest the court held that the Code prior to such amendment "vested in the husband with reference to the community property all the elements of ownership and in the wife none." It is to be also noted that Mr. Justice Harrison, who wrote the qualifying opinion in the Estate of Burdick, supra, expressly concurred in the opinion of Mr. Justice Temple in the Spreckels case. This decision, if adhered to, puts an end to the discussion as to whether the language of any of the earlier decisions of this court referred to and approved therein was dictum, and also disposes of the question as to whether those decisions, or any of them, were predicated upon any misconception of the Spanish and Mexican laws respecting the estate or interest of the wife in the property of the community during the continuance of the marriage relation. In the two cases which presently followed the foregoing decision, Sharp v. Loupe, 120 Cal. 89, 52 P. 134, 586, and Cunha v. Hughes, 122 Cal. 111, 54 P. 535, 68 Am. St. Rep. 27, the doctrine declared in Estate of Burdick, supra, to the effect that the wife took her share of the community property by succession from her husband, is approved, the court citing the above case as authority for that conclusion, and Mr. Justice Harrison writing, and Mr. Justice Garoutte concurring in each of said decisions.

Thus the course of decision touching this subject stood for another decade until the case of Estate of Moffitt arose under the Inheritance Tax Statute approved March 20, 1905 (Stat. 1905, p. 341, § 1), wherein it was provided that:

> "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same * * * shall be and is subject to a tax hereinafter provided for."

The single question presented upon appeal in the above case was whether the surviving wife's share of the community property was subject, under the terms of said statute, to an inheritance tax. In determining that question the court reviewed its past decisions, fully approving its most recent utterances in the cases of Estate of Burdick and Spreckels v. Spreckels, supra, and also restating with approval the conclusions of Chief Justice Field and Mr. Justice Cope as to the state of the Spanish and Mexican laws from which the statute of 1850 had been derived, as expounded in Van Maren v. Johnson and Packard v. Arellanes, supra, and quoting from the latter as declaring that:

> "So long as the community exists, her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity."

The court accordingly held that the community interest of the wife derived from her husband upon his death was subject to the provisions of the said inheritance tax law.

Before proceeding further with an examination of our decisions touching this subject, it may be well to glance briefly at the course of legislation upon it. We have already noted the provisions of the act of 1850. That statute remained unchanged until the year 1861, when section 11 thereof was amended so as to provide that upon the death of the wife the whole of the community property, instead of one-half as formerly, should go to the surviving husband. Stats. 1861, p. 310. In the year 1864 (St. 1863–64, p. 363) section 11 of the act of 1850 was further amended so as to dispense with any administration upon the community property, in the event the wife died first. The act of 1850, with its foregoing amendments, was carried into the Civil Code upon its adoption in 1872, and the law of community property, as thus codified and as the same had been thus far interpreted, remained practically unchanged until the year 1891, when section 172 of the Civil Code which up to that year had read, "The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate," was amended by adding thereto this provision, "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto." In the year 1901 (St. 1901, p. 598), the following further proviso was added to said section:

> "And provided also, that no sale, conveyance or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife."

In the case of Spreckels v. Spreckels, supra, it was earnestly urged that by the amendment to section 172 of the Civil Code in 1891 the status of the husband as invested with the sole ownership of the community property had been changed, and that the wife had thereby become invested with an ownership in the undivided one-half thereof. The court did not, however, deem it necessary to dispose of that question in that case, confining itself to the declaration that any legislative attempt to encroach upon the vested ownership by the husband of the property of the communtiy so as to be retroactive upon such property owned by him prior thereto would be unconstitutional, as an interference with his vested rights in such property. In the second case of Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, the question as to the effect of such amendment to section 172 of the Civil Code was directly presented and this court, after the painstaking manner of Mr. Justice Shaw, went again over the ground covered by its former decisions from the beginning of our judicial history, reviewing all of the cases wherein it had been laid down as the established doctrine in this state that, under our statutes as they existed prior to 1891, the husband was, during the marriage "the sole and exclusive owner of all the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him." Having so again held, the court proceeded to say:

> "We are satisfied that the proviso of 1891 does not render a gift of community property by the husband without the consent of the wife void as to him, nor confer upon him, in his lifetime, or upon his personal representatives after his death, any right or power to revoke the gift or recover the property. There is nothing in the language to express the idea that the title does not, as before, remain wholly in him. The provision is merely for a limitation upon his power to dispose of it. He is bound by his own gift as fully as if it was of his separate estate. * * * Neither does the proviso purport to vest in the wife, during the marriage, any present interest or estate in the community property given away by the husband without her written consent. In view of the long-settled doctrine that the entire estate therein is in the husband during the marriage relation, a doctrine that had become a fixed and well understood rule of property, it is not to be supposed that the Legislature would have made a change of so radical a character without plain language to that effect. We do not find in the proviso such language, nor anything that can reasonably be so construed. If it confers upon her, during the marriage, any right respecting such gifts, it is nothing more than a right to revoke the gift and, if necessary, sue to recover the property, not as her separate estate, but to reinstate it as a part of the community property, with the title vested in the husband and subject to sale by him, as before. We do not find it necessary to determine whether this right accrues to her at once when the gift is made, or whether it remains in abeyance until her expectancy in the community property becomes vested by the dissolution of the marriage by death or divorce. In either case, upon the facts alleged, the present action must fail."

In the case of Dargie v. Patterson, 176 Cal. 714, 169 P. 360, decided in the following year, this court again had occasion to deal with the effect of the amendment of 1891 upon the status of the wife in relation to the community property as it existed under said section of the Code prior to its said amendment, and in so doing fully reaffirmed, with apt quotation therefrom, what it had so recently decided in the second Spreckels Case. In so doing, the court went so far as to expressly disapprove of certain utterances of Chief Justice Beatty in his concurring opinion in the first Spreckels Case, and which might lend color to the view that prior to the husband's decease, but subsequent to the act of 1891, the wife had some sort of vested interest in property which the husband had undertaken to give away, other than her interest as an heir. The foregoing utterances of this court in the second case of Spreckels v. Spreckels as to the interest of the wife in the community property, and especially its declaration that, "in view of the long-settled doctrine that the entire estate therein is in the husband during the marriage relation, a doctrine that had become a fixed and well understood rule of property, it is not to be supposed that the Legislature would have made a change of so radical a character without plain language to that effect," while applied to the Code amendment of 1891, has also a particular significance in its application to subsequent legislation upon the subject. In the year 1917 (St. 1917, p. 880), the Legislature adopted an act revising the inheritance tax laws, and in so doing changed the intendment of the act of 1905 as interpreted by this court in Estate of Moffitt, supra, and as continued in force in the later amendments of said act down to the year 1917. In said revision of the latter year the Legislature added the following proviso, viz.:

> "Provided, that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act." St. 1917, p. 881, § 1.

It is to be observed that the foregoing proviso is by its terms expressly limited to "the purposes of this act," thus clearly indicating by exclusion that it was not the purpose of the Legislature of 1917 to change the otherwise general and long-established rule of property except in its application to the particular and limited purposes of said inheritance tax law. This is made plain when we come to consider the further legislative enactments adopted of even date with the foregoing act in the form of certain amendments to the several sections of the Civil Code relating to community property. Section 164 of the Civil Code as it had existed since 1897 (St. 1897, p. 63) was amended (St. 1917, p. 827) by adding certain clauses thereto which it is not contended are in any respect germane to this litigation. Section 172 of said Code was also amended (St. 1917, p. 829) so as to read as follows:

> "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

In addition to the foregoing amendment of section 172, 172a was added thereto, reading as follows:

> "The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith, without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

It is most earnestly contended by and on behalf of the respondent herein that the changes in the laws relating to community property effectuated by these two latter amendments were such as to create in the wife, if such had not theretofore existed, a vested interest in an undivided one-half of the community property immediately upon the acquisition of such property by the spouses or either of them, and to continue thereafter during the existence of the marriage relation. We are unable for the following reasons to give our approval to that contention. The Legislature in framing these two amendments which, taken together, worked a revision of the former section 172 of the Civil Code did not state therein "in plain language," as it was pointed out in the second Spreckels Case it might easily have done, "that the purpose of these amendments was to vest in the wife during the marriage a present interest or estate in the community property." The Legislature did not even by said amendments to the Civil Code go as far as it had done in its revision of the inheritance tax law, coincidently adopted, so as to state that:

> The "one-half of the community property which goes to the surviving wife on the death of the husband * * * shall not be deemed to pass to her as heir of her husband but shall * * * be deemed to go, pass, or be transferred to her for valuable and adequate consideration."

Had the Legislature seen fit to so declare in the language employed by it in the coincident statute, no doubt could have existed as to its intent to work such a radical change in the former and long-established status as to render the interest of the wife in the community property thereafter to be acquired a present vested estate and interest therein from the date of its acquisition. The Legislature did not do this nor anything like it. All that the Legislature by these amendments did do, or attempt to do, was to cast about the interest of the wife in both the real and personal property of the community during the continued existence of the marriage relation added safeguards and protection against the fraudulent or inconsiderate acts of the husband in the exercise of his control and dominion over these properties of the nature of those already provided for in earlier statutes and especially in and by the 1891 amendment to section 172 of the Civil Code.

It follows, to our minds, irresistibly that the same reasoning which was applied to the earlier amendment of section 172 of the Civil Code equally applies to those changes in and revision thereof accomplished by the Legislature in 1917. Additional force is, if needed, given to this conclusion when the particular provisions of section 172a as added to the Code in that year are subjected to careful consideration; for it is made to therein appear that the sole lease, contract, mortgage, or deed of the husband holding the record title to community real property to a lessee, purchaser, or incumbrancer in good faith, without knowledge of the marriage relation, shall be presumed to be valid and shall be so valid unless an action to avoid such instrument shall be commenced within one year from the recordation thereof. This provision renders the conveyance of the whole of the community real estate to a purchaser or incumbrancer thereof in good faith voidable but not void; a condition entirely inconsistent with the existence of a present and vested ownership in the wife of an undivided one-half of such property, and also with an intent on the part of the Legislature by said amendments to effectuate such a radical change in a long-established rule of property. We are, therefore, clearly of the opinion that the amendments to the Civil Code, adopted in 1917, did not operate to change such rule to the extent of creating in the wife a present vested interest in the property of the community during the continuance of the marriage relation.

[1, 2] In what has been heretofore said in this opinion we are not unmindful of the fact that in certain of the other states which have been designated as "community property states," or, in other words, states which immediately derived or have mediately adopted their laws relating to community property from the laws of Spain and Mexico, a different interpretation of those laws and of the statutes based thereon has prevailed and that much emphasis has been laid during the presentation of this cause in the argument and briefs of counsel upon the divergence existing between the decisions in California and in these several other jurisdictions. Discussions of this character are interesting, but are by no means controlling in dealing with questions involving conflicts in laws. California was as much entitled as New Mexico or Texas or Washington to adopt and to persist in its own interpretation of the meaning and effect of the Spanish and Mexican laws in relation to the wife's interest in the community property. Having made and persisted in its own interpretation of these originals through all these years, and having by so doing created and consistently adhered to such interpretation as to render the same a fully established rule of property, it is for the Legislature, but not for this court, to depart from such rule. Up to and including the year 1917, the Legislature has not, in our opinion, seen fit so to do. The parties to this action acquired the property affected by this litigation during the year 1918.

[3, 4] It being admitted that the property then became and has since been community property, the respective rights of the said parties thereto, in so far as those rights do or do not amount to vested interests therein, must be determined by the state of the law at the date of their acquisition of said property. Spreckels v. Spreckels, 116 Cal. 339–349. It is not necessary to consider later changes in the law, and particularly those changes which relate to succession. Nor do we think that any further prolonged discussion is required with respect to the more recent decisions of this court. The case of Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22, in which the opinion was written by Mr. Justice Lawlor and concurred in by a united court, followed along the beaten track of our former decisions touching the wife's interest in the community as it existed prior to 1917. It is, however, pertinent to the present discussion in so far as it considers, and we think correctly disposes of, the cases of Blum v. Wardell (D. C.) 270 F. 309, and (C. C. A.) 276 F. 226, so much reiterated and relied upon by the respondent herein, and also considers and disposes of the case of Arnett v. Reade, 220 U. S. 311, 31 S. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, to the satisfaction of this court. With respect to Estate of Brix, 181 Cal. 667, 186 P. 135, we find nothing in the opinion of Mr. Justice Shaw, the writer of the opinion therein, out of line with the previous utterances of that jurist in cases written or concurred in by him and hereinabove commented upon. Nor do we find anything in Estate of Jolly (Cal. Sup.) 238 P. 353, which militates against the main current of decision in our earlier cases as reviewed in this opinion. The most recent decision of this court touching the subject is that of Blethen v. The Pacific Mutual Life Ins. Co. et al. (Cal. Sup.) 243 P. 431, in which in an opinion written by Mr. Justice Lennon and concurred in by the full court, the earlier and later cases are again reviewed, and the conclusions reached in Dargie v. Patterson and Roberts v. Wehmeyer, supra, are approved. We do not deem it necessary to prolong this opinion by commenting upon the opinion of the Supreme Court of the United States in the recent case of U. S. v. Robbins, 269 U. S. 315, 46 S. Ct. 148, 70 L. Ed. 285, nor in adverting to the varying views of certain officials of the federal government as to the present state of the laws of California relating to community property, and as to the status of the wife's interest therein, as affected by inheritance tax legislation.

We wish to say in conclusion that we are in accord with the intimations from time to time reflected by this court in the long line of its past decisions to the effect that the interest of the wife in the property of the community during the continuance of the marriage relation, while it has not yet reached the status of a vested interest therein, is, and has always been from a time reaching back into the Spanish and Mexican originals of our community property laws, a much more definite and present interest than is that of an ordinary heir. She has, by virtue of the share which in her own sphere she has contributed toward the acquisition and conservation of such properties, rights therein which have been always safeguarded against the fraudulent or inconsiderate acts of her husband with relation thereto, and for the assertion and safeguarding of which she has been given access to appropriate judicial remedies both before and after the time when her said rights and interests would ripen and become vested through the death of the husband or other severance of the marriage relation, whenever such rights and ultimate interests were affected by or threatened with such forms of invasion. The instant case is not, however, such a case. In her complaint herein the plaintiff expressly alleges that she and the defendant, her husband, "are now and ever since their said marriage have been peacefully and happily living together as husband and wife." She nowhere alleges therein that her said husband is attempting or threatening to deal with or dispose of said property fraudulently or inconsiderately or otherwise so as to affect or in anywise endanger her legal rights and interests therein. He could not do so in fact, even if he did so desire, since the legal title to said property stands of record in the plaintiff's name.

The trial court was clearly in error in adjudging that the interest of the plaintiff in said property was that of "the owner of an undivided one-half valid present vested interest in and to the within described property."

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

79 Cal. App. 262

In re LE FEVRE'S ESTATE.

BARSE v. SCOTT et al. (Civ. 5619.)

(District Court of Appeal, First District, Division 2, California. Sept. 4, 1926.)

Executors and administrators ⚿314(12).

Question of jurisdiction of superior court sitting in probate being exceeded by determination of title to personalty may not be considered on appeal from decree of distribution, no appeal from decree settling final account having been taken.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

In the matter of the estate of Frances B. Le Fevre, deceased. From part of the decree of distribution, Mills W. Barse, as executor and individually, appeals; Clara L. Scott and others being respondents. Affirmed.

Edward E. Leighton, of Los Angeles, for appellant.

Shaw & McDaniel, Victor E. Shaw, Ivan G. McDaniel, and Flint, MacKay & Bowen, all of Los Angeles, for respondents.

STURTEVANT, J. This is an appeal by Mills W. Barse, "both personally and as executor," from paragraph II of the "decree of distribution to foreign executor under section 1667 of the Code of Civil Procedure." The appellant brought up a typewritten transcript containing copies of (1) the decree; (2) second and final account and report of executor and petition for final distribution; and (3) notice of appeal. He also brought up a typewritten reporter's transcript, which purports to contain proceedings had on February 5, 1925. However, the reporter's transcript does not show what part of the probate proceedings were on hearing on said date. After the transcripts were filed, and after the respondent Clara Le Fevre Scott had filed her brief, the appellant made a motion that he be granted permission to also bring up as a part of his record on appeal the inventory and the final account. The hearing of that motion was continued until the date of the hearing of the appeal. Thereafter the parties stipulated that the appeal might be submitted on the briefs, without oral argument. We must assume, therefore, that the motion to bring up additional papers has been abandoned.

In his opening brief the appellant states that the sole question presented on this appeal is whether the superior court, sitting as a probate court, exceeded its jurisdiction in making a decree of distribution, determining from the evidence introduced at the hearing that the chattels, household furniture, and furnishings were at the date of the death of decedent, and are now, the property belonging to the estate of said decedent, and that said Mills W. Barse has no right, title, or interest in said property, other than the interest acquired by him under the will of said decedent. To that proposition the respondent replied that the record presented to this court does not show that the probate court exceeded its jurisdiction; in other words, that by its decree the probate court attempted to adjudicate title as between the estate and an adverse claimant. In this behalf the respondent contended that such an adjudication under no circumstances could be a part of a decree of distribution, because a decree of distribution merely purports to determine who are entitled to share in the estate and the amount of such share.

The respondent further contended that, while ordinarily a probate court will not undertake to try the title to personal property (In re Haas, 97 Cal. 232, 31 P. 893, 32 P. 327), nevertheless, as between an executor and legatees under the will, that it sometimes becomes necessary in settling the account of an executor for the probate court to hear and determine what properties the executor should be charged with. Estate of Simonton, 183 Cal. 53, 56, 190 P. 442. However, in such an instance, in order that the same may be reviewed on an appeal, the aggrieved party should appeal from the order settling the final account. In this behalf the respondent further showed to this court that in the instant case no appeal from the order settling the final account was taken, and therefore that the question which the appellant would have this court determine is not properly before the court. In making these contentions we think the respondent is correct.

After having filed the motion above mentioned, the appellant filed a reply brief. In that brief he assumes that the inventory and final account have been brought up. So assuming, he calls attention to the fact that the inventory and the final account refer to the furniture, etc., in a lump sum of $7,500. Thereupon he contends that neither the in-

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ventory nor the final account show that the particular pieces of personal property which he claimed to own were included. He then asserts that a decree settling a final account is conclusive only as to those matters contained in the account. While asserting that the pieces of personal property which he claimed were not in the account, the appellant asserts further that he had no remedy by appealing from the decree settling the final account. This last proposition is sound, but it carries the appellant too far. If the pieces of personal property which he claimed to own were not in truth and in fact included in the final account, then it is perfectly clear that the appellant has not been injured, and that there is no reason why he should take an appeal. However, be that as it may, as we have recited in the beginning, he took no appeal from the decree settling the final account, and he may not present the question on appeal from the decree of distribution.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

79 Cal. App. 268

PEOPLE v. ANASTASION. (Cr. 905.)

(District Court of Appeal, Third District, California. Sept. 7, 1926.)

Infants 🔑20—Rape 🔑54(1).

In prosecution for rape of girl 11 years old and lewd and lascivious conduct with her, corroboration of her is not required.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Tom Anastasion was convicted of rape and lewd and lascivious conduct, denied a new trial, and he appeals. Affirmed.

Martin I. Welsh and John C. March, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was tried and convicted upon an information containing two counts, one count charging the defendant with the crime of rape committed upon a female of the age of 10 years, and a second count charging the defendant with the crime of lewd and lascivious conduct committed with the same female, all in the county of Sacramento, state of California, and charged to have been committed in the month of August, 1925. The jury fixed the place of imprisonment in the state prison. From the judgment of conviction and the order of the trial court denying defendant's motion for a new trial, this appeal is taken.

The record shows that this cause was regularly set for hearing and notice given. No appearance, however, was made on the part of the defendant and appellant and no brief has been filed by or on behalf of the appellant. We have, however, examined the record and find that the testimony of the female and the testimony of two physicians called on the part of the people amply sufficient to support the judgment of conviction upon both counts. The female was found to be of the age of 11 years, and, under the ruling in the cases of People v. Mayes, 66 Cal. 597, 6 P. 691, 56 Am. Rep. 126, and People v. Preston, 19 Cal. App. 675, 127 P. 660, did not require corroboration. But, as we have stated, the testimony of the female was corroborated to the effect that her person had been violated by some one. We have gone through the record and found the same exceptionally free from any rulings of the trial court that could possibly be construed as prejudicial to the appellant. The testimony is of such a character that it should not be spread upon the records, and we have therefore contented ourselves with saying that the verdict of the jury finds ample support and the defendant appears to be properly and justly convicted.

The order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

79 Cal. App. 313

BROWN v. SANDELL et al. (Civ. 5574.)*

(District Court of Appeal, First District, Division 2, California. Sept. 13, 1926.)

1. Pleading 🔑301(3)—Attorney's verification that complaint was true "to the best of his knowledge, information, and belief" held not made on information and belief only.

Attorney's verification that complaint was true "to the best of his knowledge, information, and belief" *held* not made on information and belief only, since words used merely stated general rule that any verification is to best knowledge, information, and belief of affiant.

2. Pleading 🔑298—Whether plaintiff's absence was "cause" for which she was unable to verify complaint held for trial court (Code Civ. Proc. § 446).

Where attorney verifying complaint alleged that plaintiff was absent from county where she resided and where action was brought, it was for trial court to determine whether this was "some cause" for which plaintiff was unable to verify it, within Code Civ. Proc. § 446.

3. Process 🔑96(3)—Affidavit for publication of summons, stating that action was to determine adverse interests in certain premises, held sufficient (Code Civ. Proc. § 412).

Affidavit for publication of summons, stating that action was to determine adverse interests of defendants in premises described in complaint, which was made part of it, *held* sufficient, within Code Civ. Proc. § 412.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court November 12, 1926.

4. Quieting title 🔑34(1).

Complaint in action to quiet title, alleging plaintiff's ownership in fee and defendants' adverse claims, *held* to allege all necessary probative facts.

5. Process 🔑96(1)—Order for publication of summons held proper, though affidavit was made more than two months before, in view of supplemental affidavit.

Order for publication of summons *held* proper, though affidavit was made more than two months before, where supplemental affidavit showing further unsuccessful search for defendants was made on day before order.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action to quiet title by Mary F. Brown against A. D. Sandell and others. From an order denying motion by defendant Christena L. Diedrich to set aside judgment, she appeals. Affirmed.

Sweet, Stearns & Forward and Richard M. Kew, all of San Diego, for appellant.

Herbert C. Kelly and E. E. Hubbell, both of San Diego, for respondent.

NOURSE, J. Plaintiff commenced this action on July 5, 1916, against a large number of defendants to quiet title to certain described real property situated in the county of San Diego. The complaint was verified by one of plaintiff's attorneys, who gave as the reason for his verification the "plaintiff's being absent from said San Diego county, wherein the affiant resides and said action is brought." On August 2, 1916, the plaintiff's agent subscribed to an affidavit for the publication of summons against a number of the defendants, and on October 24 the same agent subscribed to a supplemental affidavit for the same purpose. On the following day the superior court entered its order for publication of summons based upon these affidavits. The default of the defendant Diedrich and others for failure to answer was subsequently entered, and on March 3, 1917, judgment was entered against these defendants quieting title in the plaintiff as prayed in the complaint. On May 2, 1924, the defendant Diedrich moved to set aside this judgment in so far as it related to her and to a designated portion of the real property involved on the ground that the court had no jurisdiction of the person or of the subject-matter, and on June 23, 1924, this motion was denied. From the order denying the motion the defendant Diedrich has appealed upon a typewritten record.

On this appeal the appellant urges that the order of publication of summons was void because (1) the complaint was improperly verified; (2) that the affidavits were insufficient to show the existence of a cause of action against this appellant; and (3) that the affidavits failed to show diligence on the part of the respondent at the time of the making of the order for publication.

[1] The complaint was verified by the affidavit of one of the attorneys for respondent, who stated that he knew the contents of the complaint and that the same was true "to the best of his knowledge, information, and belief," and that he made the verification rather than the plaintiff "owing to said plaintiff's being absent from San Diego county, wherein affiant resides and said action is brought." It is argued that the verification of the attorney is made upon information and belief only. We cannot agree with this. The affiant stated positively that the allegations of the complaint were true, and added, "to the best of his knowledge, information, and belief." These words do not detract from the positive affirmance of the truth of the allegations of the complaint. They merely state the general rule that any verification of the truth of the facts stated is to the best knowledge, information, and belief of the affiant. Pratt v. Stevens, 94 N. Y. 387, 392; Hambel v. Lowry, 264 Mo. 168, 174 S. W. 405, 406.

[2] Section 446, Code of Civil Procedure, provides that when an attorney verifies a complaint on behalf of his client he must set forth in his affidavit the reasons why it was not made by one of the parties, and that such verification is permissible if the party is absent from the county where the attorney has his office or for some cause is unable to verify it or the facts are within the knowledge of the person verifying the same. It is patent that an attorney may verify on behalf of his client if any one of the three contingencies exists. In the verification before us the attorney complied with the third proviso when he affirmed that he knew the contents of the complaint wherein the facts were alleged and that these facts were true. This allegation necessarily implied a knowledge of the facts upon which the complaint was based. In addition to this he alleged that the respondent was absent from the county wherein he resided and the action was brought, and it was therefore a matter for the trial court to determine when properly brought before it whether this was "some cause" for which the respondent was unable to verify the complaint, as covered by the second proviso.

[3, 4] Appellant concedes that under the terms of section 412, Code of Civil Procedure, the question of verification of the complaint becomes unimportant if the affidavits upon which the order for publication was based sufficiently disclosed that a cause of action existed against her, that she was a necessary or proper party to the action, or that this was an action which related to real property in which she claimed some interest, or that the relief demanded in the action consisted

wholly or in part in excluding her from any interest therein. In one of the affidavits upon which the order was based it was alleged that "the above-entitled action is brought to determine the claim of each of the said defendants to an estate or interest in and to the premises described in the complaint filed in this action adverse to the plaintiff, which said verified complaint is hereby referred to and made a part of this affidavit." The complaint was in the ordinary form of an action to quiet title, merely alleging that the respondent was the owner in fee of the premises described, and that the defendants and each of them claimed some interest adverse to her, which claim was without right. The prayer asked that the defendants set forth their claims and that it be determined that they had no estate or interest in the property. It is unnecessary to cite authority to the point that the complaint alleged all the necessary probative facts in an action of this kind, and it cannot be doubted that, aside from the question of the verification of the complaint, the affidavit sufficiently disclosed that the cause of action related to real property in this state in which the defendants claimed some interest adverse to the plaintiff. Appellant cites People v. Mulcahy, 159 Cal. 34, 112 P. 853, as holding that the affidavit is insufficient. Reliance is placed upon the opinion in the Mulcahy Case because it involved the question of the sufficiency of an affidavit for the publication of summons in a case which, like the one at present, involved adverse claims to real property in this state. An examination of the opinion, however, clearly discloses that the Supreme Court did not have before it the amendment to section 412, Code of Civil Procedure, which included the provisions relating to causes involving adverse claims to property such as we have here. There is nothing in the Mulcahy decision which covers the point to which it is cited, and it is therefore not authority upon that proposition. The terms of the statute are plain that either the verified complaint or the affidavit must show the existence of one of the conditions mentioned in section 412, Code of Civil Procedure, and, as the affidavit here in question clearly disclosed that the action involved adverse claims to real property in this state, it was sufficient within the terms of that section.

[5] The last point raised is that the first affidavit, subscribed on August 2, 1916, was insufficient to justify the court on October 25 of the same year to enter the order for publication of the summons because, though it disclosed that due diligence had been exercised on the part of the plaintiff to discover the location of the various defendants prior to August 2, their location on October 25 might have been known. But the supplemental affidavit subscribed on October 24 and filed on the following day sufficiently disclosed that further search had been made for these defendants without success, and the court was at the time of the making of the order fully informed that these defendants could not, after due diligence, be found for the purpose of making personal service.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

PER CURIAM. Petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal, First Appellate District, Division 2, is denied. However, we withhold our approval of that portion of the opinion which holds that the complaint in the action was properly verified.

---

79 Cal. App. 291

PEOPLE v. LIBHART. (Cr. 936.)

(District Court of Appeal, Third District, California. Sept. 11, 1926.)

1. Automobiles ⚷355(8).

Evidence *held* to sustain conviction under Vehicle Act, § 141, for failure to stop after striking person with automobile.

2. Automobiles ⚷354—Evidence of accused automobile driver's statement relating to his sobriety immediately after accident was admissible (Vehicle Act, § 141).

In prosecution under Vehicle Act, § 141 (St. 1923, p. 518), for failure to stop after striking person with automobile, admitting evidence that immediately after accident defendant stated he had drunk wine during preceding night, and that it would be hard to state where he stayed that night, was proper.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

R. E. Libhart was convicted of failure to stop after striking a person with an automobile, and he appeals. Affirmed.

B. M. Bainbridge, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the violation of section 141 of the California Vehicle Act (Stats. 1923, p. 518), which provides:

> "The driver of any vehicle which strikes any person * * * shall immediately stop and give his name and address, * * * also the registration number of his vehicle, * * * and shall also render * * * all necessary assistance," etc.

This is an appeal from the judgment.

[1] Appellant's main contention is that the evidence is insufficient to support the judgment. A witness for the prosecution testified that on the 17th day of January, 1926, in the early morning when "it was just breaking daylight," as he was driving his automobile north on California street in the city of Stockton, he saw and heard the defendant's

automobile, traveling south along the opposite side of the same street, the defendant being on his way to Modesto, strike a pedestrian, knocking him down, and, without stopping, continue on its course to the south; that the witness turned and followed the defendant and overtook him a few miles out of the city; that the defendant "said he didn't know that he hit anybody"; that both the witness and the defendant then drove back to Stockton, and the witness advised the defendant to report the accident to the police; that the defendant "said he had been out the evening before, and he said he had a drink of wine, and asked if he couldn't have something to kind of kill the smell of that, if there was any left"; that the defendant then went to his sister's house and from there to the police station. A police officer testified that the defendant stated at the police station that:

> "He was driving south on California street, and he felt a bump. He said his windshield was wet; he didn't see anybody. I asked him, 'Why didn't you stop?' * * * He said he didn't think he ran into a human being. * * * He told me that he was supposed to go to work down there (at Modesto) at 6 o'clock at the Hudson garage. * * * He says, 'I overslept.'"

In a statement made on the following day, and taken down by a shorthand reporter, the defendant said:

> "There was rain over the windshield. I couldn't see very good for about a minute. * * *
>
> "Q. You felt a jar? A. Yes; I didn't realize it was a human being that I hit. * * * When the fellow told me I hit a man, I said I didn't know anything about it. He said, 'Look at your fender, the fender was not bent like that before?' I says, 'I guess I must have struck something.' * * * I stopped at my sister's, and went in and told my sister that I hit somebody."

A photograph of the bent fender was introduced in evidence at the trial. The defendant and other witnesses testified at the trial that the fender was bent prior to the time of the accident, but such testimony merely creates a conflict upon that question, upon which the determination of the jury is conclusive on appeal. The man who was struck was thrown with such force as to seriously injure him and render him unconscious, and it is highly improbable that the defendant did not know that he had struck the man. The evidence is amply sufficient to sustain the judgment.

[2] Appellant contends that it was error to admit evidence to the effect that he had stated, immediately after the accident and his return to the city, that he had been out during the preceding night, and had had a drink of wine, and that it "would be kind of hard to state" where he stayed that night. It was competent, however, for the prosecution to show the facts and circumstances surrounding the accident, including his mental state and condition of sobriety, which, together with his haste to get back to his employment in Modesto, would enable the jury to determine the reasonableness of his conduct and the accuracy of his statements in relation thereto, and to the accident itself. The other contentions of appellant in respect to the admission and rejection of evidence relate to matters of a trifling nature and need not be specially considered. It is sufficient to say that there is no merit in any of them.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, Justice pro tem.

79 Cal. App. 249

PEOPLE v. BENNETT. (Cr. 1309.)*

(District Court of Appeal, First District, Division 2, California. Aug. 30, 1926.)

1. Evidence 🔑501(3)—In defense of insanity, examination of witnesses was not improperly limited where facts were brought out from them in later examination by state.

In prosecution for robbery, where defense was insanity, examination of witnesses was not improperly limited, where they were permitted to fully state all facts on which they relied in support of their conclusion that defendant was irrational, and in each case where objection was made to limitation of examination the same facts were brought out from same witnesses at later stage of examination by state.

2. Criminal law 🔑1170(2)—In robbery case, where it appeared that defendant had previously been charged with murder, but not convicted, it was proper to refuse to allow defendant to explain circumstances.

In prosecution for robbery, where testimony of witness brought out previous charge of murder against defendant, and disclosed that he was successful in his resistance of charge, no error was committed in refusing to allow defendant to testify, explaining circumstances of charge, or make further proof that he was not convicted.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Miles Bennett was convicted of first degree robbery, and he appeals. Affirmed.

Jos. A. Brown, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Appellant was tried on an information charging him with the crime of robbery. He was convicted of robbery in the first degree, and from the judgment following the verdict and from the order denying a motion for a new trial he prosecutes this appeal.

The facts of the robbery were not controverted, but were admitted by the defendant at the time of his arrest. On the 10th day of

---

*Hearing denied by Supreme Court October 28, 1926.

October, 1925, the defendant and a companion entered the offices of a practicing physician located in the Garfield building on Market street, San Francisco, and, leaving his companion in the waiting room, the defendant knocked at the door of the physician's private office. When the door was opened, he pointed a gun at the physician and commanded him to raise his hands. He then forced the physician to the floor, bound him with a cord, and took property from him of the value of over $3,000. His companion and he then departed from the offices, but were immediately overtaken by the physician and a young lady, who followed them down stairs to the second floor, where they all took the elevator to the street. The defendant and his companion then ran, followed by the physician and this young lady, until the defendant, separating from his companion, rushed into a hotel at the corner of Mason and Turk streets, and hid in a linen closet. The police officers were called, and when they appeared at the hotel they made a search of the building until they found the defendant in the closet with the elevator operator and a woman whom he had forced into the room at the point of a gun. The door was locked behind the defendant, and it was necessary for the police officers to break it open to make the arrest. Upon his apprehension the defendant stated to the officers the full details of the robbery, and at no time denied his participation in the crime.

At the time of the trial all the evidence on behalf of the state was admitted without objection and stands in the record uncontroverted. The only defense offered by the defendant was that he was insane at the time of the commission of the act, and, that because of his mental condition, he did not at that time know the difference between right and wrong with respect to the act which he was committing. The testimony of the father and mother of the defendant was offered to prove that he had received several falls from which he had become irritable and had acted peculiarly at times. The testimony of his counsel was offered to prove that four days after his arrest the defendant had complained to his counsel that he was in a serious physical condition because of having been brutally beaten by the police officers following his arrest. Testimony of a physician called to attend the defendant at that time was also offered to the effect that the defendant had complained to the physician that he had been severely beaten by the police officers, but upon examination the physician found that his statements were untrue. It was conclusively shown that this story of the beating was without any foundation.

[1] On this appeal the attack upon the judgment and the order is that the trial court improperly limited the examination of these various witnesses, and thereby prevented the appellant from fully presenting to the jury the facts upon which he relied. An examination of the record discloses that all the witnesses called by the appellant were permitted to fully state all the facts upon which they relied in support of their conclusion that the appellant was irrational, and, that in each case where objection is now made to the limitation of the examination, the same facts were brought out from the same witnesses either at a later stage of the examination or in the cross-examination by the state.

[2] The further objection is made that the trial court erred in refusing to allow the appellant to testify in his own behalf to explain the circumstances under which he was charged in connection with a murder at a previous date. The facts of this charge had been brought out in the cross-examination of one of the police officers who referred to it for the purpose of fixing the date upon which he held a conversation with the appellant. The same witness disclosed that the appellant had been successful in his resistance of the charge, and there was therefore no error in the ruling of the trial court in refusing to permit his counsel to go into the circumstances of the charge or to make further proof that he had not been convicted of that crime.

A full examination of the record discloses that the appellant was fairly tried and fairly convicted, and that no prejudicial error was committed.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

79 Cal. App. 265

PEOPLE v. RICHARDSON. (Cr. 923.)

(District Court of Appeal, Third District, California. Sept. 4, 1926.)

1. Larceny 🔑65.

Evidence *held* to support conviction of grand larceny of automobile.

2. Criminal law 🔑747.

Conflicts in evidence are for jury to settle.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Frank Richardson was convicted of grand larceny, and he appeals. Affirmed.

John J. Bauer, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Convicted by a jury in the superior court of Sacramento of the crime of grand larceny, as charged in an information previously filed in said court, the defendant has brought the case to this court by

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

an appeal from the judgment and the order denying him a new trial.

Although the transcript containing the record of the case was filed in this court on the 26th day of March, 1926, no brief in behalf of defendant in support of his appeals has ever been filed herein. The cause was regularly placed on the calendar of this court for its September term to be heard, and counsel for defendant duly notified of that fact, but neither counsel nor the defendant appeared to present an oral argument in support of the appeals when the cause was called for hearing and argument. The Attorney General, upon the situation thus explained as to the appeals, moved that the cause be submitted for consideration and decision upon the record and a brief filed by him, and a submission was accordingly ordered.

[1] The facts briefly stated are: On the 14th day of November, 1925, a short time before the hour of 6 o'clock p. m., one H. S. Parker parked his automobile (a Chevrolet coupe) on Ninth street, between M and N, in the city of Sacramento. Two hours later he returned to get the car, but discovered that it had been taken by some one. In the succeeding month of November, the defendant was arrested in the city of Stockton on a warrant charging him with the theft of the automobile. Two officers of Sacramento went to Stockton to take the defendant to Sacramento. On arriving at Stockton and the city jail of that city, the Sacramento officers took charge of defendant, who requested the former to go with him to a garage, where the automobile had been left, so that he (defendant) could get some shirts which he had left in the car. The officers accompanied the defendant to the garage referred to and the defendant took from the automobile the shirts which he stated he had left in the machine. Thereupon the officers, with the defendant and one Tierney, who had also been arrested at Stockton as an accomplice of the former in the stealing of the car, started in an automobile on their return to Sacramento. On the way to the latter place, so one of the officers testified, the defendant admitted to the officers that he stole the car, but exonerated Tierney from all connection with the commission of the crime, declaring that he alone took the coupe from where it was parked on Ninth street, between M and N streets, in Sacramento. Both the officers who conducted the accused from Stockton to Sacramento testified that he (defendant) declared, while on the way to the last-named city, that he was guilty and that he intended to plead guilty and "get the matter over as soon as possible," or words to that effect. When the stolen car was returned to Sacramento it was found by H. S. Parker, the owner, that the license plate bearing the license number assigned to it by the state motor vehicle department, and issued to H. S. Parker, had been removed and another license plate, with a different number, attached to the car and so substituted therefor. Parker testified that the car was of the value of $550.

[2] The above embraces a reproduction in substance of the facts brought out through the evidence introduced by the people. The defendant, taking the stand in his own behalf, denied taking the automobile, claiming that he was visiting with friends some 20 or more miles from the city of Sacramento on the evening on which and at the particular time of that evening at which the car was said by its owner to have been stolen. There was some substantiation of this claimed alibi by two other witnesses, testifying for the defendant. The latter further denied that he went with the officers to the garage in Stockton, where the car in question had been left, and there took from said car any shirts or other articles of personal property belonging to him. The verdict is amply supported. The jury were warranted in finding that the defendant feloniously took the car from Sacramento to Stockton and left it in the garage in the latter city, where it was found upon the testimony of the officers, of the confession of guilt by the accused, and of the fact, as testified to by one of the officers, that defendant, before leaving with his custodians for Sacramento, requested that he be allowed the privilege of procuring certain of his personal belongings which he had left in the car, and, being granted that privilege, going to the garage and taking from the car certain articles belonging to him. His contradiction of the testimony of the officers, as above indicated, merely had the effect, obviously, of creating an evidentiary conflict, which it was for the jury to settle. Their verdict upon such conflict precludes any just claim that the result arrived at by the jury is without sufficient support in the evidence.

The charge of the court upon the law embraced a full, fair, and clearly expressed statement of all the principles of law pertinent to the nature of the offense charged and the evidence adduced upon both sides of the issue tendered by the defendant's plea of not guilty of the offense of which the information accused him.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

79 Cal. App. 257

K. KURIHARA et al. v. DETROIT FIRE & MARINE INS. CO. (Civ. 5537.)

(District Court of Appeal, First District, Division 2, California. Sept. 2, 1926.)

1. Insurance 🔑282(2)—Where store employee receiving and putting back into store half of profits was to become partner when one-half of profits equaled one-half of value of goods, there was not equitable title so as to be within fire policy conditioned on employee's sole and unconditional ownership (St. 1909, p. 404).

Where store employee receiving one-half of profits and putting them back in store and standing one-half of fire loss, was to become partner when one-half of profits equaled one-half of value of goods, and fire policy in the California form, prescribed by St. 1909, p. 404, was conditioned on his sole and unconditional ownership of the goods, *held* there was not equitable title within the condition.

2. Insurance 🔑282(2)—Store manager, receiving salary and half of profits to be put back into store, who was to become partner when his share of profits equaled value of half of goods, was not an owner, within fire policy.

Party who was to manage store for $50 a month and one-half of profits, which half was to be put back in store, to stand half of fire losses and to be partner when his profits amounted to one-half of value of goods was an employee, not an owner, within fire policy on goods conditioned on his sole and unconditional ownership.

3. Insurance 🔑282(3).

Store employee receiving and putting back into store one-half of profits, who was to be partner when one-half of profits equaled one-half of value of goods, did not hold merchandise in trust or on commission, within fire policy.

4. Appeal and error 🔑1010(1).

Findings that parties claiming under fire policy made misstatements as to their interest in the goods were conclusive, where there was evidence on the subject.

5. Appeal and error 🔑1012(1).

Appellate court cannot disturb finding where the weight of the evidence only is involved.

6. Appeal and error 🔑762.

Appellants dissatisfied with finding of lower court should make the point in their opening brief.

7. Insurance 🔑247—Assignment, by store employee of interest in fire policy on goods conditioned on his ownership to employer, known to insurer, held not to prevent it from rescinding.

Where insured was only employee and not owner of stock of goods, his assignment after fire of interest in fire policy thereon conditioned on his sole ownership to employer, known to insurer, *held* not to prevent insurer from subsequently rescinding policy.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action on fire insurance policy by K. Kurihara and another against the Detroit Fire & Marine Insurance Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

D. A. Knapp, of San Francisco, for appellants.

Chickering & Gregory, of San Francisco, for respondent.

STURTEVANT, J. The plaintiffs commenced an action to recover on an insurance policy. The judgment of the trial court was entered in favor of the defendant, and the plaintiffs have appealed. The facts were fully stated in the pleadings and the court found:

"(1) That defendant, the Detroit Fire & Marine Insurance Company, a corporation, is now, and at all times since its incorporation has been, a corporation organized and existing under and by virtue of the laws of the state of Michigan, and at all times material to this action has been, and now is, duly authorized to do business in the state of California.

"(2) That on or about the 1st day of May, 1920, defendant executed and delivered to plaintiff, T. Masuko, a fire insurance policy No. 113343 insuring said T. Masuko as 'T. Masuko, doing business as Miyako Company,' a copy of which insurance policy is attached to the original complaint herein, and therein marked Exhibit A; that said policy of insurance was by its terms to run for the period of one year from and after the 1st day of May, 1920; that at some time prior to the 1st day of May, 1921, said policy was extended so as to cover as well the period of one year beginning upon the 1st day of May, 1921.

"(3) That from the year 1912 until the year 1917, the store referred to in said policy of insurance was owned and conducted by plaintiff T. Masuko, doing business under the name and style of 'Masuko & Company'; that at the expiration of said period, plaintiff T. Masuko was adjudged a bankrupt, and his entire stock of goods, together with the lease which he held upon said store, were purchased by plaintiff K. Kurihara; that said K. Kurihara knew nothing about the running of such a merchandise store.

"(4) That on or about the 1st day of January, 1920, plaintiff T. Masuko, began to work for plaintiff K. Kurihara, upon a salary basis; that about two months thereafter plaintiffs, T. Masuko and K. Kurihara, entered into an agreement in writing, whereby the business at said store should be conducted under the name of Miyako Company, plaintiff T. Masuko receiving $50 a month as his salary and one-half of the profits of said business; that under the terms of said agreement said plaintiff T. Masuko was to be the manager of said business and devote his afternoons to it; that in case of loss by fire, it was agreed that such a loss should be shared one-half by plaintiff T. Masuko and one-half by plaintiff K. Kurihara; that Masuko was bound by said agreement to put back into the business for the benefit of the store his one-half of the profits which might be realized, it being understood that he should become a partner in the business when one-half of the value of the goods had been so paid in; the profits of the business amounted on an average of $7.50 per day up to the 28th day of December, 1920; that upon said date a fire occurred in said store and all of the goods therein were wholly destroyed by said fire.

"(5) That as a result of said agreement in writing, so entered into between plaintiff T. Masuko and plaintiff K. Kurihara, as a result of the transactions hereinabove set forth under said agreement, said plaintiff T. Masuko received into said store the goods contained therein and referred to in said policy of insurance under an arrangement which did not provide for the specification or any assumption of liability for said goods by plaintiff T. Masuko, other than hereinabove set forth, or for the receipt of said goods by said plaintiff T. Masuko, either in trust, or on commission, or for storage or repairs.

"(6) That said policy of insurance was written upon the standard California fire insurance form required by law, one provision of which is as follows: '* * * This entire policy shall be void * * * if the interest of the insured be other than unconditional and sole ownership.' That the said policy of insurance, so issued to the said plaintiff T. Masuko, doing business as Miyako Company purported to insure said plaintiff T. Masuko, as the unconditional and sole owner of said goods. That plaintiff T. Masuko was not, at any time during the life of said policy of insurance, either the sole or unconditional owner of said goods, or any part thereof. That neither defendant, nor any authorized agent of defendant, was informed at the time of the execution and delivery of said policy, or at any time thereafter prior to said loss by fire, that plaintiff T. Masuko was other than the unconditional and sole owner of said goods. That there were no circumstances in connection with the issuance or renewal of said policy of insurance which should have put the defendant on inquiry as to the fact that plaintiff T. Masuko was not the unconditional and sole owner of said goods.

"(7) That subsequent to the happening of said fire and destruction of said stock of goods, and within the time required by the provisions of said policy of insurance, both plaintiffs, T. Masuko and K. Kurihara, rendered to defendant what purported to be verified proofs of the loss of said stock of goods as aforesaid. That in all of said proofs of loss there were contained misstatements as to the interest of both plaintiff T. Masuko and plaintiff K. Kurihara in said goods, and said misstatements covered matters material to the risk. That said misstatements were so made by both said plaintiff T. Masuko and said plaintiff K. Kurihara with knowledge of their untrue character, and for the purpose of deceiving and misleading defendant as to the true nature of the respective interests of plaintiff T. Masuko and plaintiff K. Kurihara in said stock of goods.

"(8) That on or about the 15th day of March, 1921, defendant duly served upon plaintiff T. Masuko in the city and county of San Francisco, a notice of rescission and denial of liability under the said policy of insurance. That a true copy of said notice of rescission and denial of liability is attached to the answer to the amended complaint upon file therein and marked Exhibit A. That at the time of the service of said notice upon said T. Masuko, the defendant also duly tendered back to said T. Masuko, and said plaintiff T. Masuko accepted, the sum of $41.40 as the premium paid to defendant upon said policy, which said sum was everything of value which had been received by defendant by reason of its said policy of insurance from said plaintiff T. Masuko or from any one."

[1] The appellants contend that they established an equitable title within the meaning of the language contained in the policy, "sole and unconditional ownership." Formerly this contention might have been sound, but the policy sued upon is what is commonly called the "California form," which was prescribed by statute. Stats. 1909, p. 404. Since the enactment of that statute the earlier authorities are no longer applicable. Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 P. 99.

[2] The appellants further contend that, under the facts, T. Masuko was an owner at the time the policy was written and was not an employee. The question is not an open one in this state. It was directly decided against the appellants' contention in the case of Brown v. Franklin Fire Ins. Co., 178 Cal. 302, 173 P. 403.

[3] The appellants further contend that Masuko had an insurable interest under the policy other than that of ownership. In this connection the appellants state that the policy was divided into two parts, the body and the rider. And, under the rider the appellants claim Masuko held the merchandise "in trust or on commission." The trial court found otherwise, and, as we think, correctly.

[4-6] The policy provided, among other things,

> "This entire policy shall be voided in case of any fraud or false swearing touching any matter relating to this insurance or the subject thereof whether before or after a loss."

The trial court in finding No. 7, quoted above, found the facts as contended by the respondent. At this time the appellants under the headings, "Alleged Proof One," etc., attack the sufficiency of the showing made by the respondent before the trial court. In doing so appellants attempt to justify and to explain and thereupon to contend that in truth and in fact the appellants did not make "misstatements as to the interest of both plaintiff T. Masuko and K. Kurihara in said goods." These contentions involve the sufficiency of the evidence, but it will suffice to say that there was evidence on the subject and the power to resolve the conflicts in the evidence rested with the trial court. During the oral argument other findings were also attacked in the same manner and for the same reason. In no one of those attacks was it contended that the finding so attacked had no evidence to support it. But the claim was earnestly presented that the trial court did not correctly weigh the evidence. As stated in the reply to the last point, this court has not the power under these circumstances to disturb the finding as made. Furthermore, if the appellants were dissatisfied with any finding, they should have made the point in their opening brief and should have given the respondent an opportunity to answer it.

[7] It will be noted that the fire occurred on the 28th day of December, 1920. In the following month, the plaintiff Masuko attempted to assign his interest in the policy to the plaintiff Kurihara. It is asserted by the appellants that the respondent had notice of the purported assignment and, relying on that fact, the appellants contend that thereafter, to wit, on the 15th day of March, 1921, the respondent had no legal right to rescind the policy. McCarthy v. Mt. Tecarte L. & W. Co., 110 Cal. 687, 691, 43 P. 391. The authority cited is not at all in point as applicable to the facts presented by this case.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

79 Cal. App. 322

COLLIER v. JOHNSON et al. (Civ. 3173.)

(District Court of Appeal, Third District, California. Sept. 14, 1926.)

1. Landlord and tenant ⚷61—Statute prohibiting tenant from denying landlord's title is inapplicable where landlord's title is extinguished by operation of law or where he conveys to tenant (Code Civ. Proc. § 1962, subd. 4).

Code Civ. Proc. § 1962, subd. 4, prohibiting tenant from denying landlord's title at commencement of relation, which changed common-law rule that such estoppel applies during entire tenancy, is inapplicable where landlord's title is extinguished by operation of law or where he conveys to tenant.

2. Landlord and tenant ⚷63(2)—Tenant held not estopped to deny landlord's title where latter sued for possession and also to quiet title (Code Civ. Proc. § 1962, subd. 4).

Tenant *held* not estopped to deny landlord's title where latter sued for possession and also to quiet title; Code Civ. Proc. § 1962, subd. 4, being inapplicable where landlord puts title in issue.

3. Quieting title ⚷42.

Where pleadings are indefinite as to facts relied on by either party in action to quiet title, such facts should be set forth in amended pleadings.

Appeal from Superior Court, Siskiyou County; Claude F. Purkitt, Judge.

Action by B. K. Collier against J. Cal. Johnson and others. From a judgment for plaintiff on the pleadings, J. Cal. Johnson appeals. Reversed.

James D. Fairchild, of Yreka, for appellant.

Collier & Barta, of Yreka, for respondent.

PLUMMER, J. This is an action to quiet title and to recover possession of certain real estate. Plaintiff had judgment upon the pleadings, and the defendant Johnson appeals.

The plaintiff's complaint alleges that on the 31st day of May, 1920, the plaintiff let the defendant Johnson into the possession of the Oregon Bar mining claim, together with certain improvements thereon, describing the situation of the claim; that on or about the month of April, 1922, the defendant Johnson let one F. W. Edsall into possession of said property without the consent of the plaintiff. Edsall was made a defendant in the action, but he is not an appellant here. The complaint further alleges that on the 31st day of May, 1920, the plaintiff was the owner of said mining claim and of all improvements thereon and was the owner of said mining claim at the time of the beginning of the action; that the defendants and each of them claim an estate or interest in said property adversely to the plaintiff; that the claims of the defendants were without right, etc. The prayer of the complaint is as follows: "That defendants and each of them be required to set forth the nature of his claim; that all adverse claims of the defendants and each of them may be determined by a decree of this court; that by said decree it be declared and adjudged that defendants and each of them have no right, title, or estate whatever in and to said lands and premises; that the title of plaintiff be declared and adjudged good and valid; that defendants and each of them be forever enjoined and debarred from asserting any claim whatever in said lands and premises, adverse to plaintiff"; and that the defendants be ejected from said premises and the possession thereof be restored to the plaintiff.

The amended answer of the defendant Johnson denied that the plaintiff had title to said premises on the 31st day of May, 1920; also denied that the plaintiff had the present title to said premises. The answer further alleged that the assessment work was not done upon said mining property during the year 1921; that in 1922 the defendant Johnson vacated said premises; that on the 11th day of April, 1922, said premises being vacant, unappropriated mining ground, said Edsall, discovering valuable minerals thereon, located the same as a mining claim; that thereafter and on the 22d day of October, 1923, said Edsall, for a valuable consideration, conveyed said premises to the defendant Johnson. The answer admits plaintiff let the defendant Johnson into possession of said premises on or about the 31st day of May, 1920, but denies the allegation of the complaint that the defendant was to do any assessment work thereon, but was to make $50 worth of improvements. Upon these pleadings the court granted the plaintiff's motion for judgment according to the prayer of plaintiff's complaint.

[1] We think the record satisfactorily establishes that the defendant Johnson was let into possession of the described premises by the plaintiff as a tenant of the plaintiff, although the terms and conditions of that tenancy are not pleaded with any great degree of accuracy in the plaintiff's complaint, and that if the issue of possession of said premises only had been tendered to the trial court, subdivision 4 of section 1962, Code of Civil Procedure, and the decisions of the courts extending that rule during the continuation of the tenancy and until possession had been restored by the tenant to the landlord, would apply, to wit, "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation"; the common law being also that a tenant is estopped to deny his landlord's title during the continuance of the tenancy. Our statute limits that denial to the time of the commencement of the tenancy, but the great weight of authority supports the rule that the estoppel applies during the entire period of the tenancy. This estoppel, however, has certain well-defined exceptions, to wit, the extinguishment of the landlord's title by operation of law, such as an execution sale; also, the acquisition of title by the tenant through conveyances from the landlord. These exceptions, however, do not apply to this case.

[2] There is another well-defined exception to the rule estopping a tenant from denying a landlord's title, and that exception is given effect when the landlord, by the form of procedure instituted by him, puts his title in issue. Thus, if the landlord not only seeks possession of the premises, but asks that the title be vested in him, the tenant is not estopped from disputing the landlord's title, and may set up his own superior title. 35 C. J. 1232, § 575, note 32, and the cases there cited. The rule as to this exception is very clearly set forth in the case of Stevenson v. Rogers, 103 Tex. 169, 125 S. W. 1, 29 L. R. A. (N. S.) 85, Ann. Cas. 1912D, 99, to wit:

> "It is the general rule that in an action by the lessor, after the termination of the lease, for the possession of the leased premises, the tenant cannot dispute his landlord's title or right to possession without first surrendering the possession that he received under the lease. When, however, as in this case, the suit is to recover possession and to establish the title of the plaintiffs, whereby the title of the tenant would be destroyed, the latter may defend by showing a superior title in himself. 18 Am. & Eng. Ency. of Law (2d Ed.) 421; 24 Cyc. 942; McKie v. Anderson, 78 Tex. 209, 14 S. W. 576; Bertram v. Cook, 44 Mich. 397, 6 N. W. 868; Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690; Dodge v. Phelan, 2 Tex. Civ. App. 448, 21 S. W. 309."

These limitations of the rule do not trench upon the rights of the landlord to have the possession of the premises restored to him before his title thereto can be put in issue by the tenant. The landlord under the rule is entitled to have his title to the premises litigated from the vantage ground of possession, but if he chooses to litigate his title in the same action it would, as held in the case of Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690, supra, give him an undue advantage for the reason if when the landlord voluntarily puts his title in issue the tenant is estopped from denying the same, the judgment entered therein would become a bar to any subsequent assertion of title by the tenant and work a forfeiture or disseisin of his property, if any ownership he had in the premises, without opportunity to have his day in court. In McKie v. Anderson, supra, the law applying to the case at bar is thus stated by the Supreme Court of Texas:

> "The rule, that a tenant cannot deny his landlord's title, is limited to suits for possession only, and does not apply in an action of trespass to try title and for partition, in which the title itself is put in issue."

In Hambey v. Wise, 181 Cal. 286, 184 P. 9, the Supreme Court of this state, in considering the exception to the rule limiting defenses that may be made by a tenant, which we are here considering, held as follows:

> "Even if it be conceded that on March 17, 1916, Wood was a tenant at will holding under Wise, and that, by the written agreement entered into on that date between Wood and Hambey, Wood terminated the tenancy at will and became the tenant of Hambey for a term certain, nevertheless Wood was not precluded from acquiring title to the property from Wise, nor is he precluded from setting up in this action any title he may have so acquired, inasmuch as Hambey is not seeking to recover for the use and occupation of the land under the lease, but has put the title itself in issue"—citing Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690, and McKie v. Anderson, 78 Tex. 207, 14 S. W. 576.

See, also, 15 Cal. Jur. 650, § 60, where the following language is used:

> "While under subdivision 4 of section 1962 of the Code of Civil Procedure so providing, a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation, this statute permits the tenant to assert the landlord's subsequent loss of title, when circumstances recognized by law justifying such a course have arisen."

In the case at bar the plaintiff, instead of confining his action to one for possession merely, where the tenant would be estopped to question title, as of the commencement of the relation, or to tendering any issue affecting the title of the plaintiff, the plaintiff has gone farther and has sued to obtain a judgment against the defendant not simply for possession of the premises, but, in effect, quieting the plaintiff's title thereto and forever debarring the defendant from asserting title to the premises; thus, in effect, seeking a judgment to deprive the appellant of any ownership in said premises, if any he has, without permitting the appellant to have his day in court. This, we think, the law does not contemplate, and the landlord, if he seeks to avail himself of the advantages given him by statute, must limit the relief sought by him to the question of possession, and whatever rents or compensation he may be entitled to under the terms of the lease, and not, under cover of such action, seek to litigate other questions. It is but just to say that the argument of counsel upon this appeal would indicate that the rule limiting the defenses that may be made by a tenant is applicable only where the landlord by his action puts in issue only the question of possession and his rights arising under the lease were not called to the attention of the trial court.

[3] The question whether the mining premises in question have or have not been withdrawn from location, sale, or entry, as indicated by counsel, cannot be determined by reason of the indefiniteness of the pleadings, and is not considered upon this appeal further than to state that whatever the facts may be, if relied upon by either of the parties hereto, they should be set forth by amended pleadings. For the reasons herein stated, the judgment is reversed.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

---

79 Cal. App. 252

REED v. SEVERIN. (Civ. 5577.)

(District Court of Appeal, First District, Division 2, California. Sept. 1, 1926.)

1. Deeds 🔑56(2).

The essential to the valid delivery of deed is intention of the parties, which is a question of fact to be determined in light of all circumstances surrounding transaction.

2. Appeal and error 🔑1010(1).

Finding supported by any evidence in the record, including finding of nondelivery of deed, *held* conclusive on appellate court.

3. Evidence 🔑417(17).

Whether deed was delivered is a question of fact on which parol evidence relating to grantor's instructions for its retention and delivery after his death is admissible.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action to quiet title by Edwin Reed, as administrator of the estate of Otto N. Sehr, real name Guy Northfield, deceased, against Fred J. Severin, as administrator of the estate of Anna Sehr, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Mossholder, of San Diego, for appellant.

Hamilton & Lindley, of San Diego, for respondent.

NOURSE, J. Plaintiff, as administrator of the estate of Otto N. Sehr, deceased, sued to quiet title to a parcel of real property located in San Diego county claimed by the defendant as the administrator of the estate of Anna Sehr, deceased. The defendant answered, claiming title through a deed executed by Otto N. Sehr on June 7, 1916. A trial was had before the court resulting in judgment for the plaintiff as prayed, from which the defendant has appealed on the judgment roll and a bill of exceptions.

Johann Sehr and Anna Sehr, husband and wife, came from Austria and settled upon a ranch in San Diego county in 1883. At that time, having no children, they took to their home Guy Northfield, who was then about three years of age, for the purpose of raising him as their own child. About twenty years later Johann Sehr passed away, and his wife and this boy, who had been given the name of Otto Sehr, continued to live upon the ranch, where they were very successful from a financial standpoint. In September, 1914, Otto Sehr purchased a tract of land adjoining that occupied by Mrs. Sehr and himself consisting of about 1,100 acres—the property here in suit. This purchase was effected by funds which Otto had saved while working with Mrs. Sehr upon the ranch and with money which he borrowed from Mrs. Sehr and for which he gave to her his promissory note. At the time of the purchase the owner took from Otto a mortgage to secure a balance of the purchase price. This balance was subsequently paid in full by Otto and the mortgage canceled, and the promissory note given to Mrs. Sehr was likewise paid off by Otto and the note returned to him. Some time before this Mrs. Sehr had executed a blanket deed to Otto conveying to him the property standing in her name. This deed had not been recorded, but was placed in a trunk which was kept in Mrs. Sehr's room upon the ranch. At the time of the execution of this deed, and on several occasions thereafter, Mrs. Sehr directed one Mayerhofer, who for many years had been her intimate friend and confidential business adviser, that the deed was to be retained in the trunk until her death, and upon that event he, Mayerhofer, was to procure the deed and record it for the benefit of Otto. On January 7, 1916, Otto requested Mayerhofer to prepare a deed for him to execute conveying all his interest in the property in suit to Mrs. Sehr. Upon the execution of this deed Otto took it with him and placed it in the same trunk with the deed previously executed by Mrs. Sehr conveying her property to him, and at the same time and on several occasions thereafter he gave similar directions to Mayerhofer to take the deed from the trunk upon his death and record it for the benefit of Mrs. Sehr. Both Mrs. Sehr and Otto were found dead in the ranch house at the same time in the early part of March, 1923. Immediately following the discovery of the bodies Mayerhofer and the coroner of the county discovered the two deeds in the trunk where the respective grantors had notified Mayerhofer they would be kept. This trunk, it appears from the evidence, was the common depository of all the private papers and valuables of both Mrs. Sehr and Otto, and both of them had access to it for that purpose. Neither of the deeds was recorded prior to the death of the parties.

On these facts the trial court found that on June 7, 1916, Otto Sehr signed and acknowledged before a notary public a grant deed purporting to convey to Anna Sehr all his property, real, personal, and mixed, but that said instrument was never delivered and never became effective as a deed; that after the death of Otto defendant procured possession of the instrument and had the same recorded; that the plaintiff as administrator of the estate of Otto, and Otto Sehr personally as predecessor in interest of the plaintiff, had been in the actual, exclusive, and adverse possession of the property in suit continuously for more than five years prior to the commencement of the action. The trial court thereupon concluded that the plaintiff was entitled to judgment quieting his title to the property, and that defendant should be precluded from asserting any claim thereto.

On this appeal the appellant attacks the judgment on the ground that the evidence is insufficient to show that Otto Sehr purchased the property with his own funds in the first instance, and that it is insufficient to support the finding of the trial court that the deed of June 7, 1916, had not been delivered. Complaint is also made of the ruling of the trial court in receiving the testimony of witnesses covering the oral instructions given by the grantor relating to the delivery of the deed.

As to the first point the evidence is without conflict that Otto Sehr purchased the property in his own name with funds which he had in his possession, aided by a loan from Mrs. Sehr, which he subsequently paid off in full, and a mortgage for the balance of the purchase price, which he gave to the owner and which he subsequently satisfied in full. As against this the appellant has suggested the improbability of Otto's having sufficient funds to purchase the property because of the meager wages which he had been paid while working for Mrs. Sehr, and insists that because Mrs. Sehr had been a successful and thrifty farmer it was more probable that she would have purchased the property with her own funds. Though the matter is not of great importance, it must be apparent that mere conjectures of this nature have little weight as against positive evidence of the facts in dispute, and if the trial court had been called upon to find definitely upon this issue, its finding based upon the positive evidence would not have been subject to attack.

[1, 2] As to the evidence of delivery, the testimony is sharply in conflict. Many witnesses were called who testified that both deeds were held by the respective parties under essentially the same conditions; that both grantors gave definite instructions that neither deed should be delivered to the grantee therein named; that in neither case should the deposit of the deed in the common trunk be treated as a delivery to the grantee; and that in both cases the witness Mayerhofer was to act as the agent of both parties and should in the event of the death of either deliver and record the deed executed in favor of the survivor and destroy the other. As against this evidence testimony was offered on the part of the appellant, coming from witnesses who were in or about the premises on numerous occasions, to the effect that Mrs. Sehr controlled the trunk as her own; that she had stated that this particular property had been deeded to her by Otto; and that the latter had stated to the witnesses that he had given his mother a deed to the property.

It hardly need be said that it was the duty of the trial court to determine the one essential fact of delivery and that this fact was to be determined upon all the evidence and circumstances surrounding the execution and retention of the paper. The intention of the parties "is declared to be the main or vital thing, or the one essential to the valid delivery of the deed. The final question always is, What was the intent with which the formality of a delivery was gone through with? And it is the intent which restricts or enlarges the effect of the instrument. The intent is a question of fact to be solved in the light of all the circumstances surrounding the transaction." 9 Cal. Jur. § 52. p. 155. The evidence supporting the finding of the trial court on this issue is on a par with that found in Meeker v. Spencer, 41 Cal. App. 400, 182 P. 782, and which the appellate court there held sufficient to support the finding of nondelivery. Other cases to the same effect might be cited but to no purpose in view of the established rule that a finding of the trial court based upon conflicting evidence may not be disturbed if there appears any evidence in the record to support that finding.

[3] The appellant complains that the trial court was in error in admitting the testimony of the various witnesses covering the oral instructions given by the parties to the deed relating to its retention and delivery after the death of the grantor. It is true, as claimed by appellant, that when a deed has been properly executed and actually delivered, parol evidence is not permissible to show that it was to take effect only upon the performance of some condition not expressed therein. But this is not the rule which is applicable here. The question is whether the deed was delivered or not, and this is a question of fact from the very nature of which parol evidence is admissible. Williams v. Kidd, 170 Cal. 631, 651, 151 P. 1, Ann. Cas. 1916E, 703; Fisher v. Oliver, 174 Cal. 781, 788, 164 P. 800.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

79 Cal. App. 270

LOS ANGELES CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. HYATT et al. (Civ. 5238.)

(District Court of Appeal, Second District, Division 2, California. Sept. 8, 1926.)

1. Appeal and error 🔑1011(1).

Finding of fact on an issue as to which there is substantial conflict in evidence, will not be reviewed on appeal.

2. Eminent domain 🔑205.

Finding of value *held* sustained by substantial evidence.

3. Eminent domain 🔑202(4)—In proceeding to condemn unimproved land for school purposes, testimony as to its value for subdivision purposes was properly excluded.

In condemnation proceedings for school purposes, objections to owner's questions on direct examination as to value of the five acres of unimproved property as a subdivision proposition were properly sustained.

4. Eminent domain 🔑202(1).

In condemnation proceedings for school purposes, trial court had the duty to consider all conditions having any bearing on valuations, including zoning restrictions.

5. Eminent domain 🔑262(1).

In condemnation proceedings for school purposes, owner who made no objection to evidence of zoning restrictions may not raise the point on appeal for the first time.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action in eminent domain by the Los Angeles City High School District of Los Angeles County against Hayden T. Hyatt and others to acquire property for school purposes. From the decree, Hayden T. Hyatt appeals. Affirmed.

M. J. McGarry, of Los Angeles, for appellant.

Edward T. Bishop, County Counsel, and J. F. Moroney, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, J. This is an action in eminent domain for the acquisition of certain property in Los Angeles county for school purposes alleged to be required by the public interest, convenience, and necessity. It was tried before the court without a jury, and judgment was entered directing that respondent take the property here involved, for said purposes, upon the payment to appellant of $75,000 and costs.

The principal ground of appeal is that the amount allowed is wholly inadequate, and that the evidence warranted the finding and allowance of a higher valuation. It appears that the property sought to be condemned consisted of about five acres, that it was unimproved, but suitable for residences, flats, apartments, and bungalows, and was surrounded by improved property. Appellant's witnesses testified that the land was worth $225,000 to $350,000, whereas the witnesses for respondent placed its market value at $70,000 to $75,000.

[1, 2] Appellant contends that because respondent's witnesses MacKeigan and Kelliher made official appraisements for the county and for the school board, they were biased, and follows the statement of the witness Robinson that he did not inquire about or consider the effect of the sale of adjoining property improved with a bungalow court with the argument that respondent's witnesses "deliberately refrained from making any inquiries or investigation which would in any way influence or guide or assist them in arriving at a conscientious valuation of appellant's property." Witness Kelliher testified that he appraised and bought all property for Los Angeles county; that he had been engaged in the real estate brokerage business for 20 years, and that he believed the property in suit had a market value of $75,000. The witness MacKeigan had been an insurance broker for a period of 20 years, appraised for the county and for banks, mortgage loan companies, and individuals; he swore that he was familiar with the Hyatt property and examined it for the purpose of determining its market value as of the date suit was filed; that he had on four or five occasions talked with owners of property in

the neighborhood, and obtained details of sales in that immediate vicinity; that he took into consideration selling agency, reasonable charge for subdivision, profit charge, and expenses, and with these elements in mind he fixed the market value of appellant's property at $75,000. Urban was a real estate broker, located within five and a half blocks of the Hyatt property for a period of four years and eight months; he examined it, and placed its market value at $70,000 to $75,000. Robinson, a real estate broker in the same vicinity, stated that he was familiar with the location, general environment, and situation of the property involved, and that its market value was $70,000 to $75,000. Two witnesses who were called and testified for appellant—a civil engineer and a real estate broker, respectively—apparently considered the property worth much more. It is unnecessary to cite authorities for the rule that a finding of fact upon an issue as to which there is a substantial conflict in the evidence will not be reviewed upon appeal. There was substantial evidence to sustain even a lower valuation than that made by the trial court.

[3] Counsel for appellant asked a witness on direct examination regarding the value of the property as a subdivision proposition, to which objections were sustained, and this is assigned as error. The rulings were correct. Sacramento, etc., R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979. It appears in respondent's brief, however, and is not contradicted, that the witness answered the questions, by stating that if subdivided into lots it would sell for $225,000 to $250,000.

[4, 5] It is insisted that the consideration of zoning restrictions to which the property in question was subject was "an unjust handicap to appellant in fixing the award of damages." There might be many considerations which if removed would enhance the value of real property, but when they exist they should be observed. It was the duty of the trial court to consider all conditions having any bearing upon valuations. Furthermore, appellant made no objection to such evidence and cannot raise the point here for the first time.

There is no error in the record, and the interlocutory decree should be affirmed.

The decree appealed from is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

79 Cal. App. 294

WAHL v. McCADDON et al. (Civ. 3139.)

(District Court of Appeal, Third District, California. Sept. 11, 1926.)

Limitation of actions 🔑151(2).

Action on note, payable in one year, dated February 2, 1917, *held* not barred by limitation on April 10, 1924, where written agreement extending time for one year was made in January, 1922, in view of Code Civ. Proc. § 360.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Elizabeth Wahl against James A. McCaddon, as administrator of the estate of Alice C. Moore, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

James E. O'Keefe, of San Diego, for appellants.

John H. McCorkle, of San Diego, for respondent.

FINCH, P. J. This is an appeal by the defendant McCaddon from a judgment in favor of the plaintiff. The only question presented by the appeal is whether, at the time the action was commenced, it was barred by the statute of limitations in so far as it is based upon a certain promissory note.

In January, 1922, Alice C. Moore, now deceased, was indebted to John Wahl, also now deceased, in certain sums of money, evidenced by three promissory notes, secured by mortgages on real estate, the note in question being dated February 2, 1917, and payable one year after the date thereof. During the month first mentioned the parties to the notes executed an instrument, reciting the execution of the notes and that Alice C. Moore was desirous of securing an extension of time for the payment thereof, and providing as follows:

> "Now, therefore, in consideration of $1, the receipt whereof is hereby acknowledged, it is mutually agreed between the said John Wahl and said Alice Copeland Moore that the time of payment of the principal sum as mentioned in each of the three promissory notes and in accordance with the terms and conditions thereof is hereby extended for a period of one year from the 27th day of January, 1922, and the said Alice Copeland Moore on her part hereby promises to pay said notes and each one thereof on the date when the same become due under said extension and hereby confirms the execution of said notes and said mortgages and hereby assumes the payment thereof and each thereof."

Thereafter said John Wahl died, and, on the administration and settlement of his estate, the three notes were distributed to the plaintiff. Alice C. Moore also died, and defendant McCaddon was duly appointed administrator of her estate. This action was commenced April 10, 1924.

It so clearly appears that the action was not barred at the time of the commencement thereof that it is deemed sufficient to cite the following: Code Civ. Proc. § 360; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Wilcox v. Gregory, 135 Cal. 217, 67 P. 139; Dixon v. Bartlett, 176 Cal. 572, 169 P. 236; Curtis v. Holee, 184 Cal. 726, 195 P.

395, 18 A. L. R. 1024; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, Justice pro tem.

79 Cal. App. 234

CITY OF SACRAMENTO v. HUNGER et al.
(Civ. 3033.)

(District Court of Appeal, Third District, California. Aug. 28, 1926.)

1. Automobiles 🔑244(21) — Plaintiff alleging automobile driver's negligence in failing to comply with law must prove negligence by preponderance of evidence (Motor Vehicle Act, § 133).

In action for damages to police automobile caused by collision with defendant's automobile, where plaintiff claimed accident was due to negligence of defendant in failing, upon sounding of siren, to obey Motor Vehicle Act (St. 1923, p. 560), § 133, burden was on plaintiff to prove negligence by preponderance of evidence.

2. Automobiles 🔑247—Verdict for defendant held implied finding defendant could not hear police automobile siren.

In action for damages to police automobile caused by collision with defendant's car, where there was no contradiction of testimony that siren was continually sounded, and verdict was for defendant, such verdict implied finding that defendant could not hear siren in sufficient time to stop his automobile as required by law.

3. Automobiles 🔑247—Implied finding defendant could not hear police automobile siren affords sufficient support to sustain verdict for defendant.

In action for damages to police automobile, caused by collision with defendant's automobile, where verdict for defendant implied finding that defendant could not hear siren signal in sufficient time to stop his car as required by law, such implied finding affords sufficient support to sustain verdict.

4. Automobiles 🔑245(19) — Whether defendant heard police automobile siren held for jury (Code Civ. Proc. § 1960).

In action for damages to police automobile, caused by collision with defendant's automobile, where there was ample testimony that siren was continually sounded, but no direct testimony that defendant heard siren, question whether defendant heard siren was one of inference for jury under Code Civ. Proc. § 1960.

5. Automobiles 🔑245(1)—In action for damages to police automobile, where there was testimony that certain witness was asleep at time, whether such witness was asleep was for jury.

In action for damages to police automobile, caused by collision, where there was testimony that witness, who testified he did not hear siren before collision but heard crash, was asleep at the time, whether such witness was or was not asleep was for jury.

6. Evidence 🔑586(3, 4)—Jury has right to believe statement of witness that he did not hear police automobile siren, notwithstanding his inability to fix time of accident.

In action for damages to police automobile, caused by collision, where witness positively stated that he did not hear siren, jury had right to believe that statement, notwithstanding inability of witness to fix time at which accident happened.

7. Automobiles 🔑245(19) — Whether defendant heard police automobile siren before entering intersection was for jury.

In action for damages to police automobile, caused by collision with defendant's automobile, where there was conflict in evidence, whether defendant heard siren before he entered intersection was question for jury to resolve.

8. Appeal and error 🔑1033(5)—Appellant cannot complain of instruction for omission which was to his benefit (Motor Vehicle Act, § 132).

In action for damages to police automobile in collision with defendant's car, omission from instruction of arbitrary exercise of right of way by police automobile, under Motor Vehicle Act (St. 1923, p. 560) § 132, was not available to plaintiff, where failure was to his benefit rather than his injury.

9. Automobiles 🔑175(3)—Police vehicle's right of way does not constitute license to operate vehicle regardless of safety of others (Motor Vehicle Act, § 132).

That Motor Vehicle Act (St. 1923, p. 560), § 132, provides "police vehicles shall have right of way," does not confer license entitling police vehicles to be operated over city streets regardless of safety of other persons using them.

10. Negligence 🔑3.

"Due care" is relative expression, and means that degree of care which circumstances of particular case requires.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Care.]

11. Appeal and error 🔑1064(2)—Instruction, "police automobile had no right to cross intersection," was not reversible error, where charge contained correct statement of all principles of law pertinent to issues and jury were not confused.

In action for damages to police automobile, use of word "had" in instruction that "police automobile had no right to cross intersection," while invasion of province of jury, was not reversible error, where charge contained correct statement of all principles of law pertinent to issues, and such instruction was not so inconsistent with other instructions that jury failed to derive information that question was for their determination.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the City of Sacramento against William F. L. Hunger and another. Judgment for defendants, and plaintiff appeals. Affirmed.

R. L. Shinn, City Atty., and Chas. J. Hasman, Asst. City Atty., both of Sacramento, for appellant.

Evans J. Hughes, of Sacramento, for respondents.

HART, J. The plaintiff in this action sues for damages in the total sum of $1,200 for damage alleged to have been done to a police armored automobile belonging to said city in a collision between said automobile and the automobile of the defendant William F. L. Hunger, and also for expenses paid by plaintiff for medical services rendered to one of its police officers for physical injuries sustained by the latter by reason of said collision, said officer being in the police car at the time of the mishap. The cause was tried before a jury and a verdict rendered for the defendants. The appeal is by the plaintiff from the judgment entered upon said verdict.

The defendant William J. Hunger is the father of the other defendant, the latter, so the complaint states, being, at the time of the collision, a minor.

The accident occurred between 11 and 12 o'clock on the night of the 10th day of January, 1925, at the intersection of Seventh and L streets, in the city of Sacramento. Just prior to the happening of the collision the police department received a notice by telephone that a burglar was carrying on criminal operations at or near a residence in the neighborhood of Seventeenth and V streets, in said city. Immediately two police officers, George A. Kaminsky and A. P. Noone, were dispatched to the scene of the burglarious operations in an armored automobile and drove from the police station at Sixth and H streets, to Seventh street, thence along the last-named street in a southerly direction. The police car and that of the defendant William F. L. Hunger, driving over and along L street in a westerly direction, collided, with the result that the police car was seriously damaged and Officer Noone likewise injured, and the car of Hunger also damaged.

The contention of the plaintiff is that the verdict is minus sufficient evidentiary support, and that prejudicial error was committed by the trial court in certain particulars in its charge to the jury. In its opening brief the plaintiff makes the following concession:

> "It may be granted that at the time the two cars arrived at the intersection, as above stated, it was too late to avoid an accident, and that an emergency was created thereby which would relieve either of the operators of the automobiles from liability for the accident itself, because, assuming that the defendant William F. L. Hunger, by proper presence of mind, might have obviated the collision with the police car, the emergency was so great at that time he could not be chargeable for taking the wrong method."

The following further statement, however, is made in said brief in connection with the foregoing admission:

> "The police car was equipped with a siren, which was sounded continuously from the time of leaving the police station at Sixth and H streets until almost the instant of the collision at Seventh and L streets, the distance from the police station to the point of the accident being approximately five city blocks."

It will thus be observed that the plaintiff, in its claim that the accident was due to the negligence of the defendant Wm. F. L. Hunger, relies entirely upon the proposition that he (said Hunger) failed, upon the sounding of the siren or signal attached to the police car, to obey the mandates of section 133 of the State Vehicle Act (St. 1923, p. 560). Said section provides:

> "Upon the approach of any police or fire department vehicle, it shall be the duty of the operator of any street car, upon the sounding of a signal by such police or fire department vehicle, to stop such street car forthwith, unless at the time such street car is crossing an intersection of the public highways, in which event it shall be operated so as to clear the intersection of the highways and then stopped, and every other vehicle shall immediately be moved to a position as near as possible and parallel to the right-hand curb, and shall remain there until the police or fire department apparatus has passed such vehicle."

The point that the verdict is destitute of sufficient evidentiary support is practically reduced to the simple question whether the siren signal connected with the police car was sounded or being sounded as said car was proceeding along the streets to the point of destination of the officers, and, if so, whether the defendant Wm. F. L. Hunger at any time heard it.

The two officers who were in the car, one (Kaminsky) at the wheel and at the same time manipulating the siren connection so as to give the usual warning of the approach of the car, testified that the speed at which said car was driven at no time exceeded that of 35 miles an hour, and that the siren was continually sounded as they were passing along the streets from the time they (the officers) left the police station to the time they reached the point where the collision occurred. Each of the officers stated that "the siren was going all the time." Six other parties who, just before and at the time of the collision, were on the streets along which the police car was then being driven in a southerly direction from the point where the police station is located, each testified that he heard the sound of the siren from the time his attention was attracted to said car by the signal sound until the car reached Seventh and L streets, where the collision took place. Some of these witnesses were, at the time the accident happened, within a few yards of the point of collision, one or two not so near, and others practically at the corner.

The defendant Wm. F. L. Hunger testified that he was driving his car on L street in a westerly direction; that he had been driving at the rate of about 15 miles an hour and continued to drive at that rate of speed as he approached and was in the act of crossing L street at Seventh; that after he had reached a point near the center of the intersection of Seventh and L streets, his attention was attracted to the police car by the rapid rate of speed at which the latter car was driving and also the headlights thereof; that, instantly apprehending the danger of a collision with the approaching police car, and in the hope of avoiding a collision, he suddenly swerved his car to the left or in a southerly direction—the same direction in which the police car was going—but had hardly more than made that movement when the two cars collided. He further testified that, when first his attention was attracted to the police car, said car was at a point a trifle south of the alley between K and L streets, the first-named street being north of the last-named, and that said car, according to his best judgment, was traveling at a rate of speed of between 40 and 50 miles an hour. Said defendant did not say whether he at any time heard the sound of the siren attached to the police car, nor was he asked, either on direct or cross-examination, whether he heard the siren.

A witness by the name of Jackson, residing in the alley between L and M streets, and whose home "faces towards L street," testified (for the defendants) that he was in his house engaged in a conversation with one Jim Brown, when he heard the "crash" caused by the collision. He testified that, prior to hearing the "crash" he did not hear the sound of the siren on the police car. He stated that he could not fix the time in the evening at which the collision occurred, but that at the time "of the accident" it was getting dark—along getting dusk. "I was sitting," he said, "in the middle room of my 'shanty.'" J. J. Reed, a witness for the defendants, testified that he was employed in a garage at 624 L street, not far distant from the corner of Seventh and L streets, and that he was in the office of the garage at the time of the collision and heard the noise caused by the impact between the two cars, but that he did not hear the siren prior to the collision. Reed stated that the office of the garage was situated on the west side of the building—that is, the side nearest to L street. He testified that he was familiar with the sound produced by the siren on the police car, and that his hearing was fairly good.

Wm. Garvey, a witness for the plaintiff, testified that he was walking along Seventh street, going south, and not far from the corner of Seventh and L streets when he heard the sound of the siren on the police car; that, looking back, he saw the police car about midway between J and K streets, going south on Seventh; that he, near the same time, saw the car driven by defendant Wm. F. L. Hunger enter Seventh street on L from the east, traveling at the rate of about 20 miles an hour; that he (said defendant), proceeding toward the center of the intersection of the two streets, had reached a point from 5 to 10 feet from the east line of Seventh, or "pretty near the turning block" in the center of the intersection, when the police car, traveling at the rate of 40 or 50 miles an hour, and the said defendant's car collided.

In rebuttal one Menzell was called by plaintiff and testified that he was with defendants' witness Reed in the garage near Seventh and L streets when the collision occurred, and that at and just prior to that time said Reed was asleep in a chair. Reed, as above shown, testified that he did not hear the siren before the accident happened.

[1] The foregoing embraces substantially all the testimony given in the case. The burden was, of course, upon the plaintiff to prove by a preponderance of the evidence the negligence upon which it relies to establish a case under the averments of its complaint upon the theory advanced, to wit, that the defendant William F. L. Hunger at some time before reaching the eastern line of Seventh street heard the sound of the siren, but failed or omitted to immediately move "to a position as near as possible and parallel to the right-hand curb of the sidewalk" and remain there until the police car "passed such vehicle."

[2, 3] The plaintiff contends that the verdict is wholly without support. The argument is that, since there was no contradiction of the testimony of the witnesses for the plaintiff that the siren on the police car was continually sounded from the time it was first heard as the car was between J and K streets going south on Seventh street to the time at which the collision occurred, there was nothing left for the jury to do but to find that the defendant Wm. F. L. Hunger must have heard and did hear the siren in time to have stopped his car and removed it to the curb of the sidewalk on L street, in the manner prescribed by the vehicle law, before the police car reached the intersection of Seventh and L streets where the accident happened. If the verdict had been for the plaintff a court of review would no doubt be required to hold, upon the evidence as it is disclosed by this record, that the verdict implied a finding that the said defendant did hear the siren in sufficient time to have stopped his car as indicated by the law and thus have avoided the collision, and, further, required to hold that such implied finding was afforded sufficient support, or, in other words, be compelled to hold that we could not say that such finding was devoid of sufficient evidentiary support to sustain it and, consequently, the verdict. We hold that the position of this

court with respect to the verdict as it now stands is precisely the same as it would be as to the case assumed or supposed.

[4] There can be no doubt that there is ample testimony to show that the siren was continually sounded from the time the police car started from police headquarters to the time at which the collision occurred, but, as in the very nature of the situation, there could be no direct testimony that said Hunger at any time heard the siren before the accident, except by his own admission to that effect, and this he did not make. Obviously, the question whether said Hunger heard the siren was one of inference to be drawn by the jury from all the testimony in the case. Any assumption that where the testimony upon an issue of fact is all one way the presumption is that it speaks the truth as to such issue would be fallacious, unless the case furnishes an instance where the particular facts proved are such as necessarily or upon their face can lead to but one conclusion, in which case the law expressly directs that such conclusion or deduction shall be made. Code Civ. Proc. § 1959. This case presents no such instance, however. To the contrary, it is the usual case where the ultimate issue must be established, if at all, upon the proof of the facts and circumstances inhering in the transaction itself. In other words, as above stated, the case is one in which it is for the jury, and not for the law, to determine from the evidence whether the fact sought and necessary to be proved has been proved, and the process of such determination is that of inference, as defined by section 1960 of the Code of Civil Procedure, as follows:

> "An inference must be founded: 1. On a fact legally proved; and, 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

We are not prepared to say what course this or any other court of review would take if there was no other testimony in the record than the testimony showing or tending to show that the siren on the police car was continually sounded from the time it left the police station to the time of the collision. If, though, a reviewing court should be compelled, in such circumstances, to reverse the cause for want of sufficient proof to support the result arrived at below, it would be required to plant its judgment, not upon the proposition that such testimony was to be presumed to be true, but solely upon the ground that the question of evidentiary support was a question of law, and therefore the verdict, as a matter of law, failed of sufficient evidentiary support. But the record here presents an evidentiary conflict. The defendant Wm. F. L. Hunger testified that the rapid movement of the police car and its headlights were what first attracted his attention to said car, and that was after he had entered Seventh street and had proceeded some ten feet from the eastern line of L street towards the center of the intersection. As shown, he did not say that he did not hear the siren, nor did he say that he did hear it. He was asked no question either on direct or cross-examination whether he did or did not at any time hear the siren. Counsel for plaintiff contend that, because he did not say that he did not hear the police signal, it must be presumed that he did hear it. As pointed out above, this court can indulge no such presumption. To the contrary, this court must assume that the jury concluded from his statement that he was attracted to the police car by the rapid speed at which it was traveling down Seventh street and its headlights, and that there was nothing else in connection with said car which attracted his attention or gave him any warning of its approach to L street. As above stated, however, there was other testimony contradictory of that of the plaintiff upon the question, itself sufficient, we think, to produce a substantial conflict in the evidence thereon. The witness Jackson's testimony, as seen, was to the effect that, continuously for some time before and at the time the collision occurred, he was in his house, situated near Seventh and L streets; that he heard the noise caused by the collision, but did not at any time hear the siren.

[5] The witness Reed, who was in a garage at Seventh and L at the time of the accident, testified, as above shown, that he did not hear the siren before the collision, but heard the crash. It is true that a witness in the garage where Reed was at the time testified that he heard the siren and the noise from the impact, and further, that Reed was and had been asleep in a chair at the time of the collision. It is also true that the witness Jackson could not state the hour of the night that the accident happened. In fact, he appears to have been unable to say whether it was early in the evening or late at night. But these apparent weaknesses in the testimony of these witnesses were matters for the jury to consider in weighing or appraising the probative value of their testimony.

[6] Jackson positively stated that he did not hear the siren prior to the collision, and the jury had the right to believe that statement, notwithstanding the inability of the witness to fix precisely or even approximately the time at which the accident happened. The witness Reed was not asked on cross-examination whether he was and had been asleep in the chair down to the time of the collision, nor was he recalled to the witness stand by defendants and interrogated regarding the matter. The witness, if available after the statement was made that he was asleep as indicated, should have been brought back to the stand and given an opportunity to say whether he was or was not asleep until

awakened by the crash, as is the implication from the testimony to that effect. But this, too, was a matter which involved the question of the probative force of Reed's testimony that he did not hear the siren, and it was, obviously, for the jury to decide whether Reed was or was not asleep at the time. The witness who testified that Reed was asleep did not say how he knew that he (Reed) was asleep other than from the fact that he (Reed) was sitting in a chair leaning against the wall. Of course, it does not necessarily follow from the fact that a person may be sitting quietly in a chair, even with his eyes closed, that he is asleep. The jury, in view of Reed's statement that he did not hear the siren, in the absence of an explanation by him (if it was true) that the reason he did not hear it was because he was and had been asleep until he heard or was awakened by the crash, could most reasonably have concluded that Reed was not asleep while sitting in the chair. At any rate, it is certain that this court cannot say, as a matter of law, that the testimony shows that Reed was asleep at the time indicated.

[7] That there is a conflict in the evidence upon the question whether defendant Wm. F. L. Hunger heard the siren at any time before he had entered the intersection cannot be doubted, and, as before stated in other forms of expression, it was entirely with the jury to resolve that conflict. "The weight to be given to negative testimony of the character of that produced by the plaintiff is a question for the jury, and 'it has frequently been held that negative evidence of this character is sufficient to sustain a verdict, * * * even though it conflict with other evidence to the effect that a warning was actually given.' Keena v. United Railroads of San Francisco (Cal. Sup.) 239 P. 1061; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Jones v. Southern Pacific Co. (Cal. App.) 239 P. 429." See Carey v. Pacific Gas & Electric Co. (Cal App.) 242 P. 97, 98.

The court gave the following instruction:

> "The law requires that any person operating or driving a motor vehicle, and this includes a police automobile, upon the public streets, shall operate or drive the same in a careful or prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the street, and that no person shall operate or drive such motor vehicle on a public street at such rate of speed or in such manner as to endanger the life or limb of any person or the safety of any property."

Appellant contends that the above instruction, in so far as it includes police automobiles within the purview of the general rule regulating and prescribing the degree of care and the speed limit of motor vehicles driven over the streets and other highways of the state, is violative of the express provisions of the Motor Vehicle Law of 1923 relating to the use of streets by police automobiles, and that the giving of the instruction was, therefore, seriously prejudicial to its rights. Section 113 of the Motor Vehicle Act (Stats. 1923, pp. 517, 553), prescribes the speed limit of motor vehicles according to the different degrees of peril to others using the streets and highways arising and existing by reason of the varying conditions necessarily characterizing the public thoroughfares. The speed limit as so prescribed ranges from 15 to 35 miles an hour, according as such conditions may require in the very nature of the situation. Section 120 of said act provides as follows:

> "The provisions of this act prescribing the speed for vehicles shall not apply to vehicles of any city, city and county, or county or of the state of California when such vehicles are being operated in the chase or apprehension of violators of the law, or of persons charged with or suspected of any such violation, nor to fire department vehicles when traveling in response to a fire alarm nor to ambulances or the vehicles of licensed physicians when actually traveling in response to emergency calls."

Section 132 of said act provides:

> "Police and fire department vehicles shall have the right of way over all other vehicles but must be operated with due regard for the safety of all persons using the public highway. This provision shall not protect the driver of any such vehicle or his employer or principal from the consequence of the arbitrary exercise of such right of way."

[8] The specific objections urged by appellant against the instruction are: That it "entirely eliminated the question of the arbitrary exercise of a right of way by the police automobile"; that it "erroneously included police automobiles in the category of vehicles which would have to be operated at such a rate of speed, or in such manner, as not to endanger the life of any person, or the safety of any property." The first stated ground of objection is apparently based on the last clause of section 132 of the Vehicle Act and hereinabove quoted. The omission from the instruction of a statement embracing that clause of said section certainly could not have prejudiced the plaintiff. It involves a positive mandate against any attempted arbitrary use of the streets by police automobiles when in active operation in pursuance of the purposes for which such vehicles are maintained by the police department of a city, and the failure to state that proposition to the jury was to benefit rather than to injure the appellant. Besides, the mandate of that clause of said section is diametrically opposed to the theory involved in the objection urged by appellant against the instruction secondly hereinabove stated. To hold that, because the statute fixes no maximum limit of speed at which police automobiles may be driven over the streets of a city when they are being op-

erated "in the chase or apprehension of violators of the law," they may be so driven with absolute indifference to others legitimately using such streets, or with a reckless disregard of the lives and property of others, would be to fly squarely in the face of the last clause of section 132. Indeed, in the absence from our statutes of such a provision, no court would hold that such vehicles, although not expressly restricted by the statute to a specified speed rate when used for their purposes, could be negligently or carelessly operated or in such manner as necessarily to imperil the lives or the property of others. The law permits a speed limit of 35 miles an hour for motor vehicles over the highways outside of the limits of a city, yet the law holds a driver of such a vehicle over such highways, when employing the limit of speed fixed in such a case, to the exercise of reasonable care in thus operating an automobile. Obviously, the same is equally true where there is no restriction whatever upon the rate of speed at which automobiles used for certain special purposes may be driven.

[9, 10] Nor does the provision of section 132 of the statute, that "police and fire department vehicles shall have right of way over all other vehicles," relieve the driver of such vehicles from the duty of exercising the proper degree of care when operating them over and along the streets of the city. In fact, the language of the section following that just quoted declares that such vehicles "must be operated with due regard for the safety of all persons using the public highway." The court below in one of its instructions in the instant case correctly stated to the jury that the exemption by the state vehicle law of police automobiles from the speed limits prescribed by said statute "does not constitute a license" to the driver of a police vehicle to operate such vehicle over the city streets regardless of the safety of other persons using such streets. It may be added that, when operating police automobiles on and over the streets for the purpose of such vehicles, the rule should be and is that a greater amount of care is required than in those cases of the use of motor vehicles where the maximum limit of speed is fixed by the law. We are not thus to be understood to say that a greater degree of care, as that expression technically implies, should be required in such cases as the present. "Due care" is a relative expression and means that degree of care which the circumstances of a particular case requires, and, while "reasonable care" only is required to be exercised in the operation of police automobiles when they are employed in "chasing and apprehending criminals," a greater amount of such "reasonable care" should be exercised when using motor vehicles under the indicated circumstances.

[11] The most serious question presented here grows out of the following language of one of the given instructions:

"Those in control of the police automobile had no right to continue their way across the intersection heedless of other vehicles which might be lawfully using the intersection."

By the use of the word "had" in the quoted sentence the instruction assumes that the driver of the police automobile did proceed over and across the intersection of Seventh and L streets "heedless of other vehicles which might be lawfully using the intersection." As so phrased, the instruction in effect involved an invasion of the province of the jury, upon whom alone rested the duty of determining and deciding upon the evidence whether those in control of the police automobile did or did not "continue their way across the intersection heedless of other vehicles," etc. But other than this error, the court's charge, as a whole, contained a clear and correct statement of the rules or the principles of law pertinent to the issues as made by the pleadings and brought into the case by the proofs, and from the instructions other than the one complained of here no intelligent person could fail to derive the information that the question whether the driver of the police car in continuing across the intersection did or did not exercise reasonable or due care, or was or was not heedless of the safety of other vehicles which might then be lawfully using the intersection, was solely one for the jury's determination. We cannot persuade ourselves that the jury, even if they noticed the inadvertent grammatical error characterizing the criticized language of the instruction, attached any significance to it, but were solely governed by the plain declarations of other parts of the court's charge to the effect that the question whether the plaintiff's agents who drove the police automobile were at any time heedless of the safety of others as they were operating said automobile was one which it was wholly their duty to decide upon all the evidence before them. Instructions must be considered as a whole or a single charge upon the law, and where, in thus viewing the instructions, it is clear, as is the case here, that a correct statement of all the principles of law pertinent to the issues are set forth therein, an error in the statement of some rule, elsewhere correctly stated in the charge, must be of a very serious nature or the instruction containing the error thereby rendered so inconsistent with the other instructions upon the same proposition as necessarily to conduce to confusion in the minds of the jury as to the true rule, before an appellate court will reverse a case for that cause alone. Particularly is this true where, as here, the error has been produced by an obvious grammatical error, and which presents a question merely of grammatical nicety in the phrasing of an instruction.

There are other instructions criticized, but upon practically the same ground upon which the instruction first hereinabove considered is here objected to. It is therefore not necessary to give those assignments special attention herein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

79 Cal. App. 286

PEOPLE v. T. WAH HING. (Cr. 900.)*

(District Court of Appeal, Third District, California. Sept. 11, 1926.)

1. Physicians and surgeons 🔑6(10).

Evidence *held* to sustain conviction, under Medical Practice Act, § 17, for practicing medicine without certificate.

2. Physicians and surgeons 🔑6(10).

Proof of treatment of single patient with evidence of surrounding circumstances may show practice of medicine without certificate, contrary to Medical Practice Act, § 17.

3. Physicians and surgeons 🔑6(10)—Evidence of what defendant did on day of arrest for practicing medicine without license, held admissible (Medical Practice Act, § 17).

Although defendant charged with practicing medicine without certificate, contrary to Medical Practice Act, § 17 (St. 1913, p. 722), was not on trial for anything he did on day of his arrest, evidence thereof was admissible as tending to prove that he was practicing medicine as business and not giving incidental treatment.

4. Physicians and surgeons 🔑6(11)—Instruction defining "practicing medicine," held not misleading (Medical Practice Act, § 17).

In prosecution, under Medical Practice Act, § 17 (St. 1913, p. 722), for "practicing medicine" without certificate, instruction that if patients state ailments and describe symptoms, and defendant on request prepared and delivered herbs or medicines, he would be practicing medicine, was not misleading, in view of instruction that to practice medicine meant that he was engaged in such work as business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Practice of Medicine.]

5. Physicians and surgeons 🔑6(1).

Diagnosing, prescribing and treating ailments are constituent parts of "practice of medicine."

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

T. Wah Hing was convicted of practicing medicine without a certificate, and he appeals. Affirmed.

S. Luke Howe and Howe, Hibbitt & Johnston, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the violation of section 17 of the Medical Practice Act. Stats. 1913, p. 722. This appeal is from the judgment and the order denying a new trial.

The indictment, filed September 16, 1925, charges that the defendant, on the —— day of July, 1925, "did then and there willfully and unlawfully practice, attempt to practice, and hold himself out as practicing a system or mode of treating the sick and afflicted in this state, without having at the time of so doing a valid, unrevoked certificate from the board of medical examiners of the state of California."

[1] Appellant contends that the evidence is insufficient to sustain the conviction. A witness for the prosecution testified that a neighbor, Mrs. McBride, was ill during the month of July, 1925, for a period of about three weeks, and that she died the 1st or 2d of the following month; that the defendant visited the McBride residence during that period "at least three or four times," remaining there "around 10 minutes" each time; that his visits were made "a couple of times in the evening, along about 7 or 7:30, and at other times, during the day." A second witness testified that she saw the defendant drive up to the McBride residence once "in the evening, about 7 or 7:30, and one time in the morning"; that one evening a son of Mrs. McBride used the witness' telephone and asked for "Dr. Hing," and that "in a very few minutes" the defendant arrived at the McBride residence. A third witness testified that she was present in the McBride home on one occasion when the defendant called there and remained for 15 or 20 minutes; that Mrs. McBride "told defendant she was awful sick"; that he "tried Mrs. McBride's pulse" and "gave her a dose of medicine"; that he left three kinds of medicine and gave the witness directions "how to give this medicine"; that "he fixed it for her, he stood it for her and steeped it * * * for her"; and that he was addressed as "Dr. Hing" while there and "didn't say anything about" the use of the word "doctor." A fourth witness testified that Mrs. McBride was "very sick" about July 13, 1925; that she saw the defendant at the McBride residence twice; that he left some herbs one time, and directed the witness "to make a tea of them"; that he made a "slight examination" of Mrs. McBride "when she complained of being bloated, * * * just pressed about a couple of times in her abdomen"; that he looked at her tongue "one time"; that at another time he left some gray powder to be put in her tea. A fifth witness testified that he saw the defendant at the McBride residence three or four times; that one morning, "a little before 7 o'clock," Mr. McBride requested the witness to telephone to "Dr. Hing"; that the witness called the defendant on the telephone

*Rehearing denied October 11, 1926. Hearing denied by Supreme Court November 8, 1926.

"and asked if it was Dr. Hing, and he says, 'Yes, yes; I am getting the medicine now.' I phoned that Mrs. McBride was in great pain, and Mr. McBride wanted him to come out right away, and he said, 'Yes, yes; I am getting the medicine now;'" that the defendant appeared at the McBride residence "in about a half or three-quarters of an hour after that." A deputy sheriff testified that he arrested the defendant in the latter's office September 17, 1925; that on that occasion a "colored lady came in and says:

> 'Dr. Hing?' He says: 'Yes.' She says: 'I have pains in my stomach; I would like some medicine.' * * * Dr. Hing says: 'I am busy now; you come back after while; I'll fix you up.'"

The defendant did not take the witness stand, and the foregoing evidence stands wholly uncontradicted.

Appellant cites Ex parte Greenall, 153 Cal. 763, 96 P. 804, in support of his contention that the evidence is insufficient to prove the charge in this case. In that case (page 769, 96 P. 805) it is said:

> "When we say that one is practicing medicine or surgery or osteopathy, we ordinarily mean that he is engaged in that line of work as a business, * * * and we would not apply the term to one who incidentally and gratuitously suggests or puts into operation some method of treatment in the case of one who is 'sick or afflicted.' * * * It might be sufficient in the complaint to charge simply that one had practiced medicine, or osteopathy, or chiropractics, without such certificate. * * * But the complaint in the case before us, as we read it, contains no such allegation. The allegation was simply that the defendant did willfully and unlawfully 'treat the sick or afflicted' without having at the time a valid unrevoked certificate as required by the act."

It will be observed that in the Greenall Case the court was discussing the alleged insufficiency of the pleading therein to state an offense, while the question under consideration here is whether the facts and circumstances given in evidence are sufficient to warrant the inference that the defendant was engaged in the practice of medicine as a business. It is true that no witness testified that the defendant ever treated any patient other than Mrs. McBride, although he treated her on several different days, but it does not necessarily follow that the proof is insufficient.

[2] Proof of treatment of a single patient, together with evidence of surrounding facts and circumstances, may clearly show that a defendant was engaged in the practice of medicine as a business. Proof of a single sale of intoxicating liquor by a defendant is not alone sufficient to show the maintenance of a nuisance by him, but the circumstances surrounding the sale may be such as to warrant the inference that the single sale was part of a continuing course of conduct and therefore sufficient to sustain a conviction of maintaining a nuisance. People v. Mehra (Cal. App.) 238 P. 802, and cases there cited. Likewise the circumstances surrounding a single treatment of a patient may be such as to warrant the inference that the single treatment was part of the practice of medicine as a business by a defendant. Here the defendant was addressed as "Dr. Hing," and when asked if he was "Doctor Hing" he replied in the affirmative. He responded to several calls to attend Mrs. McBride and proceeded to diagnose her case and prescribe medicines of his own selection. He maintained an office, the character thereof not appearing from the evidence, and, the next day after his indictment, he said to another sick woman who stated her condition and asked for medicine, "I will fix you up."

[3] He was not on trial, of course, for anything he did on the day of his arrest, but the evidence thereof was admissible as tending to prove that he was practicing medicine as a business in his treatment of Mrs. McBride, and not merely giving incidental treatment to a sick or afflicted person. People v. Poo On, 49 Cal. App. 220, 223, 192 P. 1090. The evidence is clearly sufficient to sustain the charge.

[4] The court instructed the jury substantially in the language of the instruction quoted in the Poo On Case at page 224 (192 P. 1092), and also gave the following instruction:

> "If a patient states his or her ailments and describes his or her symptoms, and asks the defendant to supply herbs or medicines which would effect a cure, and if the defendant thereupon prepared and delivered herbs or medicines of his own selection such selection and delivery under such circumstances would constitute a violation upon the part of the person so furnishing such herbs or medicines of section 17 of the Medical Practice Act under which this prosecution is made."

[5] Appellant contends that while these instructions "might have been relevant to a charge of 'diagnosing, prescribing or treating, etc.,'" they are not applicable to the charge actually set out in the indictment. "Diagnosing, prescribing and treating," however, are constituent parts of the practice of medicine, and it was proper to instruct the jury in relation thereto. If the instructions stood alone, they might imply that the jury was authorized to convict the defendant of offenses not charged in the indictment, but the court read the indictment to the jury and gave the following instruction:

> "You are instructed that to practice, means that he was engaged in that line of work as a business, holding himself out as being so engaged, and that in order to convict the defendant in this case of practicing, or attempting to practice, or holding himself out as practicing, a

system or mode of treating the sick and afflicted in this state, without having at the time of so doing a valid, unrevoked certificate from the board of medical examiners of the state of California, you must find from the evidence to a moral certainty and beyond all reasonable doubt, that he was practicing, attempting to practice, or holding himself out as practicing, a system or mode of treating the sick and afflicted as his business, and that unless you do so find beyond all reasonable doubt and to a moral certainty, your duty is to find the defendant not guilty."

In view of this plain and accurate instruction it is highly improbable that the jury could have been misled by the instructions of which complaint is made.

Complaint is made of the court's refusal to give certain instructions requested by the defendant, but the propositions of law which are contained therein are fully covered by other instructions which the court gave.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; PULLEN, Justice pro tem.

---

79 Cal. App. 238

PEOPLE v. FOSTER. (Cr. 1308).

(District Court of Appeal, Second District, Division 1, California. Sept. 14. 1926.)

1. Criminal law 🔑1169(1).

Evidence that after offense was committed, codefendant failed to keep certain appointment, though immaterial, *held* not prejudicial.

2. Witnesses 🔑37(4).

Witness who had not heard defendant's reputation discussed and did not know his general reputation could not testify to his reputation for truth, honesty, and integrity.

3. Criminal law 🔑369(2)—Defendant's conversation with witness relating to other crimes held admissible, being part of general conversation tending to show conspiracy to commit offense charged.

Defendant's conversation with witness relating to other crimes *held* admissible, where it was part of general conversation tending to show conspiracy with codefendant to commit offense charged, since material evidence is not inadmissible because it showed commission of independent offense.

4. Embezzlement 🔑43.

Whether "bad checks," given by defendant, were thereafter paid, *held* immaterial.

5. Criminal law 🔑1119(2).

Assignment that defendant was not permitted to make certain proof cannot be considered, where record shows no attempt to make it.

6. Criminal law 🔑675.

Exclusion of cumulative evidence showing interest of witness *held* not prejudicial.

7. Criminal law 🔑452(3).

Objection to question as to whether witness had seen telegram from Mr. W., or telegram with his signature, *held* properly sustained as calling for conclusion.

8. Criminal law 🔑1137(5).

Appellant cannot complain of admission of certain "check sheets," first admitted as one of his own exhibits.

9. Embezzlement 🔑47.

Motion to strike testimony relating to conspiracy between codefendants charged with embezzlement *held* properly denied, where such evidence was sufficient to take question to jury.

10. Criminal law 🔑1170(1).

Exclusion of evidence showing financial relations existing between two defendants, if error, *held* not prejudicial.

11. Criminal law 🔑1137(6).

Where defendant introduced evidence that he was going under alias, he cannot complain of refusal to allow explanation thereof.

12. Criminal law 🔑1170(1).

In prosecution for embezzlement, exclusion of evidence of termination of defendant's business in 1915, his occupation, health and residence for ten years preceding trial, and his business prior to December 5, 1924, with hotel where he lived, if error, *held* not prejudicial.

13. Criminal law 🔑1186(4).

Where state showed defendant's flight from state, exclusion of evidence that he did not resist extradition, if error, *held* not prejudicial, in view of Const. art. 6, § 4½.

14. Criminal law 🔑829(1).

Refusal of instruction covered by given instructions *held* not error.

15. Criminal law 🔑814(3).

Refusal of instruction not based on evidence *held* not error.

16. Criminal law 🔑814(2).

Giving instruction as to conspiracy *held* proper, where such question was for jury.

17. Embezzlement 🔑44(1)—Evidence held sufficient to support conviction for embezzlement.

Evidence *held* sufficient to support conviction for embezzlement, though codefendant assumed responsibility for commission of offense.

18. Embezzlement 🔑47.

In prosecution for embezzlement, defendant's guilt *held* question for jury.

19. Criminal law 🔑1159(2).

Where evidence was sufficient to support conviction, verdict will not be disturbed.

20. Embezzlement 🔑24—Defendants, who appropriated check belonging to employer of one, held guilty of embezzlement (Pen. Code, § 503).

Defendants, who appropriated check belonging to employer of one, *held* guilty of embezzlement and not larceny, in view of Pen. Code, § 503.

21. Criminal law ⚷1159(5).

That jury disagreed on charge of forgery *held* not to authorize reversal of conviction for embezzlement, where defendants appropriated check of employer.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Russell S. Foster was convicted of embezzlement, and he appeals from the judgment, and from an order denying the motion for a new trial. Affirmed.

Homer C. Mills, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

HOUSER, J. Russell S. Foster, prosecuted under the name of Frank E. Gallagher, was convicted of the crime of embezzlement. He appeals from the judgment, and from an order denying his motion for a new trial.

Appellant was jointly charged with one Allen, whose true name was Abraham Goldstein. It appears that Allen was an employee of a man named Wise, who had his office in a room in a certain hotel; that defendant Gallagher also had a room in the same hotel and was considerably in arrears on account of his room rent, cash advanced, etc.; that in the regular conduct of the business in which Wise was engaged, and in his absence, a certain check was received by Allen for the use and benefit of Wise; that Allen's only authority in the premises was to deposit such check in a certain bank to the credit of Wise; that defendant Gallagher, on being approached by the credit manager of the hotel regarding the payment of his back room rent, etc., stated that because a number of bank checks, which theretofore he had given in attempted liquidation of his indebtedness to the hotel, had been returned from the bank on which such checks were drawn, marked "no account," he was making arrangement with Wise to "take care of" the matter and settle such indebtedness; and, in a subsequent conversation, Gallagher stated to such credit manager that Wise was forwarding a check. Shortly thereafter, defendant Allen presented to the credit manager the check which theretofore had been received by him for the account of Wise, and stated that he would like to have Gallagher receive $100 on the check, and that the balance thereof should be applied on account of the checks which Gallagher had cashed at the hotel, but which had not been honored by the bank on which they had been drawn; which request was later changed so that instead of $100 to be paid to Gallagher, he was to be given $25, with which modified request the credit manager of the hotel complied—defendant Allen and defendant Gallagher indorsing the check. The authority of defendant Allen to so use the check which had come into his possession having been repudiated by Wise, the arrest, prosecution, and conviction of both Allen and Gallagher followed.

[1] Appellant Gallagher presents many assignments of alleged prejudicial error, the first of which being that, over the objection of defendants, evidence was admitted of the fact that, after the offense had been committed, defendant Allen failed to keep an appointment which he had made to meet a certain person. The significance of the circumstance is not apparent; nor has counsel for appellant directed attention to any connection which it may have with the case. So far as this court is able to determine, the evidence was immaterial, excepting possibly from a standpoint of showing guilty knowledge on the part of defendant Allen; but the probability that such evidence had any influence upon the verdict is most remote and can be regarded only as of little, if any, consequence.

[2] The next specification of error to which the attention of this court is directed is that one of the witnesses produced by defendants was not permitted to testify regarding the general reputation of defendant Gallagher for "truth, honesty, and integrity." On voir dire examination of the witness, the fact was developed that the witness had never heard the reputation of the defendant discussed, and did not know his general reputation in the community, but proposed to base his testimony solely upon his own opinion regarding the traits of defendant's character which were involved in the case. In such circumstances, it would appear that there was no abuse of the discretion vested in the trial court in passing adversely upon the qualification of the witness to answer the question.

[3] Appellant's third specification of error, as well as several other specifications of like nature, is that the trial court erred in admitting in evidence, over the objection of defendants, certain conversation had between defendant Gallagher and one of the witnesses relating to other crimes committed by said defendant Gallagher. An examination of the reporter's transcript discloses the fact that the conversation to which appellant refers was but a part of a general conversation which tended to prove that a conspiracy existed between defendant Allen and defendant Gallagher to commit the offense of which they were subsequently convicted. Moreover, the rule is thoroughly established that where offered evidence is material to the issue before the court, the fact that such evidence tends to show the commission of an independent offense presents no valid reason against its admissibility. People v. Ebanks, 117 Cal. 663, 49 P. 1049, 40 L. R. A. 269; People v. Nakis, 184 Cal. 105, 193 P. 92; People v. Cunningham, 66 Cal. 670, 4 P. 1144, 6 P. 700, 846; People v. Oakleaf, 66 Cal. App. 314, 226 P. 24.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Without assigning any reason or authority therefor, appellant suggests that the trial court erred in admitting in evidence certain conversations had between defendant Allen and one of the witnesses introduced by the prosecution. It must therefore be assumed that appellant has no confidence in the correctness of his position. However, on consideration of the matter involved, in view of the entire evidence in the case, it would seem that no valid objection could be interposed by defendant to the admission of the testimony to which he refers.

[4] Appellant also makes the point that error was committed by the trial court in refusing permission to defendant to ascertain on cross-examination of a witness whether certain "bad checks," theretofore given by defendant Gallagher, as well as the check which was the basis for the prosecution of defendants Allen and Gallagher, thereafter had been paid. It need only be said that the charge against defendant was that of embezzlement, and consequently whether after the alleged crime was committed defendant had paid certain "bad checks" which theretofore had been issued by him, or whether the check in question thereafter had been paid, was wholly immaterial.

[5] A part of the circumstantial evidence against defendant Gallagher was that, shortly after the offense was committed, he somewhat hurriedly left the state of California. He now specifies error in that the trial court refused to permit him to show that on his departure he left a forwarding address with an employee of the hotel at which he had been rooming. The transcript of the record of the proceedings had on the trial fails to verify appellant's position. While it may have been the intention of counsel representing defendant to propound questions to a witness or witnesses to develop the fact here suggested by him, the record is silent as to any such questions having been asked. The point, therefore, cannot be considered.

[6] It is contended by appellant that the trial court erred in refusing to permit a witness (who was employed at the hotel) to state whether the hotel "was holding Mr. Gallagher's trunks" and certain other of his effects. While in strictness, for the purpose of showing interest of the witness, it may be that defendant was entitled to an answer to the question, for the reason that theretofore in the evidence of the case the interest of the witness already had been conclusively shown, the refusal by the court to admit additional evidence on the point, which at most would merely have been cumulative, worked no hardship on defendant.

[7] Another specification of error by appellant is that the trial court erred in its refusal to permit a witness to testify on cross-examination as to whether he had ever seen certain "telegrams from Mr. Wise," or whether he had ever seen a telegram "with the signature of A. A. Wise on it." The record shows that no foundation was laid for such questions, and that such objection was properly sustained on the ground that the questions relating to the matter called for conclusions of the witness.

[8] Appellant also claims to have been prejudiced by the action of the trial court in admitting in evidence, over defendant's objection, certain "check sheets." An examination of the proceedings had with reference thereto discloses the fact that the "check sheets" were first admitted in evidence as one of defendant's exhibits. He is, therefore, in no position to complain.

[9] Appellant also assigns as error the order of the court denying his motion to strike from the record all testimony relating to an alleged conspiracy between himself and defendant Allen. We are of the opinion that the motion in question was properly denied for the reason that from the conduct of appellant and defendant Allen at the time the check in question was appropriated and cashed, as well as from certain conversations had between them and some of the witnesses who testified on the trial, sufficient evidence was presented on the question of whether a conspiracy existed between the two defendants to entitle it to go to the jury.

[10] Prejudicial error against defendant Gallagher is also claimed by appellant in that the trial court refused permission to said defendant to show the financial relations existing between the two defendants. The attention of this court is not directed to the bearing which such evidence would have upon the question of either the guilt or the innocence of either of the defendants, as to the charge of embezzlement. It would, at least, appear to have been of no great consequence, and could not have vitally affected defendant's case.

[11] On direct examination appellant was asked if Frank Gallagher was his "right name"; to which question he replied that his true name was "Russell S. Foster, of Virginia." Appellant now urges that the trial court erred in refusing to allow him to explain how it happened that he was using an assumed name. Evidence that appellant was going under an alias name was introduced by himself. In such circumstances it is difficult to understand on what theory defendant can now claim that his rights were invaded by the action of the court of which he complains. No duty rested on defendant to introduce evidence of the fact that his true name differed from that under which he was being prosecuted. So far as his defense was concerned, such evidence was immaterial, and to allow him not only to introduce immaterial evidence, but as well to go into an explanation thereof, over objection by the opposing party, would be a procedure contrary to the ordinary rules governing the introduction of evidence. It is possible that some harm resulted to de-

fendant by reason of the circumstance, but, if so, it was brought about solely by defendant himself, and we think he should not be heard to complain of the result.

[12] Appellant specifies further alleged error by the trial court for the reason that by its orders objections were sustained to questions propounded to certain witnesses, through which defendant expected to establish what "terminated appellant's business in 1915"; how much of the time during the ten years last past appellant had spent at the Alexandria Hotel; what was the state of appellant's health during the years preceding his trial; what his occupation had been "for the past ten years and during the year previous to his arrest"; and as to appellant's business with the hotel prior to December 5, 1924. Just what bearing any possible answer to either or all of such questions would have had upon the charge of embezzlement against defendant is not pointed out. So far as we are able to determine, no prejudice resulted to defendant by reason of the action of the trial court in sustaining objections to the questions to which reference has been had.

[13] It is next contended by appellant that the trial court erred in sustaining objections to questions seeking to establish the fact that defendant did not resist extradition. In view of the condition that theretofore some evidence had been introduced by the prosecution tending to show flight of defendant, it would seem proper that he should be permitted to rebut any inference of a guilty mind which might be deducible from such circumstance by showing his complete willingness to return to the scene of the alleged crime. The weight of authority is perhaps in favor of appellant's contention. La Fell v. State, 69 Tex. Cr. R. 307, 153 S. W. 884; also, cases cited in footnote, 20 L. R. A. (N. S.) 409. But, to the contrary, see Rogers v. Commonwealth, 161 Ky. 754, 171 S. W. 464. Assuming that defendant should have been permitted to show the fact that he voluntarily returned to Los Angeles to face the charges which had been preferred against him, we cannot say that such assumed error was of such material consequence that it resulted in a miscarraige of justice. Section 4½, art. 6, Const.

[14, 15] Appellant complains of the action of the trial court in refusing to give to the jury each of two instructions which were requested by defendant. As to the first of such instructions, it appears that in meaning and intent the substance thereof was covered by other instructions which the court gave to the jury. As to the other of such instructions, no evidence was introduced by the people or by either of the defendants upon which the requested instruction could be based. It is therefore clear that, in that regard, no error was committed by the trial court.

[16] It is appellant's contention that the trial court erred in giving to the jury two instructions covering the general subject of conspiracy by the defendants to commit the crime charged, for the reason that the evidence "was insufficient to disclose a conspiracy between Allen and the appellant." Without setting forth herein the details of the evidence relating thereto, it may suffice to state that in part it tends to show that appellant and Allen had entered into some sort of an agreement or arrangement to appropriate to their own use the check which had been received by Allen for the use and benefit of Wise. In such circumstances, it was a question upon which the jury was authorized to pass, and, in order to do so intelligently, it was proper that it should be instructed regarding the law covering the situation.

[17-21] Appellant finally urges that the evidence was insufficient to support the verdict because defendant Allen testified that defendant Gallagher was in no way connected with the crime involved in the controversy; because the crime, if any, was larceny and not embezzlement; and because, as to the second count in the indictment by which both defendants were charged with the crime of forgery, the jury disagreed.

We are of the opinion that none of such reasons is tenable. In view of the circumstantial evidence in the case, the fact that the codefendant of appellant assumed responsibility for the commission of the offense was not conclusive. The jury had the right, and upon it was thrust the duty, of determining the ultimate fact or conclusion as to the guilt of defendant Gallagher. If the incriminating evidence was sufficient, and convinced the jury of his guilt beyond a reasonable doubt, this court has no authority to disturb the verdict. The point that the offense, if any, was larceny and not embezzlement, is largely disposed of by the definition of embezzlement found in section 503 of the Penal Code, as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted."

The attention of this court is not directed to any evidence which would require the conclusion that, as to defendant Allen, the intent to wrongfully appropriate the check in question was present in his mind before the check was received by him. To the contrary, certain inferences to be drawn from the evidence (including the testimony of defendant Allen) are that the check was received by Allen in due course of his employment, and that not until after its receipt by him did he conceive the thought of misappropriating the check to the use of defendant Gallagher. The state of the evidence is such that the jury was warranted in concluding that the crime of embezzlement had been committed.

Finally, the fact that the jury disagreed on the charge of forgery against the defendants proves nothing, nor can any presumption arise therefrom. It is possible that on a retrial, with additional evidence, or on identical evidence, the jury might be convinced beyond a reasonable doubt that the crime of forgery had been committed. But, assuming that a verdict of acquittal should be reached, such a result would not necessarily affect the verdict heretofore rendered on the charge of embezzlement. Under the facts of this case it is clear that the defendants might be innocent of the crime of forgery, and yet be guilty of the crime of embezzlement.

We find no error in the record presented which would justify a reversal of the judgment.

It is ordered that the judgment and the order denying the motion for a new trial be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

---

79 Cal. App. 318

EDDIE v. SCHUMACHER WALL BOARD CO. (Civ. 4492.)

(District Court of Appeal, Second District, Division 1, California. Sept. 13, 1926.)

1. Appeal and error ⟹695(1)—Sufficiency of evidence cannot be examined where only portion of testimony is set out.

Sufficiency of evidence on issues tried cannot be examined on appeal, where bill of exceptions recited that evidence set out "was portion of the testimony."

2. Pleading ⟹406(9)—Lessee held not entitled to new trial because lessor's complaint did not allege ownership of leased premises at time of damage.

Lessee *held* not entitled to new trial because lessor's complaint alleging damage to leased premises did not allege ownership at time of damage, where such ownership was proved without objection.

3. Appeal and error ⟹699(1).

Refusal of requested instruction cannot be *held* prejudicial error, where instructions given are not in record.

4. Appeal and error ⟹1032(1).

Appellant has burden to establish existence of prejudicial error affecting merits of appeal.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by E. C. Eddie against the Schumacher Wall Board Company for damages for breach of covenants of leases, in which the defendant filed a cross-complaint. From the judgment and from an order denying a new trial, defendant appeals. Judgment affirmed; appeal from the order denying a new trial dismissed.

Louis J. Euler, of Los Angeles, for appellant.

Charles J. Kelly, of Los Angeles, for respondent.

CONREY, P. J. In November, 1919, Frank A. Garbutt and W. W. Orcutt entered into possession of described premises, including a certain building and appurtenances thereon in the city of Los Angeles under a lease from the plaintiff of said property, for the purpose of conducting therein a plaster mill for the manufacture of wall board. On August 30, 1920, defendant entered into possession of said building as sublessee of Garbutt and Orcutt and continued therein as such sublessee until the termination of the lease on November 16, 1920. At said time of entry by defendant the plaintiff executed a lease to the defendant of the same premises for the further period of one year commencing November 16, 1920. The defendant continued to occupy said building until November 16, 1921.

In said lease to defendant, defendant agreed that on the termination of the lease it would surrender the premises in as good order and condition as reasonable use and wear thereof should permit, damages by the elements excepted. In his complaint the plaintiff alleged certain abuses and resulting deteriorations of the property which were caused and permitted by the defendant, with resulting damage.

As a second cause of action, the plaintiff alleged that on October 11, 1920, he made another lease to the defendant of a building adjoining the premises first above mentioned, and running for the same term as the other lease to defendant. Injury by defendant to said second leased building, with resultant damage to the plaintiff, is alleged in this second count of the complaint.

That the defendant occupied the premises as tenant of the plaintiff is an admitted fact. The issues which were submitted to the jury relate to the terms of agreement between the parties and their conduct in regard to performance of their several obligations. The defendant in its answer denied the several facts alleged as constituting injury and damage to plaintiff's property, and further by cross-complaint defendant claimed damage by reason of the alleged failure of plaintiff (cross-defendant) to deliver possession of the building covered by the second lease at the agreed time or in proper condition to be used, with resultant damage for which cross-complainant sought to obtain compensation. In accordance with the verdict of the jury, plaintiff recovered damages in the sum of $700, and defendant on its cross-complaint recovered damages in the sum of $120.

[1] Appellant is dissatisfied with the judgment allowing no more than $120 on its cross-complaint, instead of the sum of $803.34, which appellant claims should have been awarded in its favor. To this claim respondent suggests, first, that the sufficiency of the evidence upon the issues tried cannot be examined on appeal, since the record is incomplete. The bill of exceptions recites that the

evidence set forth therein is "a portion of the testimony on behalf of the defendant * * * and a portion of testimony on behalf of the plaintiff." The court in approving the bill did so in accordance with a stipulation that the same contained "a part of the evidence offered by both plaintiff and defendant." We think that respondent's objection is well taken. In a case where the bill of exceptions did not set forth any of the evidence received at the trial, the Supreme Court said:

> "In the absence of a record showing the evidence received in the case, the so-called special finding of the jury is conclusive upon this appeal that the damage for taking and withholding the property was shown to be $920. * * *" Nahhas v. Browning, 181 Cal. 55, 183 P. 442, 6 A. L. R. 476.

Where the bill of exceptions did not contain the evidence in full but only disconnected extracts thereof, but the judge certified that there was sufficient evidence to justify the verdict and the findings, the Supreme Court said:

> "We must presume, since the record does not contain all the evidence, that had all thereof been presented it would, as stated by the court, appear therefrom that the evidence was sufficient to justify both the verdict and findings." Foster v. Young, 172 Cal. 317, 321, 156 P. 476, 477.

If in the case at bar it had been stated that the parts of the evidence which were set forth in the bill were all of the evidence on certain stated questions of fact, the sufficiency of the evidence pertinent to those questions might have been considered. But such an assumption of fact by this court would be contrary to the record.

[2] Appellant contends that the motion for new trial should have been granted because the complaint failed to state facts sufficient to constitute a cause of action, in that the complaint did not allege ownership by the plaintiff of the property at the time when the alleged damages were inflicted upon the said property by the defendant. The only authority cited by appellant is Hill v. Pinque, 56 Cal. App. 245, 204 P. 1097. That decision is not applicable to a case like the present, wherein the action is maintained directly by the lessor of the defendant lessee.

Moreover, the fact of lessor's ownership of the premises was both assumed and proved without objection, during the trial, as a fact which had existed prior to the leases and down to the date of the trial of the action.

[3, 4] In reply to appellant's claim that the court erred by refusing to give to the jury certain requested instructions, respondent replies that the instructions given by the court are not contained in the record on this appeal, and therefore, that the refusal of the requested instructions may well have been justified by the fact that the substance of those requested instructions, in so far as the same were applicable to the case, may have been contained in the instructions given. Respondent's point is well taken. The burden is on appellant to establish the existence of prejudicial error affecting the merits of his appeal, and this he has failed to do.

The judgment is affirmed, and the attempted appeal from the order denying motion for new trial is dismissed.

We concur: HOUSER, J.; YORK, J.

---

79 Cal. App. 361

IRVING v. SUPERIOR COURT IN AND FOR EL DORADO COUNTY et al.

(Civ. 3209.)

(District Court of Appeal, Third District, California. Sept. 16, 1926.)

1. Depositions 🔑32—Application for order to perpetuate testimony should state facts sufficient to enable court to determine whether interrogatories are material to controversy (Code Civ. Proc. §§ 2083, 2084, 2086).

Application under Code Civ. Proc. §§ 2083, 2084, 2086, for order for examination of witnesses to perpetuate testimony, should set out nature of anticipated controversy, interest of applicant, and claims of adverse parties with sufficient certainty to enable court to settle proposed interrogatories or compel witnesses to answer questions, and should state sufficient facts to enable court to determine whether interrogatories are material to controversy.

2. Depositions 🔑32.

Application under Code Civ. Proc. §§ 2083, 2084, 2086, for order for examination of witnesses to perpetuate testimony *held* insufficient.

Application by James Irving for certiorari to review an order of the Superior Court for the County of El Dorado, George H. Thompson, Judge, directing the examination of certain witnesses to perpetuate their testimony. Order annulled.

R. E. Fitzgerald and Leo R. Friedman, both of San Francisco, for petitioner.

FINCH, P. J. This is a petition for a writ of certiorari to review an order of the respondent court directing the examination of certain witnesses to perpetuate their testimony. The following sections of the Code of Civil Procedure are applicable to the questions presented by this proceeding:

> "2083. The testimony of a witness may be taken and perpetuated as provided in this chapter.
>
> "2084. The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating:
>
> "1. That the applicant expects to be a party to an action in a court in this state, and, in such

case, the names of the persons whom he expects will be adverse parties; or,

"2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

"3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. * * * The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken."

"2086. The examination must be by question and answer, and if the testimony is to be taken in another state, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions."

Petitioner contends that the application for the order does not state facts sufficient to give the court jurisdiction to make it. The application alleges:

"That your petitioner and others expect to be parties to an action in a superior court of this state, involving certain transactions of the El Dorado Water Company, a corporation organized and existing under the laws of the state of California and doing business in said state in connection with the issuance, sale and/or disposal of certain bonds of said company, and in which said case your petitioner is without sufficient information whereon to identify the prospective parties litigant. That probability of such action being commenced against your petitioner and others is imminent according to the best knowledge and information of your petitioner. That it is necessary to perpetuate the testimony of certain persons having knowledge of such transactions, and your petitioner expects to prove that El Dorado Water Company, a corporation, aforesaid, issued, by and under the authority of the railroad commission of the state of California, certain bonds. That Union Trust Company of San Francisco, a banking and trust Company organized and existing under the laws of the state of California and doing business in said state, was depositary of said bonds. That part of the issue of said bonds, to wit, approximately $4,000 in face value, were abstracted from said depositary and converted to the use and benefit of persons other than said El Dorado Water Company. That by reason of said transaction your petitioner believes and alleges that he will be a party in an action at law or equity for relief. That the proof of facts to be ascertained and the action that may thereafter be commenced does not involve any right or title, nor possession nor right to possession of real property."

The foregoing sections of the Code of Civil Procedure, providing for proceedings to perpetuate testimony have never been construed by the higher courts of this state, but in San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 35, 99 P. 359, 361 [17 Ann. Cas. 933], it is said:

"It was the intention of the Legislature not only to provide a simple statutory proceeding by which litigants, actual or expectant, could secure all the relief formerly afforded by courts of equity, but even ampler relief, and upon easier terms."

[1] While it is doubtless true that, in a statutory proceeding to perpetuate testimony, the particularity of the former bills in equity for that purpose is not required, the nature of the anticipated controversy, the interest of the applicant, and the claims of adverse parties therein should be set forth in the application with sufficient certainty to enable the court to settle proposed interrogatories or to compel witnesses to answer questions propounded to them. It seems clear that this cannot be done unless the application states sufficient facts to enable the court to determine whether such interrogatories or questions are material to the controversy.

"The bill should describe a subject of controversy so as to identify it, in order to enable the court * * * to direct the interrogatories or specify the matter as to which the witnesses are to be examined; and the bill must of itself show some certain legal interest in the plaintiff." 8 R. C. L. 1148; 16 Ency. Pl. & Pr. 367; Jerome v. Jerome, 5 Conn. 352; Booker v. Booker, 20 Ga. 777; May v. Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137; Smith v. Turner, 39 N. C. 433, 47 Am. Dec. 353; Matter of Bryan, 3 Abb. N. C. 289; In re Anthony, 42 App. Div. 66, 58 N. Y. S. 907; In re White, 44 App. Div. 119, 60 N. Y. S. 702; Sioux Land Co. v. Ewing, 165 Wis. 40, 160 N. W. 1059.

"Citizens and others within the jurisdiction of our courts should not be compelled to submit to meddlesome examinations concerning their property or business transactions or methods, where the application therefor is made in bad faith, not for the purpose of obtaining, preserving, and using * * * material testimony, but to annoy, harass, or embarrass, or for some ulterior object." In re Spinks, 63 App. Div. 235, 71 N. Y. S. 398.

A subpœna duces tecum was issued out of the respondent court, commanding the petitioner herein to appear as a witness and to have with him certain books, papers and records.

"The right of the people to be secure against unreasonable or unnecessary seizure of their private papers and documents is justly regarded as a highly sacred one—so much so, in fact, that the people themselves have taken the pains in express written terms to guarantee and safeguard its perfect enjoyment. Const. art. 1, § 19. In no case, therefore, should a person be forced to surrender his private books and papers to another who does not claim to own or have any interest in them except upon convincing proof that such books or papers contain evidence which materially affects the rights in litigation of the person demanding them. As was so clearly and forcefully said by the late learned Justice McFarland, in the case of Ex parte Clarke, 126 Cal. 238, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176, 'to compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision.'" Kullman, Salz & Co. v. Superior Court, 15 Cal. App. 276, 114 P. 589; Funkenstein v. Superior Court, 23 Cal. App. 663, 665, 139 P. 101.

[2] The application for the order in question is clearly insufficient. It alleges that the applicant expects to be a party to an action, but contains no averment respecting the issues to be tried therein or of the interest of either party in the controversy. It alleges that it is necessary to perpetuate the testimony of certain witnesses and that the applicant expects to prove certain facts, but alleges no facts from which it can be determined whether the facts expected to be proved are material to any present or prospective controversy. The statute requires that the application be "verified by the oath of the applicant," but such requirement would be of little value if an application such as this were held to be sufficient, because it does not state facts upon which, if false, a charge of perjury could be based. The application not only fails to show the nature of the alleged anticipated action or the issues to be tried therein, but such facts as are enumerated are not alleged to be true, the allegation being merely that the applicant "expects to prove" the same. Persons should not be compelled to submit to examinations "concerning their property or business transactions or methods," except upon allegations of fact, duly verified, reasonably showing that the evidence sought is material to some present or anticipated controversy.

The order is annulled.

We concur: PLUMMER, J.; PULLEN, Justice pro tem.

---

79 Cal. App. 353

POHLMAN v. SMITH. (Civ. 5329.)

(District Court of Appeal, Second District, Division 1, California. Sept. 16, 1926.)

1. Landlord and tenant 🔑291(12)—Exclusion of testimony that lessee did not know lease would affect his right to possession as part owner in unlawful detainer action held immaterial (Civ. Code, § 1578, subd. 2).

Any error in excluding testimony that lessee of land did not know lease would affect his possession as part owner *held* immaterial in unlawful detainer action, in absence of proof that lessor was aware of such estoppel at time of signing lease and did not tell defendant of it, in view of Civ. Code, § 1578, subd. 2.

2. Landlord and tenant 🔑62(3)—Lessee, who was part owner of leased land and was in possession prior to execution of lease, held not permitted to dispute lessor's title in unlawful detainer action.

Lessee, who was part owner of leased land and was in possession prior to execution of lease, cannot dispute lessor's title in unlawful detainer action, in absence of facts entitling him to rescission of lease, since title is not involved.

Appeal from Superior Court, Los Angeles County; Howard A. Peairs, Judge.

Unlawful detainer action by Elizabeth A. Pohlman against Ernest B. Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Ray W. Bruce and Lucien Gray, both of Los Angeles, for respondent.

CONREY, P. J. Under date May 29, 1924, the plaintiff executed to the defendant a lease in writing of three acres of land for the period of one year, the tenant to pay rent at the rate of $100 per month. After delinquency in payment of rent and after the statutory notice had been given, plaintiff commenced this action on account of neglect and refusal of defendant to pay the rent due or quit possession of the premises.

By his answer the defendant denied that he entered into possession of the premises under and by virtue of the written lease, but alleged that he went into possession thereof in February, 1921, at which time and all times thereafter the defendant was the owner of an undivided one-third interest in said property. It is an admitted fact that at all of said times the legal title to said premises was vested in the plaintiff. The substance of the defense was that the defendant and his brother, together with their mother (the plaintiff), had purchased said property with a common fund belonging to all of them, and that they entered upon and continued their possession of said premises as such co-owners or cotenants. As a separate defense the defendant alleged that he and his said brother and the plaintiff had been engaged in business as partners and owned said real property as partners; that in May, 1924, there was a certain division of assets between the parties (not including said real property), but at that time the plaintiff demanded of the defendant that he take a lease of said premises for one year and pay her a rental of $100 per monh therefor; that she caused such lease to be prepared, and presented the same to him, and demanded that he sign the same; that in signing said lease the defendant did not believe that the same would affect his title to or right of possession of the property, nor estop him from asserting his rights in any court or action; that, had he known that the signing of the lease would affect his right to the possession or estop him from asserting said right, he would not have signed said lease; that in signing said lease he never intended to waive any right in the property or right to possession as a co-owner thereof; that at the time of the signing of said lease the plaintiff knew that the signing of said lease would act as an estoppel against said defendant; that "the mistake made by said defendant in determining the legal effect of said lease was known to the plaintiff at the time of signing the same, and plaintiff did not inform or advise this defendant of his mistaken belief as to the legal effect of said document."

From the judgment in favor of the plaintiff the defendant appeals. Counsel for appellant states the gist of defendant's grounds of appeal as follows:

> "The defendant propounded certain questions to the plaintiff, on cross-examination, and to the defendant himself, the answers to which, if given, appellant believes would have sustained the contentions and defenses set forth in his amended answer, and in addition thereto the defendant offered to prove by testimony the allegations and affirmative defense of his answer; but the court sustained the objection of the plaintiff to said questions and said offer of proof, and it is the ruling of the trial court sustaining said objections and sustaining the objections to the said offer of proof that appellant desires to have reviewed by the appellate court."

[1] It is apparent that the defense to which the offered and excluded evidence related was based upon mistake of law on the part of the defendant at the time of the execution of the lease. Such mistake of law by one party only, as constituting a ground for rescinding a contract, exists only when it arises from "a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." Civ. Code, § 1578, subd. 2. By a series of questions, addressed to the plaintiff and also the defendant, as witnesses at the trial, the defendant endeavored to show that, at the time of execution of the lease and thereafter, the defendant was the owner of an undivided one-third interest in the premises described in the lease, and that at the time when defendant signed the lease he did not know that the same would affect his right to possession as a co-owner or as an owner of an undivided one-third interest in the property. On objection by the plaintiff the court excluded this offered evidence; but the defendant did state, in answer to one of the questions relating to the time when the lease was signed, that he did not know that the signing of the lease would create estoppel, as against him, from claiming possession. It was admitted in evidence and was not disputed that the defendant "was an occupant or in possession of the property since 1921." In a statement by defendant's attorney of facts which he desired to prove, he stated that he offered to prove:

> "That at the time this lease was signed the plaintiff was aware of the fact that the signing of the lease would estop the defendant from claiming the right to possession as against her, and that the mistake on the part of the defendant in his estimate of the effect of this document was known to the plaintiff and not communicated by the plaintiff to this defendant."

To this part of defendant's offered proof, plaintiff did not object, and no adverse ruling thereon was made by the court. Nevertheless, the defendant did not attempt to introduce any evidence that the alleged mistake on the part of the defendant was known to the plaintiff. In the absence of any such evidence, and in the absence of any ruling of the court excluding the same, it is clear that any error which may have occurred in the court's ruling relating to the other evidence connected with this defense is of no consequence. This is so because the mere misapprehension of law by the defendant is immaterial, unless accompanied by evidence that the plaintiff was aware of such misapprehension of law by the defendant.

[2] In the absence of facts entitling defendant to have rescinded the lease, he was left in a position where he could not in this action dispute the title of the lessor. The fact that defendant was in possession prior to the execution of the lease, and did not make entry under or by virtue of the lease, does not give him the right to dispute the lessor's title in an action of unlawful detainer; for this is an action in which the question of title is not involved. Knowles v. Murphy, 107 Cal. 107, 114, 40 P. 111; Martin v. Bartmus, 189 Cal. 87, 91, 207 P. 550.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

79 Cal. App. 306

PEOPLE v. MUCHUPOFF. (Cr. 1326.)

(District Court of Appeal, First District, Division 1, California. Sept. 13, 1926.)

1. **Burglary 🔑41(1).**

Evidence *held* sufficient to sustain conviction of burglary in the second degree.

2. **Criminal law 🔑1170½(5).**

Method of proving previous conviction of felony of defendant testifying *held* not prejudicial, though showing name of crime, alias of defendant, identity of court, and presiding judge (Code Civ. Proc. § 2051).

3. **Criminal law 🔑1170½(5)—Voluntary statement of police officer while testifying on recross-examination that money found on defendant was evidence of another crime held not prejudicial error.**

Voluntary statement of police officer while testifying on recross-examination that money found on defendant was evidence of another crime *held* not prejudicial error, where it was stricken, and court stated that jury knew what they were trying.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

John Muchupoff was convicted of burglary of the second degree, and he appeals. Affirmed.

Roy L. Daily, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant herein was convicted of burglary in the second degree and has appealed from the judgment of convicton and from the order denying his motion for a new trial.

[1] Shortly after 4 o'clock on the morning of February 14, 1926, one Mike Britwin, occupying an apartment in an apartment house on Eighth street, San Francisco, was awakened and observed a man, whom he identified as appellant, passing through the doorway between his bedroom and the dining room. He arose immediately and followed the intruder into the hall, but the latter disappeared at the entrance to the back stairway leading to the upper and lower floors. Britwin then returned to his room and ascertained that $9.75 in silver and a keepsake 25-cent piece coined in the year 1876 had been stolen from the top of his bureau. A suit of clothes was also taken from the room. He further discovered that his keys, which he had thoughtlessly left on the outer side of the door of his apartment leading to the hallway, were missing. He then returned to the hallway, and after trying to arouse the landlady by ringing her door bell proceeded to the upper floor of the apartment house, where he found appellant. He grappled with him, both rolling down the back stairs to the floor on which the burglary was committed. The landlady, hearing the noise, came into the hall and asked the cause of the trouble. Britwin, still holding on to the appellant, who was struggling to get away, replied that he had caught a burglar and requested her to call the police. Upon arrival of the officers, Britwin minutely described the property stolen from his room. Thereupon appellant was searched and the keys and money, including the 25-cent piece, were found on his person. The suit of clothes had been dropped in the hall. Appellant at the time was not wearing coat, vest, or shoes, and in response to inquiries made by the officers as to what he was doing in the house partly undressed, stated first that he had been visiting a friend in the house, but he was unable to give the location of his friend's room. Finally he said that he had left his clothing and shoes in the lot back of the apartment house, to which he had gained entrance by scaling the fence in the rear and coming up the back stairs. The clothes and shoes were thereupon found by the officers where appellant said he had left them. Appellant at the time was either under the influence of liquor, or pretending to be, as one of the officers testified. Later, at the police station, $53 in currency was found secreted upon appellant's person. It is apparent, without discussion, that the evidence above narrated is amply sufficient to sustain the conviction.

[2] At the trial appellant was called as a witness in his own behalf, and, not being well versed in the English language, gave his testimony with the aid of an interpreter. On cross-examination the first question put to him was: "Have you been convicted of a felony in this city and county, burglary, in 1917?" Objection was made by appellant's counsel to the use of the word "burglary," and the court ordered it stricken out. The question, as amended, was then repeated, and objection was made to the phrase, "in this city and county," contained in the question. The objection was sustained, and thereupon the district attorney put the following question: "Have you been convicted of a felony," to which appellant answered, "No." As a matter of fact appellant had been convicted of a felony, as the subsequent proceedings disclosed, and consequently the district attorney, evidently believing that on account of appellant's lack of knowledge of the English language he did not comprehend the meaning of the answer, asked appellant "Do you know what I mean by a felony?" Appellant answered: "I don't understand," and the interpreter added to the answer: "He wants to know what it means; shall I tell him the meaning of felony?" The court would not allow this to be done, but stated:

"Why not ask him this: If he says he does not understand what a felony is, ask him if he was not convicted of an offense and as a punishment therefor was confined in the state prison. That is a legal definition of felony."

At the same time the court, at the request of appellant's counsel, admonished the jury as follows:

> "The jury may as well understand that any witness who is called by either party may be asked that question, whether or not he has been convicted of a felony. That is to be taken by you as no proof whatsoever as to whether or not this specific offense was committed. It simply goes to the credibility of the witness. The law sets out that a witness may be impeached, that is, that his credit as a witness, the credit which is extended to every witness and the presumption that they speak the truth, may be attacked by showing that the witness, whether he is the defendant or any one else, has been convicted of a felony, and if it is proven that any witness has been convicted of a felony, you have a right to consider that fact in determining whether or not you will believe him. He can answer that question, however."

The question suggested by the court, as to whether appellant had ever been convicted of a crime and punished by being imprisoned in San Quentin in this state, was then propounded and appellant replied: "I don't know. I was there, but I don't know for what." The district attorney then started to ask another question as follows: "Was that in the year —," but did not complete the question owing to an objection by appellant's counsel "to any more questions along this line," stating "he has testified that he has been in San Quentin," to which the court aptly replied: "He has so testified, but he may have been over there as a guest." After a brief discussion the district attorney then put the following question: "Isn't it a fact that you were convicted of burglary in department 11 of the superior court in this city and county in 1917 and sentenced to San Quentin upon that charge under the name of Joe Gravi or Joseph Grabbi?" Appellant's counsel renewed his objections to the question, stating:

> "Counsel is taking the wrong line of proving the point. He is asking the witness if he has been sentenced to San Quentin and has explained what a felony is, and then the man answered it, and they cannot go into the matter of the prior conviction. That has nothing to do with it."

The following proceedings thereupon followed:

> "The Court: Ask him if he knows why he was in San Quentin, what he was doing over there. A. I was in San Quentin, but at that time I did not understand very well the English language, and they put me there, and I did not know why.
>
> "The Court: Well, that of course is not an admission of a conviction of felony.
>
> "Mr. Hagerty (Deputy District Attorney): The only thing, I presume, is to get the record.
>
> "The Court: Surely.
>
> "Mr. Hagerty: However, I think we are entitled from this witness a positive answer as to whether or not he has been convicted of a felony and sentenced to San Quentin.
>
> "The Court: Just put the question to him in the statutory form: Have you ever been convicted of a felony? A. Yes.
>
> "Mr. Hagerty: In Judge Louderback's court?
>
> "The Court: It does not make any difference what for; he says he has been convicted of a felony.
>
> "Mr. Daily (Counsel for Appellant): He said yes.
>
> "Mr. Hagerty: That is all. * * *"

Appellant contends that the course adopted by the district attorney in seeking to prove that appellant had been convicted of a felony amounted to prejudicial error, the transgression consisting, as appellant claims, in revealing to the jury the name of the felony of which and the alias under which appellant had been previously convicted, the identity of the court wherein the conviction was had, and the name of the judge presiding We find no merit in the point.

A witness may be impeached by showing "by the examination of the witness, or the record of the judgment, that he has been convicted of a felony" (Code Civ. Proc. § 2051), and the number as well as the names of the felonies may be shown (People v. Eldridge, 147 Cal. 782, 82 P. 442; People v. Chin Hane, 108 Cal. 597, 41 P. 697; People v. Putman, 129 Cal. 258, 61 P. 961; People v. Fouts, 61 Cal. App. 242, 214 P. 657; People v. Craig [Cal. Sup.] 235 P. 721). In People v. Craig, supra, it was said:

> "The usual manner of making proof of a prior conviction is to ask the witness who has suffered such a conviction if he had been * * * so convicted, to produce a copy of the judgment of conviction, or, if he answers in the affirmative, he may then be asked of what specific crime he was convicted"—citing cases.

Therefore, in the instant case, appellant having first made positive denial of the previous conviction and afterwards having answered equivocally in reference thereto, the district attorney might well have abandoned further oral examination of the witness and introduced in evidence the record of conviction; and if he had done so, the terms of said record of conviction would have revealed the same and even more information than that which was attempted to be elicited on oral examination, and about which appellant is complaining. We therefore believe that the questions propounded by the district attorney were not violative of the rule. There is nothing in People v. Chin Hane, supra, which conflicts with our conclusion herein. It was there said:

> "The details and circumstances comprising the offense should not be gone into. But, in view of the statute, section 2051 of the Code of Civil Procedure, which allows the proof of the fact

to be made either by the evidence of the witness himself or by the record of conviction, it would appear that not only the fact of the conviction could be shown, but the name of the particular felony of which the witness had been convicted. Beyond this the examination should not go."

The last sentence of the above quotation, upon which appellant strongly relies in support of his contention, manifestly means that, regarding "the details and circumstances comprising the offense," the examination should not go beyond proving the name of the felony of which the witness had been convicted. The identity of the court, the name of the judge presiding, and the name of the defendant, as they are embodied in the terms of the judgment, cannot be considered as any part of "the details and circumstances comprising the offense"; and to exclude from the evidence those essential ingredients of the judgment, when the record of the judgment is received in evidence, would be to seriously affect the purpose for which the record of the judgment may be offered.

[3] Error is also assigned because of a voluntary statement made by Police Officer William F. Gleeson while testifying as a witness at the trial for the people. He was one of the three officers that arrested and searched appellant at the apartment house, and in response to questions asked by Mr. Daily, counsel for appellant, testified on recross-examination that the $53 in currency found on the person of appellant at the prison by Officer Jackson had not been identified by the complaining witness in this case as his money. The following then occurred:

> "Q. (By Mr. Daily): Has that (the $53 in currency) any connection with the crime, that you know of? A. No; but it has with another one.
> "Mr. Daily: We ask that that be stricken out of the record.
> "The Court: It goes out.
> "Mr. Daily: We make a motion for the return of the money not used in connection with the crime.
> "The Court: We will not go into that at this time. It has nothing to do with this crime.
> "The Witness: Your honor, I would like to make a statement. This money is held as evidence in another case.
> "The Court: No; let that go out.
> "Mr. Daily: And we ask that the jury be admonished"

—to which the court replied that the members of the jury would be admonished, indicating, however, that such admonition was probably unnecessary because "they know what we are trying here."

While the voluntary remark of the witness was not pertinent to the case, it was brought out while the witness was under examination by appellant's counsel, and consequently is not chargeable to the trial court or the prosecution; and, moreover, in view of the prompt action of the court in striking it from the record, first at appellant's request and again of its own motion, which was followed by the court's statement to the effect that the members of the jury knew what they were trying, it cannot reasonably be said that the remark influenced the jury in arriving at its verdict, the evidence against appellant being otherwise convincing.

The judgment and order are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

199 Cal. 374

HOWARD v. WINTON CO. (L. A. 8457.)

(Supreme Court of California. Sept. 17, 1926.)

Principal and agent ⚷102(1).

General manager or superintendent has no implied authority in employment of necessary help to contract to distribute any portion of profits of business.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action on contract for personal services by D. A. Howard against the Winton Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Howard L. Grace, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for respondent.

PER CURIAM. Plaintiff instituted this action to recover $4,637.83 asserted to be owing to him for services rendered the defendant company as sales manager of its Los Angeles branch. Briefly, the complaint set forth that this sum was due under the terms of a written contract, dated October 20, 1919, alleged to have been executed by the parties to the action. The contract, a copy of which is incorporated in the complaint, specifies that the plaintiff is to receive, while serving as sales manager of defendant's Los Angeles branch, $175 a month, and, in addition thereto, 1 per cent. on all retail sales made by him and 10 per cent. of the net profits of said Los Angeles branch. It is alleged in the complaint that the net profits of said branch of the defendant company for the fiscal year ending October 31, 1920, during which time the plaintiff served as its sales manager, were $46,378.35.

At this point it may be well to state that the plaintiff received, while in the employ of the Los Angeles branch of the defendant company, a monthly check for $175 from the home office of the defendant company. He has made no attempt to recover 1 per cent. commission on any retail sales made by him personally. At no time during the conduct of this action has he made demand for any compensation other than the 10 per cent. of the net profits of the Los Angeles branch.

The copy of the contract appearing in the body of the complaint shows that it was not signed in the name of the defendant company, nor by any of its executive officers. It was, however, signed by one H. L. Owesney and by the plaintiff. The record points to said H. L. Owesney as manager of the Los Angeles branch of the defendant company.

In its answer the defendant company specifically denied the execution of said written contract, or of any contract, with the plaintiff, and further denied that its net profits from the Los Angeles branch exceeded $16,249.87 during 1919–1920. The cause was tried before the court, without a jury, and it was found that the written contract sued upon was executed between plaintiff and H. L. Owesney, manager of the Los Angeles branch of the defendant company; that the alleged contract was never reported to the defendant company by either plaintiff or Owesney; that Owesney was without authority, actual or implied, to execute such contract in the name of the defendant; that the profits of the Los Angeles branch of defendant company for the fiscal year 1919–1920 did not exceed $16,000; and that defendant had no notice, knowledge, or reason to believe that the plaintiff had been promised any portion of its profits. The trial court accordingly entered judgment for the defendant company, from which the plaintiff appeals.

It is contended by the appellant that:

> "Owesney, general manager of the Los Angeles branch and general agent clothed with authority to hire, fire, and fix the compensation of employees, had authority to make the contract in suit."

Hereunder it is pointed out that said Owesney, in his capacity as general manager, had employed and discharged all employees of the Los Angeles branch, and had determined, without the assistance of the home office, the compensation to be paid such employees. It is then urged by the appellant that:

> "If the principal had any objection to measuring the amount of an employee's compensation by a fixed or definite proportion of the profits of the business of the branch, would he [it] not have placed such a restriction or limitation in the authority to his [its] agent?"

The respondent, on the other hand, contends that the general manager of its Los Angeles branch had neither actual nor implied authority to make a contract disposing of any part of the profits or property of his principal. It is argued that:

> "The implied authority of a general manager to fix the compensation of employees in reasonable amounts cannot be stretched into an authority to give away the property of the principal, and that is precisely what Owesney undertook to do. After all the expenses of the business, including the compensation paid employees, had been deducted, the remaining net profits were the property of the employer."

The finding of the trial court that the alleged contract was never reported to the defendant company by either appellant or said Owesney would seem to be supported by the record. Furthermore, there is nothing in the record to indicate that the defendant company had ever given the general manager of its Los Angeles branch express authority to make a contract with any employee, whereby such employee would receive a share of the profits of said branch. On the other hand, the plaintiff stated upon the taking of his deposition in advance of the trial that he "did not make any inquiry as to whether or not he [Owesney] had authority to make such contract. I took it for granted that he had full authority."

The case, therefore, reduces itself to a single proposition, namely, whether the general manager of a business may, in the absence of express and particular instructions, contract to distribute to an employee a share of the net profits of said business; or, in other words, is the general manager of a business clothed with implied authority to contract away the profits of the business?

Neither the research of counsel nor our own efforts have brought to light a California case passing upon the identical point here presented. The authorities are ample to the effect that a general manager has implied authority, within reasonable limits, to employ, discharge, and determine the compensation of employees. In addition, there are declarations, hereinafter quoted, to the effect that the execution of a contract disposing of a portion of the profits of a business is unreasonable, and not within the implied authority of the general manager of such business.

In 1 Mechem on Agency, pp. 711, 712, it is stated that:

> "A general manager, put in complete charge of a business in which servants, and the like, are ordinarily employed, would have implied authority, within the range of what is reasonable and proper, to employ the necessary help. In doing so, he may make contracts of a usual and reasonable sort, such as, for example, the hiring of an employee for a year; or the assumption of the risk of the employee's competency to fill the position. He would not, on the other hand, have any implied authority to contract to give the employee, as part of his compensation, an interest in the principal's business or its profits."

Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197, is cited by the respondent as authority for the proposition that the execution of a contract such as is here involved does not fall within the implied authority of a general manager. The court in that case declared:

> "If Jackson possessed the power to make it, it is by virtue of his authority as a general agent, or special authority conferred upon him by the proper officers of the company. The contract was not within the scope of a general agent to make. Such an agent is not clothed, by virtue of his agency, with power to contract with an employé for an interest in his principal's business, or an interest in the profits thereof."

At first blush Deffenbaugh v. Jackson Paper Mfg. Co., supra, would seem to be on all fours with the instant case. The two cases are distinguishable, however, in a respect not recognized by counsel for either side. In the report of the Deffenbaugh Case there appears in the statement of facts which precedes the opinion of the court the following:

> "Mr. Jackson [the asserted superintendent] was not then in the employ of the company, and there is nothing to indicate that he had then received any authority to make contracts of employment, or to act for it in any way."

In explanation of this sentence, it may be said that in that case "Mr. Jackson" was negotiating with the defendant therein to become its superintendent, and apparently during the conduct of these negotiations he, being anxious to be assisted by the plaintiff, executed the contract sued on by the plaintiff in which he employed the plaintiff as mechanical superintendent at a fixed salary per month and 10 per cent. of the net profits in excess of $5,000. In other words, the contract sued on by the plaintiff in that case was apparently executed by a person who was not at the time the superintendent of the defendant company. Whether the last-quoted declaration is a correct statement of an actual fact in that case is open to speculation, inasmuch as it does not appear in the opinion. If, however, it be a true statement, then the supposed superintendent (Mr. Jackson) would not have had authority to do any act on behalf of the defendant therein, and clearly, under these circumstances, he could not contract away a share of its profits. This is mentioned because the court in its holding in that case did not advert to this circumstance, but decided the case apparently upon the assumption that "Mr. Jackson" was, in fact, superintendent of the defendant company at the time he executed the contract with the plaintiff. If "Mr. Jackson" was not the superintendent of the defendant company at the time of the execution of the contract with the plaintiff, the holding of the court in that case, upon the question presented in the instant case, would have no greater force than that of dictum.

We are in accord with the rule enunciated in Mechem on Agency, supra, and Deffenbaugh v. Jackson Paper Mfg. Co., supra, and this whether or not its declaration in the latter was dictum. The rule that a general manager or superintendent may not, in the absence of express authority, contract to distribute to employees a portion of the profits of a business would appear to be dictated by sound business considerations. Were the rule otherwise, and should it be held that such power fell within the implied authority of a general manager or agent, it might be carried to unreasonable limits. And persons entering into contracts for a portion of the profits of a business should, for their own protection, make inquiry as to the actual authority of a general manager or agent in this respect. In the absence of such inquiry or of an estoppel or ratification, the principal should not be bound by the provisions of such a contract.

As already indicated, the defendant in the instant case had no knowledge of the existence of the asserted contract. Moreover, there is an absence of facts which might give rise to an estoppel or a ratification of such a contract. The foregoing matters, considered with the plaintiff's admission that he had not made inquiry as to the scope of Owesney's authority, would seem to warrant the finding of the trial court that the execution of the contract sued upon was not within the actual or implied authority of said general manager.

We find nothing in the California cases cited by appellant inconsistent with the views herein expressed. Those cases merely recognize the right of a company to compensate any of its employees by granting or distributing to them a share of the profits of the business. None of those cases, however, involved the question here presented, namely, whether a general manager or agent has implied authority to execute a contract with an employee by which the latter will share in the profits of the business.

For the reasons herein advanced, the judgment appealed from is affirmed.

---

199 Cal. 386

THOROMAN v. DAVID. (L. A. 9182.)

(Supreme Court of California. Sept. 25, 1926.)

1. Evidence ⚷460(5) — Escrow instructions relating to sale of realty held to constitute "contract in writing," rendering testimony of plaintiff that furniture was included in sale inadmissible (Code Civ. Proc. § 1856).

Escrow instructions relating to sale of realty, which were signed on same day, were part of same transaction constituting one document, and entire consideration passing to respective parties being expressed therein, and defendant receiving nothing not called for therein, *held* to be a "contract in writing," and hence testimony of plaintiff that furniture was included in sale was inadmissible, in view of Code Civ. Proc. § 1856.

2. Frauds, statute of ⚷85—Oral contract for purchase of furniture of value of $580 held invalid, where plaintiff received no part of the goods and parted with no consideration therefor (Code Civ. Proc. § 1973, subd. 4).

Where plaintiff's right to defendant's property of the value of $580 was predicated on alleged oral contract for its purchase, such contract was invalid under Code Civ. Proc. § 1973, subd. 4, where plaintiff received no part of the goods and parted with no consideration therefor.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge pro tem.

Action by Ralph R. Thoroman against John David. Judgment for plaintiff, and defendant appeals. Reversed.

R. D. McLaughlin, of Los Angeles, for appellant.

Edgar K. Brown and L. B. George, both of Los Angeles, for respondent.

SHENK, J. In this action of claim and delivery the complaint alleges that on January 16, 1922, the defendant sold to plaintiff certain real property and all furniture on the premises. The defendant contends in his answer that the real property alone was sold to the plaintiff and that no furniture was included in the sale. The court found that the furniture was included in the sale and that the plaintiff paid for the same; that the plaintiff took possession of the premises on February 9, 1922, and that on the preceding day, February 8, the defendant wrongfully took possession of the furniture and removed the same from the premises; that on and after January 16 the plaintiff was the owner and entitled to the possession of said personal property; and that upon the filing of the complaint the plaintiff acquired possession of the same pursuant to the provisions of section 509 et seq. of the Code of Civil Procedure, except a few miscellaneous articles valued at $50. Judgment was rendered against the defendant and in favor of the plaintiff for the possession of said few articles or for their value and costs. From this judgment the defendant appeals.

No objection is made to the form of the record which sets forth the papers constituting the ordinary judgment roll and a "statement of the case." The latter will therefore be deemed equivalent to a bill of exceptions. The principle question for determination is whether the finding that the sale of the furniture was included in the sale of the real property is supported by the evidence.

On the said 16th day of January, 1922, the plaintiff addressed to, signed, and presented to the Title Guarantee & Trust Company a document wherein it was stated among other things that the plaintiff would hand the company $1,500 which it was instructed to use, provided it could issue within 15 days a continuation of a certificate showing title to the real property to be vested in the defendant and his wife as joint tenants free of incumbrance except certain taxes and restrictions, reservations, and rights of way of record; also subject to a trust deed for an unpaid balance of $879.20 and interest. The company was further directed to deliver to the defendant, as part of the purchase price, a trust deed executed by the plaintiff in favor of the defendant for $1,127.80, payable in monthly installments. The plaintiff further agreed to execute any instruments required to complete the transaction, and when com-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pleted all documents recorded for the plaintiff were to be forwarded to him. He agreed to pay for recording fees and revenue stamps and for showing title in himself and wife. As a part of the same transaction and on the same date the defendant signed a document appended to and referring to the foregoing written instrument and addressed to the same company, stating, among other things, that the conditions specified by the plaintiff were approved and that the defendant would hand to the company a deed executed by himself, a single man, in favor of the plaintiff, which deed the company was authorized to deliver to plaintiff upon payment to the company for the defendant of the sum of $1,500 within the time specified by the defendant. The escrow was completed, the money and instruments required by the defendant were delivered to him, the instruments required by the plaintiff were also delivered, and the latter went into possession of the real property. Prior to the time plaintiff took possession, the defendant had removed the furniture therefrom, and the plaintiff never acquired possession of the same except through process of court at the commencement of the action. It was stipulated at the trial:

> "That no money whatever was paid by, and no part of the furniture was delivered to, the plaintiff, and no written memorandum was signed by the parties or either of them or by their agent or agents until they joined in the execution of said escrow instructions, and that nothing was paid and no other instruments were executed except the money agreed to be paid and the instruments agreed to be executed in the escrow instructions."

The foregoing written escrow instructions were offered in evidence prior to the offer of any oral testimony. Over the objection of the defendant, the plaintiff offered, and the court received, oral evidence to prove that on the way to and at the office of the title company, and prior to the signing of the escrow instructions the defendant stated that the furniture was to be included in the sale of the real property. Witnesses for the defendant denied that the defendant so stated. It is conceded by the defendant that, if the said oral evidence was admissible, the finding of the court to the effect that the furniture was included in the sale is supported. On the other hand, if said oral evidence was inadmissible, the said finding is not supported.

[1] It is the contention of the plaintiff that the said escrow instructions did not constitute such a written contract as expressed the complete understanding of the parties, and that the oral evidence was admissible to supplement the written expression of their understanding. It is the position of the defendant that the said agreement was complete and fully expressed the intention of the parties, and that the admission of the oral evidence was in contravention of the well-established rule codified in sections 1625 and 1698 of the Civil Code and in section 1856 of the Code of Civil Procedure and as approved in such cases as Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am. St. Rep. 469, Benson v. Shotwell, 103 Cal. 166, 37 P. 147, and Heffner v. Gross, 179 Cal. 738, 178 P. 860. In the Harrison Case the rule is thus stated:

> "The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: 'If it imports upon its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.'"

From an inspection of the writing and the facts set forth in the record before us we are convinced that the position of the defendant is well taken. The escrow instructions were signed on the same day, were a part of the same transaction, constituted one document, and should be read together. The entire consideration passing to the respective parties is expressed in the instrument, and the defendant received nothing not called for therein. When so read and considered, the instrument contains all the necessary elements of a contract and is to be regarded as a contract in writing between the parties. Neher v. Kauffman, 242 P. 713; Tuso v. Green, 194 Cal. 574, 229 P. 327. As such it is circumscribed by the rule that excludes oral evidence to vary its terms, and, as the facts do not bring the case within any exception mentioned in section 1856 of the Code of Civil Procedure, the testimony of the plaintiff that the furniture was included in the sale was inadmissible. In its absence there is no evidence in the record to support the finding and judgment.

[2] The defendant calls attention to the undisputed fact that the value of said furniture is $580, that the plaintiff's right thereto is predicated on an alleged oral contract for its purchase, and he urges with compelling force that such a contract under the facts here presented is invalid under section 1973, subd. 4, of the Code of Civil Procedure. This must necessarily be true, where it appears, as here, that the plaintiff received no part of the goods and parted with no consideration for the same.

The plaintiff contends that a judgment for the defendant would have been unwarranted in law, for the reason that in his answer the defendant did not claim a return of the personal property as contemplated by sections 627 and 667 of the Code of Civil Procedure, citing Pico v. Pico, 56 Cal. 453, Banning v. Marleau, 101 Cal. 238, 35 P. 772, and Lee v. De La Motte, 47 Cal. App. 23, 189 P. 1034. It may be assumed that under the authorities cited a judgment in favor of the defendant for the return of the property could not, in view of the deficiency in the present answer, be rendered, but the point may not rightly be urged for an affirmance of a judgment in favor of plaintiff to which under the facts he is not entitled. Upon a reversal of the judgment, the defendant should be permitted to amend his answer so as to ask therein for a return of the property, as was pointed out in Banning v. Marleau, supra. No other points require discussion.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

---

199 Cal. 369

In re DRISHAUS' ESTATE. (L. A. 8469.)

(Supreme Court of California. Sept. 16, 1926.)

1. Taxation ⚿868(1)—Separate property of husband, acquired in another state, held to remain separate property for inheritance tax purposes, where husband removed to California prior to 1923 (Inheritance Tax Act 1921, § 7, subd. 1; Civ. Code, § 164, as amended by St. 1923, p. 746).

Property of husband, acquired in Nebraska, where it constituted his separate property, on his removal to California prior to 1923, *held* to remain his separate property, subject on his death to inheritance tax as such, under Inheritance Tax Act (St. 1921, p. 1506) § 7(1), notwithstanding Civ. Code, § 164, as amended by St. 1923, p. 746.

2. Taxation ⚿862—Status of property, whether community or not, as affecting inheritance taxes held not affected by amendment of Inheritance Tax Act after imposition of tax (St. 1925, p. 471; Civ. Code, § 164, as amended by St. 1923, p. 746).

Status of property, whether community or not, under Civ. Code, § 164, as amended by St. 1923, p. 746, as affecting its liability for inheritance tax, *held* not affected by 1925 amendment of Inheritance Tax Act (St. 1925, p. 471), adopted after death of owner, imposition of tax, and appeal taken.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of Herman Drishaus, also known as Herman K. A. Drishaus, deceased. From an order overruling objections of the administrator to a report of the inheritance tax appraiser, and fixing inheritance tax, the administrator appeals. Affirmed.

George H. Stone, of San Diego, for appellant.

E. P. Werner, of Los Angeles, Wesley E. Marten, of Sacramento, Adrian C. Stanton and George S. Dennison, both of Los Angeles, for respondent.

Claude I. Parker, of San Francisco, and Ralph W. Smith, of Sacramento, amici curiæ.

RICHARDS, J. This appeal has been taken by Southern Trust & Commerce Bank, administrator with the will annexed of the estate of Herman Drishaus, deceased, from an order of the superior court in and for the county of San Diego, overruling its objection to the report of the inheritance tax appraiser and fixing the inheritance tax in said estate. The facts of the case are embraced in a stipulation of the parties hereto, from which it appears that Herman Drishaus died on May 30, 1924, in the county of San Diego, Cal., being a resident therein; that he left as his widow Addie Drishaus, to whom he was married in 1875 in Milwaukee, Wis.; that thereafter the parties to the marriage removed to the state of Nebraska and from thence and in the year 1916 removed to San Diego, Cal., where they resided until the husband's death; that all of the property of which he died possessed was personal property, acquired while a resident of the state of Nebraska, except as to such increase therein as accrued from the unused earnings of said property during the residence of the deceased in California; that under the laws of the state of Nebraska property acquired there would be the separate property of the decedent; that the deceased left a will, in which he denominated all of his property as community property; that by the report of the inheritance tax appraiser the entire property of the decedent was treated as separate property, and was subjected to the inheritance tax which would be assessable against said property as the separate property of the decedent.

[1] In the trial court the administrator urged, in support of its objection to the inheritance tax report making such appraisement and to the order fixing the inheritance tax in accordance therewith, that under the provisions of section 164 of the Civil Code, as amended in 1923 (St. 1923, p. 746), all of the property of the decedent was community property, and hence that only one-half thereof should be taxed to the widow as the sole legatee under her husband's will. Section 164 of the Civil Code, as so amended, reads in part as follows:

> "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property."

The amendment to the portion of said section above quoted, made in 1923, consisted in the insertion of the words "heretofore or hereafter," the same reading before said amendment as follows:

> "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property." St. 1917, p. 827.

The effect of the amendment, if valid, would be to render the personal property of the decedent, acquired prior to the taking effect of the amendment and while a resident of the state of Nebraska, community property, and as such subject to the laws of this state declaring the status of husband and wife with relation to the community property during the period of their residence in this state prior to the husband's death. The property of the decedent herein acquired by him in and under the laws of the state of Nebraska prior to the date when he became a resident of California, and having been under the laws of the state of Nebraska his separate property, continued to be such when the decedent became a resident of this state in the year 1916, in conformity with the well-settled rule upon that subject set forth in the following uniform line of decisions: Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrrows, 136 Cal. 113, 68 P. 488; Estate of Niccolls, 164 Cal. 368, 129 P. 278; Estate of Warner, 167 Cal. 686, 140 P. 583; Estate of Boselly, 178 Cal. 715, 175 P. 4; Estate of Arms, 186 Cal. 554, 199 P. 1053; Estate of Frees, 187 Cal. 150, 201 P. 112.

The decision in the last case above cited was handed down by this court in September, 1921, and it had reference to a case wherein a decedent, who had acquired certain property in the state of Wisconsin, which was separate property under the laws of that State, and had subsequently removed to Illinois, under the laws of which state also personal property acquired by a decedent during his marriage would constitute his separate property, and had thereafter, and in the year 1910 removed to California, where with his wife he had resided until his death in the year 1920. This court had therefore before it the question as to the effect of the amendments to the Civil Code made in the year 1917 upon the status of the decedent's estate in his said property, and as to whether such property, by reason of said amendments to the Code, had become community property. The court, in determining that question, considered two propositions: First, as to whether said amendments to the Civil Code, made in 1917, would be constitutional in so far as it was attempted by the Legislature thereby to convert the property of the husband which had theretofore been separate property into community property; and, second, as to whether the statute of 1917 should or could be given retroactive effect. In considering these propositions this court held that under the decision of Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, the amendments to sections 164, 172, and 172a of the Civil Code adopted in 1917 (St. 1917, pp. 827, 829), were not to be given retroactive effect, so as to injuriously affect the vested rights of the husband in respect to his separate property owned by him prior to said amendments to the Code.

Following the decision in Estate of Frees, the state Legislature in 1923 amended section 164 of the Civil Code in the respect above set forth, in an apparent endeavor to give retroactive effect to the provision of said section of the Code, and thus avoid the effect, in so far as it was possible to do so, of our decision in Estate of Frees, supra. The Legislature had also, in the year 1917, adopted those certain amendments to the Civil Code which are to be found in section 172 thereof as then amended and in section 172a thereof as added in that year thereto. In the case of Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22, it was held by this court that said amendments to the Civil Code could not be held to affect the vested interest of the husband in property acquired by him prior to the date of said amendments. In the case of Stewart v. Stewart, 249 P. 197, just decided by this court, the principles declared in Roberts v. Wehmeyer, supra, and in the long line of decisions which preceded it and which are fully considered therein were restated and reaffirmed.

The effect of these earlier and later decisions of this court cannot be held to be other than that of deciding that the vested interest which the decedent in the instant case had in the personal property brought by him to this state as his separate property, and since then up to the time of his death held and owned by him as his separate property and estate, was unaffected by the foregoing amendments to the Civil Code, and that at the time of the death of said decedent the whole of said property was his separate property and estate. If this be true, it necessarily follows that the inheritance tax appraiser in fixing the amount of the inheritance tax to be imposed upon the estate of said decedent was entitled to treat the whole of his said property and estate as separate property and to levy an inheritance tax thereon accordingly, and hence that the trial court in making its order approving said report was not in error.

[2] The appellant, however, insists that the amendment to the Inheritance Tax Act adopted by the Legislature in 1925 has so far affected the status of the property of this estate as to require a reversal of the order from which this appeal is taken. By the terms of

said amendment the language of the amendment to section 164 of the Civil Code made in 1923 has been inserted in the Inheritance Tax Act of 1921 (St. 1921, p. 1500) in an attempt to render said act retroactive in its effect upon the property of estates acquired under the circumstances shown in the instant case. Without discussing the effect of said amendment generally, it may be stated that, since the decedent herein died in May, 1924, and since the inheritance tax imposed by the Inheritance Tax Act as it then read and still reads (section 7 [1]), became due and payable at the death of the decedent, and since the order fixing the amount of said tax was made and entered on November 15, 1924, and since this appeal from said order was taken and perfected on November 21, 1924, we are of the opinion that the amendment to the Inheritance Tax Act approved May 22, 1925 (St. 1925, p. 471), cannot be given application to this case.

It therefore follows that the said order must be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

---

199 Cal. 391

In re SANKEY'S ESTATE. (L. A. 8905.)

(Supreme Court of California. Sept. 27, 1926.)

1. Wills 🔑270.

In proceeding to probate will, actual indorsement of affidavit of publication is not necessary part of filing.

2. Wills 🔑270—Return of service of citation in proceeding to probate will, deposited with proper officer for filing, is deemed filed.

Return of service of citation in proceeding to probate will, deposited with proper officer for filing, is deemed filed, since officer is presumed to have performed duty.

3. Wills 🔑434—Texas court's finding that notice of time of probating will complied with statute held binding on motion to set aside ancillary proceeding on ground that such court lacked jurisdiction (Code Civ. Proc. § 1323).

Texas court's finding that notice of probating will complied with Rev. St. Tex. 1911, art. 3230, as amended by Acts 35th Leg. (1917) c. 179, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 6016½), *held* binding on motion to set aside ancillary proceeding on ground that such court lacked jurisdiction, though finding recited due notice of "filing" instead of probating, since affidavit as to such notice was not part of record in ancillary proceeding, in view of Code Civ. Proc. § 1323, and it will be presumed on collateral attack that other evidence supported decree.

4. Wills 🔑434—Where lack of jurisdiction as to place of testator's residence did not appear on face of Texas decree admitting will to probate, jurisdiction will be presumed on motion to set aside ancillary proceeding.

Where lack of jurisdiction as to place of testator's residence did not appear on face of Texas decree admitting will to probate, such jurisdiction will be presumed on motion to set aside ancillary proceeding, though necessary facts conferring it do not affirmatively appear in decree.

5. Wills 🔑434.

Jurisdiction of Texas court to admit will to probate *held* collateral question on motion to set aside ancillary proceeding.

6. Wills 🔑240—California court held to have jurisdiction to admit will of resident of its jurisdiction as foreign will (Code Civ. Proc. § 1322, as amended by St. 1911, p. 88).

California court *held* to have jurisdiction to admit will of resident of its jurisdiction as foreign will, in ancillary proceeding alleging residence in Texas, where such will had been admitted to probate in Texas, in view of Code Civ. Proc. § 1322, as amended by St. 1911, p. 88.

7. Wills 🔑434—Finding in ancillary probate proceeding that probate in Texas was proper held binding on collateral attack (Code Civ. Proc. § 473).

Finding in ancillary probate proceeding that probate in Texas was proper *held* binding on collateral attack, in absence of appeal or proceeding to vacate or modify decree, under Code Civ. Proc. § 473.

8. Wills 🔑423, 434—Posthumous child held bound by decree in proceeding to probate father's will and in ancillary probate proceeding (Civ. Code, §§ 1306, 1403).

Posthumous child *held* bound by decree in proceeding to probate father's will and in ancillary probate proceeding, in view of Civ. Code, §§ 1306, 1403, being deemed to have been represented by mother or others interested in estate.

9. Wills 🔑246—Order revoking ancillary probate proceeding for lack of original jurisdiction held unwarranted (Code Civ. Proc. § 1312).

Order revoking ancillary probate proceeding for lack of original jurisdiction *held* unwarranted, in view of Code Civ. Proc. § 1312; proceeding to contest will or revoke probate being statutory.

10. Wills 🔑246—Pretermitted heir held to have no interest in will or probate thereof which would authorize motion to set aside ancillary probate proceeding (Civ. Code, § 1306; Code Civ. Proc. §§ 1327, 1333, 1664).

Pretermitted heir *held* to have no interest in will or probate thereof which would authorize motion to set aside ancillary probate proceeding, since such heir takes in hostility to will, in view of Civ. Code, § 1306 (Code Civ. Proc. §§ 1327, 1333, 1664), notwithstanding that such heir is interested in subject-matter and that probate court for purpose of administration takes jurisdiction of estate passing to pretermitted heir.

11. Wills ⚷246.

That costs of administration are less in another jurisdiction or that it may be more convenient to conduct probate proceedings there will not authorize contest of will.

12. Judgment ⚷336.

Judgment or order may be set aside on ground of fraud, mistake, or lack of jurisdiction, independent of remedy found in Code Civ. Proc. § 473.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

The will of John S. Sankey was admitted to probate on ancillary proceedings on petition of F. P. Lieuallen, after its admission to probate in the state of Texas. On petition of Mrs. Fay Williams, as guardian of Jacquelin S. Sankey, to revoke the ancillary proceedings, a decree was entered setting aside the order admitting the will to probate in such proceedings, and F. P. Lieuallen and another appeal. Reversed.

Duke Stone, of Los Angeles, McLean, Scott & Sayers and Capps, Cantey, Hanger & Short, all of Forth Worth, Tex., and W. P. Z. German, of Tulsa, Okl., for appellants.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a decree setting aside a former order of the superior court of Los Angeles county, admitting to probate the will of John S. Sankey, deceased, upon ancillary proceedings pursuant to section 1322, Code of Civil Procedure, et seq., after its admission to probate in the state of Texas. The ancillary proceedings were vacated on petition of Jacquelin S. Sankey, a posthumous child, and pretermitted heir of the deceased.

A reversal of the judgment is sought chiefly upon the ground that a pretermitted heir, who takes her share of the estate independently of and in hostility to the will, as provided by section 1306, Civil Code, has no interest in the will or the probate proceedings which will authorize her to maintain the contest, and that the proceedings which resulted in the revocation of the ancillary probate of the will at Los Angeles constituted a collateral attack upon the decree of the Texas court and of the former decree of the Los Angeles court.

John S. Sankey died testate at Fort Worth, Tex., November 30, 1921, leaving surviving him a wife and one minor child, named Eleanor Ruth Sankey. The deceased was possessed of an estate of the value of approximately $500,000, which was entirely disposed of by will. A legacy of $25,000 each was bequeathed to his wife, his mother, his brother, and his sister. The balance of the estate was left in trust for the benefit of his daughter Eleanor until she arrived at the age of 35 years, at which time it was to become hers absolutely. The posthumous child, Jacquelin, was not mentioned in the will. F. P. Lieuallen was named as trustee. Upon proceedings had in the county court of Tarrant county, Tex., the will was admitted to probate on January 3, 1922, and Lieuallen was appointed and qualified as executor thereof. Upon petition of Lieuallen, supported by authenticated proceedings of the original probate, this will was duly admitted, March 1, 1922, in the superior court of Los Angeles county, as a foreign will, and ancillary letters were issued to said petitioner. On July 2, 1922, Jacquelin S. Sankey, the posthumous child and pretermitted heir of said deceased, was born. Subsequently her mother remarried and became known as Mrs. Fay Williams. October 2, 1924, she was appointed and qualified as guardian of this child, in which capacity she filed her petition to revoke the ancillary proceedings of the Los Angeles court. This petition to revoke the ancillary proceedings alleged that Jacquelin S. Sankey was the posthumous child and pretermitted heir of the deceased; that the deceased was a resident of Los Angeles county at the time of his death; and that the superior court of that county therefore had no authority to admit the will on ancillary proceedings as a foreign will; that the notice of probate in Tarrant county, Tex., was defective, and the affidavit of publication, which was among the probate papers, was not indorsed as filed; and that the Texas court was without jurisdiction to render its decree originally admitting the will in that state; that the defect of publication of notice appeared upon the face of the authenticated proceedings presented to the Los Angeles court; and that the original decree of the Texas court and the subsequent decree of the Los Angeles court granting ancillary probate were void. No fraud or misrepresentations in procuring these decrees admitting the will to probate was alleged.

The executor and the daughter Eleanor appeared in opposition to this petition to revoke the ancillary proceedings and demurred on the specific grounds that the pretermitted heir was without authority to maintain the action to revoke or contest the proceedings since she had no interest in the will, but took her share of the estate in hostility to the will, and that her petition to revoke the probate constituted a collateral attack upon the original decree admitting the will to probate in Texas, and the subsequent decree of the Los Angeles court granting ancillary letters. The demurrers were overruled. At the beginning of the trial objections to the introduction of any evidence were made on the same grounds, which were also overruled. Evidence was thereupon received tending to impeach the jurisdiction of the Texas court, by showing the insufficiency of the publication of notice to probate, and also tending to show that the residence and domicile of the deceased, at the time of his death, was Los Angeles county, and not Texas. Upon this evidence the court made its findings sustaining the claims of petitioner and revoking the ancillary probate proceedings in Los Angeles county.

[1, 2] On the petition to revoke the ancillary proceedings the jurisdiction of the Texas court was challenged on the grounds that the testator was not a resident of the state of Texas at the time of his death; that notice of the time of proving the will was not published according to law, and that the return of service of the citation, which was among the probate proceedings, did not purport to have been filed as required by law.

The actual indorsement of the instrument is not a necessary part of the filing, but is mere evidence of that fact. An officer is presumed to have performed his duty, and one may not be prejudiced by the mere failure of an officer to perform his ministerial duty. When the instrument is deposited with the proper officer, at the proper place for the purpose of filing, in contemplation of law it is deemed to have been filed. Edwards v. Grand, 121 Cal. 255, 53 P. 796; Smith v. Biscailuz, 83 Cal. 344, 21 P. 15, 23 P. 314; Estate of Carroll, 190 Cal. 105, 111, 210 P. 817; 3 Words and Phrases, p. 2768.

[3] In response to an order of the Texas court setting Monday, January 3, 1922, as the time for probating the will, and directing ten days' notice thereof by publication as required by law, the notice was actually published in a weekly newspaper on December 16 and 23, immediately prior to the time of hearing. Article 3230 of the Civil Statutes of Texas formerly required notices for the probating of a will to be given by posting in three public places. By an amendment found in Acts 35th Leg. (1917) c. 179, § 1 (article 6016½ of Vernon's Ann. Tex. Civ. St. Supp. 1918), it is provided:

> "Whenever by law notice is required to be given of any act or proceeding, * * * which notice is now authorized by law or by contract to be made by posting * * * such notices shall hereafter be given by publication thereof. * * * All notices published under the provisions of this act shall be printed at least once each week for the period of time now required for posting such notices."

This statute evidently intended to require the publication once each week during the time for which notices were directed to be given, in lieu of the posting thereof which was formerly required. It is apparent that but two weekly notices could be published during the period of ten days. This notice was actually published once each week for two successive times during the ten days prescribed, prior to the day of hearing. The first publication occurred December 16th, and the ten days prescribed expired on December 26th. The following Monday the matter was set for hearing. During that period the notice was published as often as it could have been done, once each week, to comply with the statute. In 21 Cal. Jur. at 517, it is said:

> "Where the publication is made once each week instead of daily, it is not necessary that the full time prescribed by the order shall intervene between the first and last publications, but only that the summons shall be published once each week during the time prescribed. Of course the full period prescribed must elapse after the first publication before the service is complete."

The Texas court in its decree admitting the will to probate found:

> "On this day came on to be heard by the court the application of F. P. Lieuallen for the probate of a certain instrument in writing dated June 11, 1921; and it appearing to the court that due and legal notice of the *filing* thereof has been given in the manner and for the time required by law, and the evidence, a copy of which is on file in this court, having been heard and fully considered: It is ordered, adjudged and decreed by the court that said instrument in writing be and the same is hereby admitted to probate. * * *"

Where the court in its decree uses the language, "due and legal notice of the filing," etc., it is apparent that the word "filing" was inadvertently employed by the court instead of the word probating. This was a mere clerical error. No notice of the "filing" of a will is required by law. The finding that due and legal notice was given can refer to nothing but the notice of time and place of probating the will as required by law. Even though the notice were deemed to be insufficient, that fact can only be ascertained by reference to the affidavit on file. This affidavit was not a necessary part of the authenticated record required upon ancillary proceedings to probate a foreign will. Our statute provides only for the presenting of duly certified copies of the will, and the decree admitting the will to probate. Code Civ. Proc. § 1323. This affidavit may be considered surplusage. It was ex industria included as a part of the authenticated proceedings. In view of the findings of the court, on collateral attack, it will be presumed that other evidence was adduced in support of the decree.

In Goldtree v. McAlister, 86 Cal. 93, 102, 23 P. 207, 209, 24 P. 801, respecting the sufficiency of the evidence upon which authenticated copies of a record for ancillary probate were admitted, the court said:

> "In either case the error, if it was error (and this may be conceded for the present purpose), was such only as to the competency or insufficiency of the evidence upon which the court found the fact which is claimed to be ju-

risdictional. * * * I therefore think the trial court did not err."

When a court has general jurisdiction of the subject-matter which involves the particular class of cases in which the specific relief is sought, and formally enters its decree finding that the necessary procedure was followed, or the necessary facts exist upon which its jurisdiction over the particular matter would attach, since the right to determine these preliminary matters upon evidence adduced includes the right to make an erroneous decision, nevertheless its decree will be binding and final against any collateral attack. 1 Freeman on Judgments (5th Ed.) pp. 719–723, §§ 350, 351.

[4] Since the jurisdiction of the Texas court, authorizing it to originally admit the will of John S. Sankey to probate, required that court to first find that the deceased was a resident of that state, its decree admitting the will necessarily implies that the question of residence was first determined, and the decree became binding and final against any collateral attack. If a lack of jurisdiction does not appear on the face of the record, on collateral attack, the jurisdiction will be presumed, even though the necessary facts conferring it do not affirmatively appear in the decree. Under such circumstances it will be assumed the parties were properly before the court, and that the proceedings were regular. 15 Cal. Jur. 68. In 1 Freeman on Judgments (5th Ed.) p. 723, it is said:

> "If the residence of the deceased within the territorial jurisdiction of the court at the time of his death is essential to give the court power to admit the will to probate, or to grant letters of administration of his estate, its adjudication of such fact cannot * * * be drawn in question collaterally."

[5] In the Estate of Dole, 147 Cal. 188, 81 P. 534, the court said:

> "The determination of the probate court as to the residence of the deceased at the time of his death is final in all collateral proceedings. Irwin v. Scriber, 18 Cal. 500; In re Griffith, 84 Cal. 107, 23 P. 528, 24 P. 381; In re Eichhoff, 101 Cal. 605, 36 P. 11; Estate of Latour, 140 Cal. 421, 73 P. 1070, 74 P. 441. As this proceeding was instituted for the purpose of revoking the probate of a will which had become final except subject to attack in the manner provided by the statute, and as the statute does not provide that want of jurisdiction is one of the grounds upon which such probate may be revoked, it is clear that the question now attempted to be raised is collateral."

[6] The respondent, however, contends that the Los Angeles court had no jurisdiction, under any circumstances, to grant ancillary probate of a will executed by one who, at the time of his death, was a resident of this state, and that such an instrument could only be admitted in this state as an original domestic will. In support of this claim Estate of Clark, 148 Cal. 108, 82 P. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, is cited. The testator, Clark, was a resident of Yolo county, Cal., at the time of his death. While visiting in New Hampshire he executed his will, which, after his death, upon proceedings duly had, was admitted to probate in that state. Subsequently, upon ancillary proceedings in the superior court of Yolo county, the court received evidence of the residence of the testator, and refused to grant ancillary letters on the ground that the will was not entitled to probate as a foreign will. The court said:

> "If upon the question of residence it shall be determined that the deceased was in truth a resident of this state, it follows of necessity that the proper state court has exclusive original primary jurisdiction to admit the will to probate, and will not admit it as a foreign will for ancillary proceedings."

To this opinion Justices Van Dyke, McFarland, and Shaw dissented. This decision was rendered October 12, 1905. Section 1322, Code of Civil Procedure, then provided that any will duly proved and admitted in another state may be allowed and admitted to probate as a foreign will in any county of this state "in which the testator shall have left any estate." Since the decision in the Clark Case the Legislature has enlarged the jurisdiction of our superior courts in ancillary probate proceedings. In 1911 (St. 1911, p. 88), the section was amended to provide that such foreign wills may be allowed and recorded in the superior court of any county "in which the testator shall have left any estate, or shall have been a resident at the time of his death." Apparently this amendment was intended to overcome the effect of the Clark decision, and now clearly authorizes the granting of ancillary probate even though the testator be, in fact, a resident of the country where the proceedings are instituted, at the time of his death.

Assuming that the testator in the instant case was in fact a resident of Los Angeles county at the time of his death, upon original proceedings duly had in that county, setting forth the necessary jurisdictional facts, his will might have been admitted there as a domestic will. But upon the ancillary proceedings which alleged the residence to have been in Texas, the court had no jurisdiction to admit it as a domestic will. On the contrary, as section 1322, Code of Civil Procedure, now stands, and upon proper ancillary proceedings, the court had jurisdiction to admit it as a foreign will. Any other construction of this section would eliminate and render void the effect of the language of the amendment referred to.

[7] Upon those ancillary proceedings the Los Angeles court did accept jurisdiction, and upon the evidence adduced found:

> "That John S. Sankey died on or about the 30th day of November, 1921, in the county of Tarrant, state of Texas, and at the time of his death he was a resident of the county of Tarrant, state of Texas; that the will, a copy of which is annexed hereto, was duly proved, allowed, and admitted to probate as the last will and testament of the said John S. Sankey, deceased, in the county court of the county of Tarrant, state of Texas, by an order of said court duly made and entered therein on the 3d day of January, 1922; that said court at the time of making said order was a court of competent jurisdiction, and had jurisdiction of said matter, and of all the persons interested in the estate of said deceased; that said will was executed according to the laws of the state of Texas, in which state the testator was domiciled at the time of his death."

Upon these findings ancillary letters were issued. No appeal was taken, and no proceedings instituted under section 473, Code of Civil Procedure, to vacate or modify the decree. That decree therefore became binding as against collateral attack.

[8] The respondent, however, asserts that the petitioner was neither bound by the decree of the Texas court nor the original decree of the Los Angeles court, because she was unborn at the time these decrees were made, and she therefore had no notice of the proceedings. But a posthumous child is deemed to have been represented by its mother or other individuals possessing an interest in the estate, so as to bind it to all orders and decrees duly made in the ordinary course of administration.

> "Posthumous children are considered as living at [the time of] the death of their parents." Civ. Code, § 1403.
>
> "Parties in being, possessing an estate of inheritance, are regarded as so far representing all parties who, being afterward born, may have interests in the same, that a decree binding them will also bind the afterborn parties." 1 Woerner on Administration, 165, § 155.

In County of Los Angeles v. Winans, 13 Cal. App. 234, 245, 109 P. 640, 646, it is said:

> "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owner of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons." Faulkner v. Davis, 18 Grat. (Va.) 651, 98 Am. Dec. 698; Knotts v. Stearns, 91 U. S. 638, 23 L. Ed. 252.

In California it is specifically provided by statute that such afterborn child succeeds to its interest by operation of law, and its birth does not impair the effect or validity of any sale of property duly made in which the posthumous child may have an interest. Civ. Code, § 1306.

So far as the jurisdiction of the probate courts of Texas and of California are concerned, in the granting of probate in this matter, it must be assumed that Jacquelin S. Sankey, the posthumous child, was represented by the living heirs and devisees of the deceased, who actually had the same interest that she possessed, in the court and place where the estate was to be administered. We think that the doctrine of virtual representation applies to the instant case.

[9, 10] It further appears that the order of the Los Angeles court revoking the ancillary probate proceedings was unwarranted because the lack of original jurisdiction is not a ground provided by statute upon which a will may be contested, or the probate thereof revoked, and because the pretermitted heir possessed no such interest in the will or the probate proceedings as would authorize her to maintain the contest.

Section 1306 of the Civil Code provides that:

> "Whenever a testator has a child born after the making of his will, either in his life time or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate."

The respondent asserts the right of a pretermitted heir to contest the ancillary probate of a will, or prosecute a petition to revoke that probate upon any of the grounds upon which the original probate of the will may be contested. A will may be contested, or the probate thereof revoked, only upon the grounds authorized by statute. The proceeding is purely statutory, in rem, and binds the world as to the res involved. Estate of Baker, 170 Cal. 578, 585, 150 P. 989; Estate of Allen, 176 Cal. 632, 169 P. 364; Estate of Relph, 192 Cal. 451, 458, 221 P. 361. The grounds for contest are specified in section 1312, Code of Civil Procedure, as follows:

> "1. The incompetency of the decedent to make a last [at the time of the execution of the] will and testament; 2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence; 3. The due execution and attestation of the will by the decedent or subscribing witnesses; or, 4. Any other questions substantially affecting the validity of the will."

Under the provisions of section 1306 of the Civil Code, the pretermitted heir, immediately upon her birth, succeeded to an undivided one-third of her father's estate as completely as though there had been no will which purported to dispose of the entire estate. She inherited this share in spite of the will, and in hostility to it. On principle it naturally follows that one who claims an interest adversely to the will is not entitled to be heard in an action to contest or construe the same. 40 Cyc. 1847–1849. To the same effect the author of Alexander on Wills says:

> "An omitted child cannot appear and contest the probating of the will on the grounds of the omission, as his rights are independent of the will, and are unaffected by it. Neither has he the right to have it set aside." 2 Alexander on Wills, 962; McIntire v. McIntire, 64 N. H. 609, 15 A. 218; Bunce v. Bunce (Sup.) 14 N. Y. S. 659.

In 28 R. C. L. 386, it is said:

> "In order that a person may contest a will it is necessary that such person shall have some interest which may be affected by the probate of the proposed will. Furthermore, such interest must be pecuniary and one detrimentally affected by the will."

In the case of State v. Superior Court of Sacramento County, 148 Cal. 56, 82 P. 673, 2 L. R. A. (N. S.) 643, by means of a petition for writ of mandate the state sought to compel the court to permit it to appear and contest the will of a deceased person who died without known heirs or kin within the state, and alleged that it had "an immediate present interest in the property." The petition was denied, and the court said:

> "It is a necessary condition to the right of any party to appear [in the contest of a will] that such party shall have some interest in the estate which may be affected by the probate of the proposed will."

In the Estate of Smith, 145 Cal. 118, 78 P. 369, where a pretermitted heir was born after the execution of the will, on distribution, an annuity of $125 per month which was to be paid during the life of the mother of testatrix was reduced one-third pursuant to section 1308 of the Civil Code, which provides that all devises and legacies must contribute to the share of a pretermitted heir in the proportion which they bear to the entire value of the estate. In the opinion this court said:

> "* * * Subject to administration, the post-testamentary child succeeded immediately, by operation of law, to an undivided one-third of the property of the testatrix. As to such portion, the deceased is to be regarded as having died intestate (Smith v. Olmstead, 88 Cal. 582, 26 P. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336), and so far as such child is concerned, the will is to be considered as not existing."

And in the Estate of Loyd, 175 Cal. 699 167 P. 157, it was held that a pretermitted heir possessed no such interest in a will which had been duly admitted to probate in the state of California as would authorize him to compel the sale of lands belonging to the estate which were situated in the state of Iowa. In its opinion this court said:

> "* * * Our cases all hold, as necessarily they must, that such an heir does not and cannot take under the will, but takes (wherever by will the testator has disposed of all his property) in opposition and in hostility to that will. Pearson v. Pearson, 46 Cal. 609; Estate of Wardell, 57 Cal. 484; In re Grider, 81 Cal. 571, 22 P. 908; Estate of Smith, 145 Cal. 118, 78 P. 369; Smith v. Olmstead, 88 Cal. 582, 26 P. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336; Painter v. Painter, 113 Cal. 371, 45 P. 689. In Smith v. Olmstead, supra, it is said: 'We are unable to consider these sections otherwise than as declaring that the pretermitted child succeeds immediately by operation of law to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate and its succession is directed by law and not by the will.' In the later case of the Estate of Smith, supra, the same unescapable doctrine is declared, and it is said: 'And so far as such child is concerned the will is to be considered as not existing.' * * * What the law gives him as a pretermitted heir he takes outside of and in hostility to the will, and it is not open to him to invoke nor to ask the aid of the court in probate to enforce any of the provisions of the will for his benefit. But it is next said that the respondent had the right to invoke the provisions of the will because he was a party interested in the subject-matter, and, in this, reliance is placed upon Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889. A reading of the case demonstrates how fallacious respondent's effort is to detach a single phrase from its context, for only those are interested in the subject-matter who are the beneficiaries of the particular devise under the will."

For the purposes of administration, the probate court takes jurisdiction not only of that portion of the estate which is affected by the provisions of the will, but also that portion which passes to the pretermitted heir by operation of law. Estate of Grider, 81 Cal. 571, 22 P. 908. Therefore, to the extent of this share of the estate which the pretermitted heir takes, it must be admitted he has an interest in the administration of the entire estate, as distinguished from an interest in the will itself, and hence, upon petition for family allowance, partition, accounting, or distribution, he is entitled to be represented in such proceedings of administration. 2 Alexander on Wills, 961, § 640; 2 Woerner on Administration (2d Ed.) 1354, § 1240; William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323; Lowery v. Hawker, 22 N. D. 318, 133 N. W. 918, 37 L. R. A. (N. S.) 1143. But because he may be interested in the administration or distribution of the estate it does not follow that he may participate, as an interested party, in the contest of the will, or in a petition to set the probate thereof aside. In contemplation of law, so far as the pretermitted heir is concerned, there is no will. The title of the pretermitted heir to his share of the property vests absolutely at the death of the testator, subject only to administration, and is in no way affected by the mere process of probating the will. The pretermitted heir is not even dependent upon the probate proceedings for distribution of his share of the estate, but may resort to a proper proceeding in equity. Code Civ. Proc. § 1664; 2 Alexander on Wills, 961, § 640.

[11] The mere fact that the commissions allowed by law for the probating of the estate, or other costs incident to the process of administration, may be less in another jurisdiction, or that it may be less inconvenient, or more advantageous to the petitioner, that the probate proceedings shall be conducted elsewhere, is not the sort of an interest contemplated by law which will authorize one to contest a will. The contestant's interest must be a present pecuniary interest. The question of incidental costs of administration may be controlled by contract between the parties involved. Both the costs of administration and the matter of advantage or convenience to the litigant are too remote and uncertain to constitute such an interest as will authorize the contest of a will.

In the instant case, the revoking of the ancillary probate is not claimed to have been granted by virtue of the authority to contest a will pursuant to section 1327, Code of Civil Procedure. Not being interested in the will of the deceased, the pretermitted heir was not authorized to contest the will. Can it then be said that she would nevertheless be entitled to maintain an action to revoke the ancillary probate proceedings, because she is interested in the administration of the estate, as distinguished from the process of probating the will? The right to revoke the proceedings for the probate of a will depends as much upon statutory authorization as does the contest of the will itself.

A careful examination of the provisions of article 4 of the Code of Civil Procedure convinces us that the right to contest a will after probate thereof, is confined to persons interested in the will. That article is headed, "Contesting Will After Probate." Section 1327 reads, in part: "When a will has been admitted to probate, any person interested may, * * * contest the same, or the validity of the will." The subject referred to in this clause is unquestionably the "will," and not the probate proceedings. The reasonable and natural way of construing this section is that "when a will has been admitted to probate, any person interested [in the will] may, * * * contest the same or the validity of the will." This construction seems to be supported by reference to the language of section 1333 of the same chapter, which reads: "If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive." Clearly, by the terms of this section, it is the failure to contest the will which makes the probate thereof conclusive.

In the Estate of Bergin, 100 Cal. 376, 34 P. 867, the will of the deceased had been admitted to probate in Ireland. Subsequently the petition of Thomas I. Bergin, devisee under the will, supported by duly authenticated copies of the probate proceedings in Ireland, was filed. The public administrator also filed his petition for letters, which was denied. The will was admitted and ancillary letters issued to the devisee named. The court said:

> "The part of the Code which governs this case is found in article III, c. 2, tit. XI, part III, of the Code of Civil Procedure, embracing sections 1322 to 1324 inclusive, under the head of 'Probate of Foreign Wills.' * * * Said article III deals specially with the subject-matter of foreign wills, and it must prevail over all conflicting provisions 'as to all matters and questions arising out of the subject-matter of such article.' Pol. Code, § 4483. * * * We think it also clear that under the provisions of said chapter letters 'of administration' must be granted to a 'person interested in the will' who applies for them, in the absence of a petition by the executors."

[12] It is true that under the law of this state a judgment or order may be set aside on the ground of fraud, mistake or lack of jurisdiction, independent of the remedy found in section 473, Code of Civil Procedure, when the application is seasonably made and the fraud or misrepresentation is alleged and proved. Baker v. O'Riordan, 65 Cal. 368, 4 P. 232; Norton v. Atchison, T. & S. F. Ry. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am. St. Rep. 198; People v. Thomas, 101 Cal. 571, 36 P. 9. But the petition in this matter failed to allege, and there was no evidence to prove, fraud, or other facts depriving the pretermitted heir, or those who represented her, from a full and a fair hearing. In 3 Alexander on Wills, at page 2025, it is said:

> "The right of a court of probate to set aside its orders or decrees is a power which is equitable in its nature. In order to justify a court of probate to set aside an order admitting the will and granting letters testamentary, the party attacking the order should show not only that it was secured through fraud, accident, or mistake, or without the legal proofs required by law, but it should also show some substantial, equitable ground why it would be inequitable and unjust (or detrimental to his pecuniary interests) to allow the order which he attacks to stand, and that he was prevented from availing himself of his proofs at the original hearing because of fraud, accident or mistake, unmixed with any fraud or negligence on his part."

The Los Angeles court had jurisdiction of the subject-matter and of the res, so as to make its original decree granting ancillary probate of the testator's will, valid as against collateral attack. The pretermitted heir possessed no such interest as authorized her to petition for a revocation of the ancillary probate proceedings. Her petition constituted a collateral attack upon the former decree of the Los Angeles court granting ancillary probate, and was also a collateral attack upon the original decree of the Texas court admitting the will to probate.

For the foregoing reasons the order setting aside the decree of the court below was erroneous.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

79 Cal. App. 390

HUTSON et al. v. OWL DRUG CO.*

(Civ. 5297.)

(District Court of Appeal, First District, Division 1, California. Sept. 28, 1926.)

1. Civil rights ⚷13.

Findings *held* to show plaintiff was denied full accommodations at soda fountain on account of race, in violation of Civ. Code, §§ 51, 52.

2. Appeal and error ⚷1039(2)—Failure of complaint for denial of full accommodations and for assault to allege damages sought on each ground held not prejudicial.

Failure of complaint for damages for assault and for denial of full accommodations to specifically allege the damages sought on each ground *held* not prejudicial, in view of defendant's denial of any injury.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Lela Hutson and Britt Hutson against the Owl Drug Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Donald Barker, of Los Angeles (Harry A. Keithly, of Los Angeles, of counsel), for appellant.

Griffith Jones and John J. Craig, both of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This an action for damages for alleged violation of section 51 of the Civil Code relating to personal rights and for assault and battery. The judgment roll only is before the court.

Appellant bases its appeal upon the following specifications: (1) That the findings of fact show clearly that the defendant was not responsible for the assault found to have been committed; (2) that the findings of fact do not show a violation by the defendant of the plaintiffs' civil rights; (3) that the defendant's demurrer to the complaint was erroneously overruled.

As to the first specification, it is not claimed by respondent that appellant was responsible for any injury resulting to appellant from the assault found to have been committed by its employee. Respondents' position being that the fact of the assault, together with the fact that the employee Tucker remarked in a loud voice:

> "What did you serve the nigger for? I wouldn't have served her. She could have set there until to-morrow,"

—established the fact that respondent was not accorded the same accommodation applicable alike to all citizens. Section 51 of the Civil Code provides:

> "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises," etc.

And section 52 of the same Code provides:

> "Whoever denies to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code, or who aids, or incites, such denial, or whoever makes any discrimination, distinction or restriction on account of color or race, * * * for each and every such offense is liable in damages," etc.

[1] The court found:

That the plaintiff was at the time alleged an American citizen and a negro; that she entered the establishment of defendant corporation at the corner of Fifth and Broadway, Los Angeles, Cal., and took her place at the soda fountain where the general public is served with food and drinks, and gave her order to one Mr. Tucker, who was then one of the employees of defendant corporation, then acting in the regular course of his employment, assisting about and in dispensing food and drinks for defendant corporation; that said employee Tucker did refuse to serve plaintiff Lela Hutson; that after waiting about 20 minutes another employee served her with her order, but placed same amongst dirty dishes on the counter; that said employee Tucker remarked in a loud voice:

> "What did you serve the nigger for? I wouldn't have served her; she could have set there until to-morrow."

That thereafter the said employee Tucker hit the plaintiff on the face and threw a cup of coffee on her; that he struck her a severe blow on the jaw and hit her on the breast with the cup of coffee; that, at the time of the aforesaid occurrence, there was a large number of people in the store; that plaintiff suffered great humiliation and embarrassment and received painful injuries to her cheek and jaw; that she was not accorded the full accommodations, advantages, facilities, and privileges applicable alike to and given by defendant corporation to persons of the white race.

As conclusion of law, the court concludes that plaintiffs are entitled to recover of and from defendant damages in the sum of $500.

The transcript of the testimony is not be-

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court November 26, 1926.

fore us, but from the fact that the court has not found upon the question whether or not the acts constituting the assault were within the scope of the employee's authority, or, if not within the scope of his authority, whether the assault was acquiesced in by appellant, which facts are alleged in the complaint and denied in the answer, we conclude that the action was tried on the one issue, and that the damages allowed were allowed as damages sustained because respondent was not accorded the same accommodations, advantages, facilities and privileges, applicable alike to persons of the white race.

While it is often difficult, as will be found from a review of the decisions in re violation of civil rights, to show that the complainant was denied full accommodations simply and solely on account of complainant's race or color, the finding in this instance is direct and certain and clearly answers the assignment of error set forth in specification two.

[2] The third specification upon which appellant bases its appeal, that the demurrer should have been sustained upon the ground that the elements of damage should have been more specifically alleged, that it is uncertain what part of the damages claimed by respondents is based upon the alleged violation of personal rights of said accommodations, etc., and what part because of alleged personal injuries, is passed upon directly in Rooney v. Gray Bros., 145 Cal. 757, 79 P. 524. In that case the court says:

> "It must be conceded that a more perfect pleading in this respect, as in some other particulars, might have been prepared, * * * and it is possible that it may be to some extent open to the last objection urged against it—that it does not set forth with sufficient certainty the exact amount of damages sustained by the particular injuries complained of, although as to the manner and extent of those injuries the complaint is clearly certain enough. Yet we do not think it so fatally defective as to the allegation of damages that the order of the court overruling it should be reversed. The general rule requiring the amount of damages sustained by several alleged wrongful acts of a defendant to be stated with exactness is in order that the defendant may have an opportunity of determining whether he will concede a good cause of action for any or all of the amounts claimed, or that, if not so conceding, he may be able to prepare himself with evidence upon the trial to contest them. Mallory v. Thomas, 98 Cal. 644, 647 [33 P. 757]; Foerst v. Kelso, 131 Cal. 376, 378 [63 P. 681]. Now, it is quite evident from the record in this case that the defendants were not injured by the refusal of the court to sustain the demurrer in this respect under the above rule, or any extension of it which now suggests itself to us, because the answer of the defendant consists of a specific denial of all the allegations of the complaint. They deny that any of the injuries asserted by plaintiff occurred either through their acts or at all. Having presented these square issues, and the cause having been tried on them, it cannot be said that the alleged uncertainty in the complaint as to the amount of damages claimed to have been sustained by plaintiff, could have misled or prejudiced the appellants, as their contention was that the plaintiff had suffered no injury at all. When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint. Alexander v. Central, etc., Co., 104 Cal. 537 [38 P. 410]; Foerst v. Kelso, 131 Cal. 376, 378 [63 P. 681]."

In the instant case, as in Rooney v. Gray Bros., the answer of defendant denies that any of the injuries asserted by plaintiffs occurred, and, the case having been tried on the issues thus framed, it cannot be said that the alleged uncertainty in the complaint as to the amount of damages claimed to have been sustained by plaintiffs could have misled or prejudiced the appellant, as its contention was that plaintiffs had suffered no injury at all.

The judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 295

PEOPLE v. CASEY. (Cr. 1333.)*

(District Court of Appeal, Second District,
Division 2. California. Sept. 11,
1926.)

1. Criminal law 🔑1159(5).

On conflicting testimony as to defense of alibi, appellate court will not disturb verdict for improbability or insufficiency of evidence relating thereto.

2. Witnesses 🔑387—Permitting cross-examination of defendant as to signed statement given to police officer, without requiring that it be shown him, was not error (Code Civ. Proc. § 2052).

Permitting district attorney to cross-examine defendant as to whether he was asked questions and gave answers contained in signed statement given to police officer, without requiring that it be shown defendant as provided by Code Civ. Proc. § 2052, relating to impeachment by statement of witness in writing, was not error.

3. Criminal law 🔑780(2)—Instruction to acquit for want of corroboration of accomplices held properly refused, in view of corroborating evidence (Pen. Code, §§ 286, 288a).

On trial for infamous crimes prescribed by Pen. Code, §§ 286, 288a, instruction to acquit, requested on theory that there was no corroboration of testimony of accomplices, *held*

---

*Hearing denied by Supreme Court November 8, 1926.

properly refused, in view of corroborating circumstances.

4. Criminal law 🔑507½.

In prosecution for infamous crimes under Pen. Code, §§ 286, 288a, evidence *held* to show that prosecuting witnesses were accomplices.

5. Criminal law 🔑823(12), 824(7)—Failure to define accomplice in instructions and to state law as to corroboration held not error, in absence of request and in view of instruction given.

In absence of request by defendant, failure of trial court to give full instructions defining accomplice and stating law as to corroboration was not error, in view of instruction that corroborating evidence must, without aid of testimony of accomplice, tend in some degree to connect defendant with offense.

6. Criminal law 🔑829(9)—Refusal of instruction that presumption of innocence continued throughout trial, and, if facts could be reconciled on hypothesis consistent with innocence, to acquit, was not error, where proper instruction was given.

Refusal of instruction that burden was on state and presumption of innocence continued throughout trial, and, if facts could be reconciled on hypothesis consistent with innocence, to acquit, was not error, where court gave proper instruction on those subjects in different language.

7. Criminal law 🔑815(1)—Instruction that fact that particular rules of law had been stated did not indicate applicability held not error as authorizing disregard of instructions on alibi and character.

Instruction, that fact that particular rules of law had been stated did not indicate that they were necessarily applicable or that court considered them so, was not error as amounting to charge that jury might disregard instructions on questions of alibi and good character of defendant.

8. Criminal law 🔑1166½(3)—That reporter left courtroom without knowledge of defendant's counsel was not reversible error, where he had not asked that argument be reported (Code Civ. Proc. § 269).

Where defendant's counsel did not request that court reporter take down argument of prosecuting attorney, under Code Civ. Proc. § 269, fact that he left room without knowledge of defendant's counsel did not constitute reversible error.

9. Criminal law 🔑1166½(1)—Fact that arguments to jury were not taken held not reversible error, in absence of request, regardless of objection thereto (Code Civ. Proc. § 269).

Under Code Civ. Proc. § 269, in taking down testimony, it is duty of court reporter also to take objections and rulings thereon, but, if he is desired to take arraignments or arguments, counsel should so request, and mere fact that argument to jury, not requested to be taken, was not taken, is not reversible error, even if objection was made to part of argument.

10. Criminal law 🔑1177—Court's inadvertently striking out request for opening and closing arguments of counsel as part of record on appeal held not prejudicial error, in view of further order of court.

Fact that court struck out request specifying opening and closing arguments of counsel for record on appeal by drawing pen through words, but afterward noted on margin that such was an inadvertence, and afterward prepared order for such matters as were available, was not prejudicial to defendant.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

John J. Casey was convicted of infamous crimes against nature, and he appeals. Affirmed.

Wm. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. The appellant in this case was charged by three counts of an information with having on the 3d day of May, 1925, committed the infamous crimes proscribed by sections 286 and 288a of the Penal Code upon the persons of two young men. He was convicted upon each count, and appeals from the order denying a motion for new trial and from the judgments entered accordingly.

The testimony of the two young men was to the effect that, as they left the Odd Fellows Hall at El Monte at about midnight on the date in question, the defendant called them to an automobile in which he was seated and proposed that they accompany him to a place where he asserted that he expected to meet some girls. The two men entered the car and occupied the front seat to the right of the defendant. They drove easterly, out of El Monte, then turned back, passing through the town, and continued until they arrived at a lonely section of the country, where the defendant stopped, turned off the lights and began to feel of the legs of the man sitting next to him. The latter testified that he objected, and his partner, who sat on the outside testified, "I put up an objection, and he told me to keep my mouth shut"; that the defendant took an automatic revolver from his coat pocket, tapped him with it, and told him to "keep quiet." Casey then proceeded to commit the offense with which he was charged under section 288a. Almost immediately thereafter the two young men exchanged places in the front seat, and the same offense was committed upon the other. Following this, one of them transferred with the defendant to the rear seat, where the latter violated section 286, while the partner of the victim of this offense remained in the front seat. All three later alighted from the machine, and one of the defendant's passengers noted the license number of the car upon a paper, which was offered in evidence at the trial. On the following day one of the young men reported the occurrences to a watchman at El Monte, giving him the automobile number, and appellant's arrest resulted.

[1] The principal defense during the trial was an alleged alibi, the defendant positively denying that he had ever seen either of the boys previously to May 9, 1925, when they appeared at the police station. He swore that he was at home all night on the date of the offense, and his mother corroborated him in this. Appellant had previously signed a typewritten statement which he made to the assistant chief of police, wherein he maintained that he was at the Hollywood Military Academy from 9 p. m. to 2 a. m. of the same night with Police Captain Hall. Capt. Hall testified that the defendant was not at the academy with him, and each of the men first herein mentioned positively identified him as having been at El Monte. The license number taken by one of them corresponded with that of appellant's machine. The jury's exclusive province was to determine as to the truth or falsity of these conflicting stories, and, having done so, we are not authorized to disturb their verdict upon the ground of improbability or insufficiency of the evidence.

[2] It is insisted that prejudicial error was committed by the trial court in permitting the district attorney to interrogate the defendant during cross-examination as to whether or not he was asked questions and gave answers contained in the signed statement above mentioned, without requiring that it be shown to the defendant as provided by section 2052 of the Code of Civil Procedure. Appellant asserts that in People v. Orosco, (Cal. App.) 239 P. 82, the lower court was reversed "for this very error, among others." However, the statement discussed in that case consisted of testimony taken before a coroner's jury, and during the course of the opinion it was said:

> "It has been held in one case that a statement made by one to the police and by the latter reduced to writing is not a statement 'in writing,' under the section, of the party who makes the statement. People v. Glaze, 139 Cal. 154, 72 P. 965. See, also, People v. Talman, 26 Cal. App. 348, 146 P. 1063." People v. Orosco, therefore, sustains the ruling below.

[3] The following instruction was requested by the defendant and refused, "You are advised by the court to acquit the defendant, John J. Casey." Appellant's contention here is that the only evidence of the commission of the offense is to be found in the testimony of the two men, and that they were accomplices, and were not corroborated. The respondent insists that there is no evidence in the record tending to support this theory. There were many corroborating circumstances, including the defendant's own contradictory statements as to his whereabouts on the night of May 2-3, 1925, his identification by one witness not an accomplice, and the license number of the car. We think that this instruction was properly refused.

[4] Appellant next insists that, while the court instructed the jury as to what constitutes corroboration, it erred in failing to define an accomplice and to charge that a conviction could not be had without corroboration, although not requested to so instruct. Respondent also insists that there is no evidence amounting to even a suggestion that the two boys were accomplices of the defendant, but that they were shown to have submitted through fear and coercion.

We think that the uncontradicted testimony of the prosecuting witnesses upon direct examination alone strongly tends to show that they were at least not unwilling participants. It seems inconceivable that two young men 17 and 19 years of age, respectively, and one of them weighing nearly 150 pounds would be incapable of protecting themselves against the indecent advancements of one lone companion under the circumstances disclosed by the record in this case. It appears that one of them said "Don't" and "not to do it"; that the defendant told him to "keep still," to which he replied that he could take care of himself, whereupon Casey drew an automatic revolver, tapped him with it, and returned the gun to his pocket. There was no physical resistance or further remonstrance on the part of either. The older boy, who sat farthest from the defendant, was asked what occurred "after he finished with John," and the significant response was, "Why, John and I exchanged places; * * * John raised up and I slid over;" that the defendant afterwards asked the witness to transfer to the rear seat, and that, when the latter refused to do so, "he told John to go, and he went." One of the boys testified that he knew early during the ride that Casey was a degenerate, and "asked him what was coming off, * * * what he was trying to do"; that Casey then said, "You keep still." The witness testified that he was afraid to resist, and that, when the defendant produced a revolver, "that scared me more than ever; then I knew I couldn't do anything, so I just had to go ahead and let him do what he wanted." It was admitted, however, that after the meek display of the revolver there was no further mention of firearms or of their use. During the ride these young men drank liquor from a bottle carried by the defendant, but they were not intoxicated; there was no attempted claim that either of them was physically unable to defend himself against the disgraceful advances of a proven degenerate. As we have seen, they accepted a ride in the middle of the night, in quest of two mythical girls, with an entire stranger, and became parties to one of the most repulsive degradations known to humanity.

Though it be conceded, as argued by respondent, that the victim of a holdup is not an accomplice to the robber, yet it has been held that a prosecutrix of legal age of consent, who does consent, is an accomplice to an incestuous intercourse (People v. Stratton, 141 Cal. 604, 75 P. 166; People v. Letoile, 31 Cal. App. 166, 159 P. 1057), and that a boy 16 years of age who knowingly participates in an infamous crime against nature is an accomplice (People v. Robbins, 171 Cal. 466, 154 P. 317). In view of the record presented in this case, we are led to the inevitable conclusion that the prosecuting witnesses were accomplices.

[5] The defendant requested and the court gave the following instruction:

> "The corroborating evidence required under the law must in itself, and without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense. It need not be sufficient to establish guilt, but it must tend, in some degree, at least to establish the commission of the offense, and to implicate the defendant therein."

No other instruction was requested or given upon the subject of accomplices. It is here contended by appellant that it was the duty of the trial court to prepare and give, of its own motion, full instructions defining an accomplice and stating the law as to corroboration. It has been held that if the defendant deems it proper or advisable for the protection of his right that such instructions be given, it is his duty to request them. People v. Yates, 71 Cal. App. 788, 236 P. 185. And this is apparently the consensus of rulings in other states. Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; Carroll v. State, 45 Ark. 539; Robinson v. State, 84 Ga. 674, 11 S. E. 544; Motsenbocker v. State (Okl. Cr. App.) 233 P. 487; State v. Miller, 83 Kan. 410, 111 P. 437; State v. Weatherman, 202 Mo. 6, 100 S. W. 482; Goemann v. State, 94 Neb. 582, 143 N. W. 800; State v. Glass, 29 N. D. 620, 151 N. W. 229; State v. Ham, 24 S. D. 639, 124 N. W. 955, Ann. Cas. 1912A, 1070; State v. Grant, 26 Idaho, 189, 140 P. 959.

[6] It is next contended that the trial court erred in refusing to give requested instructions that a defendant is never required or expected to prove his innocence, but that the burden rests upon the prosecution to prove every essential fact constituting an offense; that the presumption of innocence attends the defendant throughout the trial, and that in the light of this presumption, if the jury in weighing and considering all the facts and circumstances could reconcile them upon a reasonable hypothesis consistent with innocence, they should do so and acquit the defendant. The court gave an instruction which was approved in People v. Lewandowski, 143 Cal. 574, 77 P. 467, and which embraced in different language the foregoing rules. Appellant complains of a portion of the latter instruction, but, taken as a whole, we think it was proper, and, having covered the requested charges, it was not necessary to give them again. People v. Dillon, 68 Cal. App. 457, 229 P. 974.

[7] Again, it is complained that, after giving certain requested instructions, the jury were charged generally that the fact that particular rules of law had been stated should not be taken as an indication that they were necessarily applicable to the cause on trial, or that the court considered them necessarily applicable. It is asserted that this amounted to a charge that, while the jury had been instructed upon questions of alibi, good character of the defendant, etc., they might disregard such instructions. We do not so understand the statements of which complaint is made. Although more apt language might well have been used, it appears that the meaning intended to be conveyed was merely this: That, while certain rules of law had been stated, the court did not wish to be understood as expressing any opinion upon matters of fact. It is obvious that whether or not legal principles announced are applicable to the facts of a particular case will often depend upon the jury's interpretation of the evidence. Such an instruction was appropriate in the instant case. One of similar import was approved in People v. Clark, 70 Cal. App. 531, 233 P. 980.

[8] The appellant urgently insists that he was denied due process of law. As a basis for this claim he calls attention to the fact, which is admitted, that the official reporter was absent from the courtroom during the district attorney's argument to the jury. The reporter took down all the other proceedings, but, when the evidence was closed, the court stated to the reporter, to use the language of the judge presiding:

> "That it would not be necessary for him to take the argument unless requested by the district attorney or the attorney for the defendant, and no such request had been presented, and I excused him with the understanding that, if the request should come in at any time, that he would come at once. That is what was said, and is always said."

Appellant's counsel objected to certain remarks of the district attorney during argument, and such objection was overruled, but neither the remarks, objections, nor rulings thereon appear in the record. It is not contended that the district attorney's remarks were damaging to the defendant, that the court's ruling was erroneous, nor is it attempted to be shown how appellant was prejudiced by the absence of the reporter. It is simply said that the reporter left the courtroom without the knowledge of counsel, and that this constituted reversible error.

Respondent argues that statements of counsel to the jury need not be reported unless counsel or the court so request. Section 269 of the Code of Civil Procedure provides that:

> "Such reporter * * * must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge. * * *"

It does not appear that either counsel or the court ordered the reporter to take down any of the proceedings in this case. However, we are not cited to, nor are we aware of, any authority in this state holding that, should such an order be made for the reporting of the testimony, it would automatically require a stenographic record of all the other steps enumerated in the statute. In Koyer v. Willmon, 12 Cal. App. 87, 92, 106 P. 599, it was held that under the same circumstances it was not prejudicial error to excuse the reporter before oral argument in a civil action. If appellant's contention be accepted that an order to report all the testimony requires that the reporter further take down the other proceedings, including arguments of the prosecuting attorney to the jury, it would appear from the wording of section 269, Code of Civil Procedure, that it has no application to civil actions, except in cases wherein the prosecuting attorney is interested and takes part. Yet obviously such a construction would be contrary to the intention of the Legislature.

In Lamm v. State, 4 Okl. Cr. 641, 111 P. 1002, there was presented for construction a statute which provided that shorthand reporters should, when required by a party or attorney, take down "all the proceedings upon the trial of any cause, as well as all statements of counsel, the witnesses or the court," and that, upon request of counsel for a reporter, the failure or refusal of the court to order one would constitute reversible error. It appears that a motion was there made for an order that the reporter take down all proceedings, including statements of counsel and the court, made in the presence and hearing of the jury. The court ruled that the reporter must take all that occurred during the trial except arguments of counsel, and that the attorney for either side would be entitled to have taken any statement made in argument to which either of them should desire to object. Upon appeal such order was squarely presented for consideration, and was held to be proper, the court saying:

> "We think that this order of the court was all that the defendants had a right to demand under the statute above quoted. * * * We think the object of this statute was simply to enable the parties to a trial to secure a record upon appeal, and that it does not force the judge to have the stenographer take down any statement that would not be subject to review upon appeal. It does not mean that the court stenographer should be required to take down the entire speeches of counsel for both sides of the case where no objection is made to such speeches. It gives the counsel the right to have any given statement, to which they object, and which they desire to incorporate in a case-made, taken down by the stenographer, and, upon refusal of the court to have this done, reversible error is committed, without regard to the merits thereof."

In Miller v. State, 9 Okl. Cr. 255, 131 P. 717, L. R. A. 1915A, 1088, and Walker v. State, 6 Okl. Cr. 370, 118 P. 1005, it was further held that under such statute improper remarks of counsel could not be presented for consideration upon appeal by affidavit or otherwise than phonographic report, unless it were shown that a request for reporter had been made, and was refused by the court. In the case last cited, however, it was said:

> "But even if affidavits and oral testimony were admissible, for the purpose of showing that improper arguments were made by the attorney for the state in his closing argument, we could not consider the question here presented, because it is not incorporated in the petition in error, and therefore is not properly presented for our determination."

[9] We think, after careful consideration of the point presented here, and of the foregoing authorities, that it was the intention of the framers of section 269 of the Code of Civil Procedure that in taking down the testimony it should be the duty of the reporter to also take objections and rulings thereon, but that, if it be desired that he take arraignments, or arguments, counsel should make a request therefor. Hence the mere fact that arguments were not here taken is not reversible error, and, since no objectionable statement of the district attorney is presented by the record, we are unable to say that the defendant was prejudiced thereby.

[10] Appellant argues that the record was "mutilated" by the trial judge, in that the order for the record upon appeal was modified by him with pen. There appears to be nothing in this fact that could have prejudiced appellant's rights. The request specified, among other things, the opening and closing arguments of counsel, etc., which the court struck out by drawing lines through the words, but thereafter noted on the margin that this was an inadvertence, and prepared an order of its own for such matters as were available. The record contains such request, the court's order, and all proceedings except argument, and objections and rul-

ings during argument, which we have already discussed. In spite of the mutilation, the full contents of the paper mutilated is in the record and has served every purpose that it could have served appellant had it remained untouched by the court. We can find no way in which appellant was prejudiced by the error.

The judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

79 Cal. App. 395

SAWYER v. HOOPER. (Civ. 4655.)

(District Court of Appeal, Second District, Division 1, California. Sept. 28, 1926.)

1. **Negligence** ⚷108(1).

On demurrer to complaint on ground that cause of action was not stated, whether negligence could be inferred from facts alleged *held* for court.

2. **Negligence** ⚷32(1).

One in lawful possession of premises must use reasonable care to keep them in safe condition for invitees.

3. **Gas** ⚷20(1)—**Complaint alleging defendant had uncapped gas pipe on premises and accessible valve which third person turned, causing explosion injuring invitee, held to state cause of action.**

Complaint alleging that defendant had uncapped gas pipe on premises and accessible valve which would turn gas on, and that third person turned it on, with result that plaintiff, who was invitee, was injured in explosion, *held* to state cause of action, since negligence in having uncapped pipe and accessible valve is included in proximate cause of explosion, if third person's act could be anticipated.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Fred H. Sawyer against William H. Hooper. Judgment for defendant, on demurrer, and plaintiff appeals. Reversed.

Earle M. Daniels, Julius V. Patrosso, and C. C. Mishler, all of Los Angeles, for appellant.

Owen C. Emery, of Glendale, for respondent.

PER CURIAM. This action was brought to recover damages for personal injuries sustained by plaintiff while upon certain premises of which defendant, Hooper, was the lessee and in possession, and which injuries were occasioned by the explosion of illuminating gas which had escaped from an uncapped gas pipe on said premises.

Without a statement of unnecessary details of the pleading in question, and regarding the sufficiency of which no controversy exists as between the parties to this appeal, it may suffice to state that, among other things, the amended complaint contains allegations, in substance, that the premises in the possession of defendant, Hooper, were connected with a gas main which contained "large quantities of illuminating gas," and that a gas meter equipped with a valve or device for the purpose of opening or closing the flow of gas from the gas main was installed on said premises; that defendant made no investigation for the purpose of ascertaining whether the gas pipes on the said premises were properly installed or in good condition, and knew that the outlets of said pipe leading into the premises of which he was in possession were not capped or otherwise closed to prevent the escape of illuminating gas therefrom should the valve at or on said meter be opened, and knowingly permitted to be maintained the said meter and the valve therein or thereon without inclosing or otherwise protecting the same from being turned on without his knowledge or consent, or the knowledge or consent of the proprietor of the gas main, and without locking or securing said meter or the valve therein or thereon to prevent the same from being turned on without his knowledge or consent, or the knowledge or consent of the said owner of said gas main; that at all times mentioned in the complaint defendant, Hooper, knowing that the gas pipes on the premises occupied by him were connected with the gas mains of the said gas company, negligently and carelessly maintained and permitted one of said gas pipes located on the said premises and connected with the gas main, as aforesaid, to remain uncapped and not otherwise closed to prevent the escape of gas into the premises occupied by defendant from the said gas mains; that by reason of the failure of said defendant to protect or secure said gas meter and the valve therein or thereon the said defendant carelessly and negligently permitted certain persons, without the knowledge or consent of the owner of said gas main, to negligently and carelessly turn on or open the valve in or on said meter to which were connected the gas mains of the owner of said gas main and the pipes leading into the premises occupied by said defendant, whereby gas was permitted to pass and flow from said gas main into the pipes leading into the said premises of said defendant, and that by reason thereof gas did pass or flow into said premises, and, by reason of defendant's negligence in failing to cap or otherwise close the outlets in said gas pipes, gas escaped from the said uncapped gas pipes therein, by reason of which said premises were completely filled with large quantities of combustible and inflammable gas, which became ignited, and thereupon exploded, and by reason whereof the plaintiff, who at the time of said explosion was lawfully on the premises occupied by the said defendant, and at his invitation and request, sustained the injuries of which complaint is made.

A demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained by the court. Judgment was rendered in favor of defendant, Hooper, and the plaintiff appeals therefrom.

It will thus be noted that more briefly stated the question to be determined is whether negligence may be predicated upon the fact that with full knowledge of the existing conditions defendant had an escaping gas pipe on his premises which was connected with a gas main, and "carried large quantities of illuminating gas," and which gas was ordinarily prevented from entering the premises of defendant by a valve which at all times was "in the possession and under the control of the defendant," but which was unguarded and unprotected from the acts of careless or mischievous persons, and from which conditions portions of the accumulation of gas which escaped from such uncapped gas pipe filled the premises, and an explosion occurred which caused the injuries of which plaintiff complains.

[1] At the outset it is perhaps well to bear in mind that, assuming the truth of the facts pleaded, the question of whether negligence properly and lawfully may be inferred from such a state of facts in the first instance is solely for the court to determine. In the existing status of the case, what view of supporting evidence might be taken by a jury is immaterial. In other words, the fact that a jury might arrive at a conclusion either that the defendant was guilty of negligence or that he was in the exercise of due care cannot be considered.

[2] The principle of law appears to be well established that one in lawful possession of premises, who by his invitation induces others to go thereon, is under the duty of using reasonable care to keep such premises in a safe and suitable condition to the end that such invitees will not be unnecessarily exposed to danger.

[3] The general rule with reference to liability for damages caused by wrongful act is that the negligence which directly causes such damages must be considered as the responsible agency. It is apparent that in the case at bar two different acts of negligence were present: First, the uncapped gas pipe; and, secondly, the act of strangers turning the valve so as to permit the flow of gas into such uncapped pipe. The underlying legal proposition here submitted is whether the uncapped gas pipe, together with the conditions present as hereinbefore set forth, can be considered as the proximate cause of the injuries; in other words, the inducing or immediate cause. Abstract statements of the law apparently applicable to the general facts herein might seem to indicate that, if no direct negligent act of the defendant was the cause of the injuries to plaintiff, but that such injuries arose from the negligent act of a third person, no liability will attach to defendant. One of the exceptions to such rule is that, where it appears that one has committed a negligent act, which is continuing in its nature, and from which it is or should be anticipated that in the ordinary or natural course of human conduct a succeeding act of negligence directly connected with the first negligent act is likely to be committed by any person, and which will result in injury, the proximate cause of said injury will include the first negligent act. Aside from statements of learned authorities on the law of negligence, the adjudicated cases in this state are by no means silent on the principle to which reference has just been made.

In Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 58, 183 P. 280, 281, may be found the following language:

> "The rule, as we understand it, applicable to such cases, is that where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen. * * *"

So in the case of Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, where it appears that an explosion of gas resulted from the negligence of the company in repairing a leak in the gas pipes and from the act of the lessee of the premises in bringing a light in contact with the gas, thus causing the explosion, it was held that both acts were the proximate cause of the resultant injury. A part of the preliminary law of the case as stated in the syllabus is that:

> "An independent wrongful act, to constitute the proximate cause of an injury, by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission.
>
> "The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoined with the original act to create the disastrous result."

Another case in point is that of Feeney v. Standard Oil Co., 58 Cal. App. 587, 209 P. 85, wherein it appears that an employee of defendant spilled a considerable quantity of gasoline on the floor of a garage where he was making a delivery and that some ten or fifteen minutes later, while waiting in the garage for an approval of his delivery tags by the owner of the garage, the employee of defendant carelessly and negligently dropped a lighted match into the spilled gasoline, which resulted in the destruction of the garage by fire. In the course of the opinion it is said:

> "Since the court did not find that the gasoline was negligently spilled the judgment must have been grounded upon McDonald's [the employee's] negligence in igniting the gasoline or his failure to promptly remove it from the cement floor of the garage." And after commenting upon the well-known dangerous character of the gasoline especially in the circumstances there presented, the court said that the danger to be apprehended from leaving two and one-half gallons of gasoline spilled on a cement floor of a garage was well within the range of reasonable foresight. Nor would McDonald's independent act of negligence in dropping the lighted match relieve the defendant from the consequences of his negligent failure, "as its agent, to remove the gasoline. 'If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.' Lynch v. Nurdin, 12 Q. B. A. & E., N. S. 29."

In the case of Carroll v. Central Counties Gas Co. (Cal. App.) 240 P. 53, a gas company constructed a pipe line which in part was parallel to a bridge, but located a distance of five feet therefrom. An automobile in which plaintiff was riding, without negligence on his part, was deflected from its course, and struck and broke the pipe line which caused gas to ignite and burn the plaintiff. With reference to the question of law here under consideration, after observing that the defendant was under obligation to exercise ordinary care to prevent the escape of gas from its pipe line, which care included particular consideration of the danger to be avoided and the likelihood of injuries resultant therefrom, the court quoted with approval, the following language:

> "Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it (citing several cases).
>
> " 'If the negligent act or omission is one which the company ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then it is liable for any injury proximately resulting therefrom, although it might not have foreseen the particular injury which did happen.' 12 R. C. L. 913."

Continuing further, the court said:

> "Respondent contends that, if it be conceded that it was guilty of negligence in the maintenance of its pipe line, such negligence was not the proximate cause of the alleged injury, but that 'the act of the automobilist who forced the car in which plaintiff was riding off the road was the proximate cause of the injury.' The defendant's negligence, however, was continuous in its nature, existing at all times up to the moment of the injury. Under a state of facts not distinguishable in legal effect from those here involved, it is said: 'The independent wrongful act, to constitute the proximate cause by displacing the original primary cause must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. * * * The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result' "—citing cases.

Other cases might be cited which in principle uphold the rule in effect as heretofore announced that, where a negligent act is succeeded by a disconnected act of negligence of another person, and which results in injury to a third person, if the original negligence was such that in the ordinary and natural course of events the second negligent act should have been anticipated as reasonably likely to happen, the proximate cause of the injury may be laid in the first negligent act.

In the instant case, as disclosed by the allegations of the amended complaint, defendant, Hooper, was guilty of negligence in having on his premises wherein plaintiff was invited an uncapped gas pipe "filled with large quantities of illuminating gas," which was prevented from flowing through and escaping from the uncapped gas pipe only by a valve, and unprotected from the acts of careless or mischievous persons. Defendant knew, or at least should have known, of the danger likely to arise from such a situation. It was through his original negligence, aided by such other negligence of a third person and which he should have foreseen the probability of its occurrence, with the resultant injuries to innocent persons who might be on his premises through his invitation, that the accident occurred. The amended complaint tells a connected and concise story of defendant's duty toward plaintiff and of defendant's alleged negligent acts, which, in the light of the authorities, were the proximate cause of plaintiff's injuries. The demurrer to the amended complaint should have been overruled.

For the reasons hereinbefore set forth, it is ordered that the judgment be, and it is, reversed.

79 Cal. App. 339

DUGGAN v. FORDERER et al. (Civ. 5456.)*

(District Court of Appeal, First District, Division 1, California. Sept. 15, 1926. Rehearing Denied Oct. 14, 1926.)

1. Automobiles ⟹245(2)—Chauffeur's negligence in driving into street from behind car parked along left curb held for jury.

Whether defendant's chauffeur was negligent in driving into traveled portion of street from behind car parked along left curb, without ascertaining whether he would collide with any traffic, *held* for jury.

2. Automobiles ⟹244(2).

Evidence *held* sufficient to support verdict for injured motorcyclist colliding with automobile as it was leaving left curb of street.

3. Negligence ⟹136(5).

Directed verdict on issue of negligence is proper only where evidence is so conclusive that court would be compelled to set contrary verdict aside.

4. Negligence ⟹136(14).

Existence of negligence is usually jury question.

5. Appeal and error ⟹927(7).

In reviewing directed verdict for defendant, plaintiff's evidence must be taken as true.

6. Automobiles ⟹243(3)—Ordinance prohibiting parking along left curb except in residence district held properly excluded where scene of automobile accident was not shown to be business district (Motor Vehicle Act, 1915, as amended by St. 1917, p. 382, St. 1919, p. 191, and St. 1921, p. 67).

Ordinance prohibiting parking along left curb except in residence district *held* properly excluded in personal injury action by motorcyclist who collided with automobile leaving left curb, where scene of accident was not shown to be business district, in view of Motor Vehicle Act 1915, as amended by St. 1917, p. 382, St. 1919, p. 191, and St. 1921, p. 67.

7. Appeal and error ⟹970(2)—Evidence ⟹382—Where preliminary proof is necessary to introduction of documentary evidence, its sufficiency is to be determined by trial judge, and his discretion will not be disturbed in absence of abuse.

Where preliminary proof is necessary to introduction of documentary evidence, its sufficiency is to be determined by trial judge whose decision will not be disturbed in absence of abuse of discretion.

8. Evidence ⟹25(2).

Court will not take judicial notice that Potrero avenue at Sixteenth street, San Francisco, is business district.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Thomas Duggan, a minor, by John Cavanagh, his guardian, against G. S. Forderer and others, in which the action was dismissed as to all defendants except Alice B. Forderer. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Reisner & Honey, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of respondent upon an instructed verdict, in an action for personal injuries sustained by appellant as the result of a collision of appellant's motorcycle with respondent's automobile. Before the trial, the action was dismissed as to all defendants except Alice B. Forderer, respondent herein.

[1, 2] The accident occurred on Potrero avenue near Sixteenth street in the city of San Francisco, almost immediately in front of the place of business of G. S. Forderer, the husband of respondent, which was on the east side of Potrero avenue—Potrero avenue runs in a general northerly and southerly direction, while Sixteenth street runs in a general easterly and westerly direction. The morning of the accident Mr. Forderer and his wife had returned from Los Angeles and were met at the Townsend street depot by the chauffeur, who was driving the car owned by Mrs. Forderer, and by whom he was employed. Mr. Forderer being desirous of going immediately to his place of business, the chauffeur drove him there, intending upon his getting out of the car to drive Mrs. Forderer home. When Potrero avenue was reached the automobile traveled on the west side of the street, headed south until it reached a point nearly opposite to the entrance of Mr. Forderer's place of business, when the car was driven across Potrero avenue to the east side of the street and stopped in front of such entrance. The point where the car was stopped was 77 feet and 10 inches from the north property line of Sixteenth street. As the machine was thus stopped along the east curb of Potrero avenue, it was headed south. Just as Mr. Forderer got out of the machine an alarm of fire in the immediate vicinity was heard, and the fire engine and apparatus appeared. On account of the fire, the machine was unable to move and was compelled to remain in front of Mr. Forderer's premises for some considerable time. When the fire was over, and the automobile was permitted to be moved, the chauffeur started the machine, intending to cross to the west side of Potrero avenue, which would be his right-hand side in the direction he intended going, and to then continue west on Sixteenth street and take Mrs. Forderer home.

The appellant, riding a motorcycle, came west on Sixteenth street and turned north

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court November 12, 1926.

into Potrero avenue, proceeding on the right-hand side of the street, about halfway between the curb and the first car rail, and came into collision with the front end of respondent's automobile at a point estimated by the different witnesses to be 40 to 65 feet from the intersection of Sixteenth street. At the time of the collision the front end of the automobile was 20 feet from the curb and 6 feet from the first car rail, the distance from the curb to the first car rail being 26 feet. Up to this point there is no variance in the testimony, excepting as to the place where the impact occurred, the witnesses placing it from 40 to 65 feet from the intersection of Sixteenth street. The plaintiff testified that, when he turned the corner at Sixteenth street and proceeded north on Potrero avenue, the roadway was clear, and that a machine was parked on the east side of the street at the curb; that there might have been more machines parked along the curb; that he kept going, and all of a sudden the respondent's machine shot out from the curb; that he did not see it until it was 8 or 9 feet in front of him; that he tried to avoid the collision by turning to the left, but was unable to do so. On cross-examination he testified that between the time he first saw the machine and the moment of the impact it was not going faster than 6, 7, or 8 miles an hour.

Appellant's witness Fields testified that he was driving a truck, and that appellant passed him on Sixteenth street, and that he followed appellant and saw him turn into Potrero avenue and saw everything that occurred thereafter; that he stopped his truck in the intersection of the two streets; that appellant was driving his motorcycle about 15 miles an hour at the time of the impact; that the impact occurred about 40 feet northerly from the property line of Sixteenth street and that appellant had reached a point about 30 feet down Potrero avenue when the machine of respondent started out from the curb, or, in other words, appellant was but 10 feet from the point of impact when respondent's car was driven out into the collision; that appellant was looking in the direction he was going all of the time from the time he turned into Potrero avenue until the collision, and was driving his motorcycle about halfway between the car rail and the curb; that there was another car parked in front of respondent's car, and that when he first saw respondent's car it was moving and coming out from behind the other car.

As to whether the operator of respondent's car, in driving out from behind another car onto the traveled portion of the street without first seeing that there was no traffic he might collide with, was negligent, or whether in doing so the chauffeur of respondent operated such car in a careless or reckless manner and without due regard for the traffic on the highway, is a question of fact for the jury to determine. Unquestionably the testimony given by the witness Fields, if believed, is sufficient to support a verdict. It is true that other witnesses testified that appellant was looking on the other side of the street and did not see the automobile of respondent until immediately before the collision; that his attention was directed to his impending danger by the chauffeur who sounded his horn and hollered at him, and that then he attempted to cut to the right of the car, but he suddenly swerved and his motorcycle went right from under him, and he collided with the automobile, and that the automobile was stopped when he collided with it.

[3, 4] The rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The court may grant a new trial even when there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict. It is under compulsion to order a new trial, and may do so on its own motion when the evidence is wholly insufficient to sustain the verdict. This is the meaning of the language of Estate of Baldwin, 162 Cal. 471, 123 P. 267, where it is said that a directed verdict is proper "whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence." Estate of Caspar, 172 Cal. 150, 155 P. 631.

The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury, and while the court may withdraw the case from the jury and direct a verdict, it can do so only where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a contrary verdict. Davis v. California St. C. R. Co., 105 Cal. 131, 38 P. 647; Estate of Baldwin, 162 Cal. 471, 123 P. 267; Diamond v. Weyerhaeuser, 178 Cal. 541, 174 P. 38.

[5] In the instant case, if the testimony of the witness Fields be true, and for the purpose of directing a verdict it must be assumed to be true, the court would not be compelled to set aside a verdict found in accordance with his testimony.

[6, 7] In the assignments of error that the court erred in refusing to direct a verdict in favor of appellant and erred in excluding from evidence section 11 of Ordinance No. 1857, New Series, Ordinances of the City of San Francisco, prohibiting any person in charge of a vehicle to stop the same with the left side of such vehicle towards or along or next to the curb, except in the residential district, there is no merit. The court properly denied the motion of appellant for an instructed verdict, and, upon the foundation laid for the introduction of the ordinance, it

was properly excluded. The Motor Vehicle Act, adopted in 1915, and as amended in 1917 (St. 1917, p. 382), 1919 (St. 1919, p. 191) and 1921 (St. 1921, p. 67), in force at the time of the accident, did not prohibit the parking of a machine as the machine in question was parked prior to the happening of the accident.

Unless it affirmatively appears that the district in which the accident happened was not a residential district, no foundation was laid for the introduction in evidence of the ordinance, for if the district be not a business district, the ordinance was immaterial. "The general rule is that where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and that his determination of the matter will not be disturbed unless there has been an abuse of discretion." Webster v. San Pedro Lumber Co., 101 Cal. 329, 35 P. 871.

In the instant case, the record shows that in the immediate vicinity of the place where the accident happened there were some buildings occupied for business purposes and some as residences. On the east side of Potrero avenue, between Fifteenth and Sixteenth streets, was the Forderer Cornice Works; next to that, a residence, and next to that, another place of business; on the west side was a Standard Oil station and a residence, the rest of the block being vacant. The block to the south of the place of accident was built up, as follows: At the southeast corner of Sixteenth street and Potrero avenue was a store with a residence over it; next to that, two stores with residences above them; next to that was a two-story flat. On the south side of Sixteenth street in the block from Potrero avenue east are all residences, excepting the building on the corner, made up of a store with a residence over it. In the immediate vicinity of the place of the happening of the accident was a public school and park. Such was the condition of the record when appellant offered the ordinance in evidence. Unless it affirmatively appears that the district in which the accident happened was not a residential district, no foundation had been laid for the introduction of the ordinance. Whether it was or was not such a district was a question for the court to determine before passing upon the objection made. As was said by the Supreme Court in Webster v. San Pedro Lumber Co., supra:

> "The general rule is that where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and that his determination of the matter will not be disturbed unless there has been an abuse of discretion."

[8] Appellant contends that, under the authority of Varcoe v. Lee, 180 Cal. 338, 181 P. 223, the trial court should have taken judicial notice that Potrero avenue, where the accident occurred, was a business district. In the Varcoe Case the court instructed the jury that Mission street, between Twentieth and Twenty-Second streets, in the city of San Francisco, was a business district. In affirming the case on that point, the Supreme Court uses this language:

> "It should perhaps be noted that the fact that the trial judge knew what the actual fact was and that it was indisputable would not of itself justify him in recognizing it. Nor would the fact that the character of the street was a matter of common knowledge and notoriety justify him in taking the question from the jury if there were any possibility of dispute as to whether or not that character was such as to constitute it a business district, within the definition of the statute applicable. If such question could exist, the fact involved—whether the well-known character of the street was sufficient to make it a business district—was one for determination by the jury. But we have in this case a combination of the two circumstances. In the first place, the fact is indisputable and beyond question. In the second place, it is a matter of common knowledge throughout the jurisdiction in and for which the court is sitting. A consideration of the reasons underlying the matter of judicial notice and its fundamental principles leaves, we believe, but little doubt as to its applicability here."

Under the rule thus laid down the court would not, under the evidence, take judicial notice that the locality where this accident occurred was a business district.

The ordinance, aside from being objected to as immaterial and inadmissible, is further objected to as being void for uncertainty in that nowhere in the ordinance is there any definition of "residential district," and also as being in contravention of the provisions of the State Motor Vehicle Act. The views already expressed render unnecessary a decision on these latter objections.

The judgment is reversed, and the cause remanded for a new trial.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 380

GOLDMAN et al. v. DAHLBERG.*

(Civ. 5615.)

(District Court of Appeal, First District, Division 1, California. Sept. 20, 1926.)

1. Appeal and error ⚷731(5)—Objection on appeal that under facts plaintiffs were not entitled to any recovery held unavailable, where defendant appealed by bill of exceptions not showing wherein plaintiffs were not entitled to recovery (Code Civ. Proc. § 648).

Objection on appeal that under facts plaintiffs were not entitled to any recovery *held* unavailable, under Code Civ. Proc. § 648, where defendant chose to appeal by bill of exceptions not showing wherein facts did not entitle plaintiffs to a recovery.

2. Appeal and error ⚷928(1)—Assignment of error based on giving or refusal of instructions held unavailable on appeal, where bill of exceptions did not contain all instructions given.

Assignment of error, based on giving or refusal of instructions, *held* unavailable on appeal, where bill of exceptions did not contain all of instructions given, since in such state of record reviewing court would assume that, were the whole charge of court before it, it would not show error.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Heim Goldman and others, doing business under the firm name and style of Goldman, Nye & Surr, a copartnership, against Andrew Dahlberg. Judgment for plaintiffs, and defendant appeals. Affirmed.

Herbert Chamberlain, of San Francisco, for appellant.

Goldman, Nye & Surr, of San Francisco, pro se.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of respondents in the sum of $400 for legal services. The case was tried by a jury, which returned a verdict for $750, which amount was subsequently reduced with the consent of respondents as a condition to the denial of appellant's motion for a new trial.

Appellant urges three grounds upon which the judgment should be reversed: First, under the facts plaintiffs are not entitled to any recovery; second, the court erred in refusing to give certain instructions requested by defendant; and, third, the court erred in giving certain instructions requested by plaintiffs.

[1] Appellant's first ground of objection, "that under the facts plaintiffs are not entitled to any recovery," is not available to him. He chose to appeal by a bill of exceptions. The bill of exceptions contains no specifications of particulars wherein the facts do not entitle respondents to a recovery—wherein the evidence is insufficient to support or justify the verdict. Such specifications are necessary in order to authorize the court to review the evidence and consider its sufficiency. Code Civ. Proc. § 648; Winterburn v. Chambers, 91 Cal. 185, 27 P. 658; Meads v. Lasar, 92 Cal. 227, 28 P. 935; Estate of Depeaux, 118 Cal. 290, 50 P. 387; Estate of Behrens, 130 Cal. 418, 62 P. 603; Moore v. Franklin, 49 Cal. App. 108, 192 P. 1047.

[2] In support of the second and third grounds upon which the judgment is assailed, appellant refers to five instructions as having been given or refused, for which error is claimed. The bill of exceptions does not contain all of the instructions given (but only those the giving of which and the refusal to give which are made the subject of the claim of error). In such a state of the record we must assume that, were the whole charge of the court before us, it would not show error, but that any imperfections of instructions as are exhibited here are harmonized, and a correct statement of the law was made. It is essential to an assignment of error based upon the giving or refusal of an instruction that all instructions given be included in the record. Harris v. Barnhart, 97 Cal. 546, 32 P. 589; Churchill v. More, 4 Cal. App. 219, 88 P. 290; O'Brien v. New Method Cooperative Laundry Co., 38 Cal. App. 531,176 P. 879. "It necessarily must be said that from such a record this court would not be justified in determining that there had been a miscarriage of justice." O'Brien v. New Method Cooperative Laundry Co., supra.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

79 Cal. App. 373

PEOPLE v. ADAMS (Cr. 1322.) *

(District Court of Appeal, Second District, Division 1, California. Sept. 17, 1926.)

1. Indictment and information ⚷125(6)—Indictment charging defendant, as chairman of board of supervisors, with forgery of demands against road district, held not to charge more than one offense.

Indictment charging defendant, as chairman of board of supervisors, with forgery of demands on a road district, *held* not to charge more than one offense, in that the demand, warrant, and indorsements on it were separate and distinct instruments.

2. Forgery ⚷12(½)—That demand against road district, alleged to have been forged by defendant as chairman of board of supervisors, was not verified, held immaterial.

That demand against road district, alleged to have been forged by defendant as chairman of board of supervisors, was not verified, *held* immaterial, where defendant certified to it as verified by claimant, and accepted it and approved it as genuine, and represented it to oth-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court November 15, 1926.

er officers as genuine, and himself indorsed warrant which was issued on such demand.

3. Forgery 🔑37—Admitting in evidence indorsements on warrants issued in payment of demands against road district, alleged to have been forged by defendant as chairman of board of supervisors, held not prejudicial error.

In prosecution for forgery of demands against road district by defendant as chairman of board of supervisors, admitting in evidence indorsements on warrants issued in payment of demands *held* not prejudicial error since they were pertinent to charge of uttering a false demand with intent to defraud.

4. Forgery 🔑37—Evidence that demand against road district did not comply with statute held properly excluded, in view of defendant's allowance of same, knowing forgery, and utterance of same as a valid claim (Pol. Code, § 2644).

In prosecution for forgery of demands against road district, excluding evidence that demand did not comply with Pol. Code, § 2644, *held* not error, since defendant's allowance of claim, knowing same to be a forgery, and utterance thereof as a valid claim, estopped him from contending that making and uttering of demand was irregular.

5. Criminal law 🔑790.

In charging a jury, court is required to state to them all matters of law necessary for their information.

6. Criminal law 🔑814(1).

Under Pen. Code, § 1127, court must refuse to give all requested instructions not pertinent.

7. Criminal law 🔑813.

An instruction in the abstract need not always be given, although it is in language of Penal Code.

8. Criminal law 🔑834(2)—Refusal of requested instruction, covered by given instruction in different language, is not error.

If a requested instruction correctly states law applicable to facts before jury, and court refuses to give it as requested, but gives instead an instruction containing all that was material in the requested instruction in different language, it is not error.

9. Criminal law 🔑829(3).

Refusal of defendant's requested instruction in language of Pen. Code, § 125, *held* not erroneous, where substance thereof was fully covered by court's instructions.

10. Criminal law 🔑1186(4)—Failure to sustain demurrer to uncertain indictment held not to result in miscarriage of justice, where defendant had as good an opportunity to defend charges against him as he would have had under any other form of indictment (Const. art. 6, § 4½).

Failure to sustain demurrer to indictment in prosecution for forgery of demands against road district, in that indictment was uncertain in not showing whether demand or warrant was forged or in what particular instrument was forged, *held* not to result in miscarriage of justice within Const. art. 6, § 4½, where defendant had as good an opportunity to defend charges against him as he would have had under any other form of indictment, and he availed himself of that opportunity.

Appeal from Superior Court, Imperial County; L. D. Jennings, Judge.

J. Roy Adams was convicted of forgery, and he appeals. Affirmed.

Edgar B. Hervey, of El Centro, S. P. Williams, of Imperial, and Byron C. Hanna, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

YORK, J. Appellant was indicted by the grand jury of Imperial county of the crime of forgery with intent to defraud Mrs. J. M. Adair, treasurer of Imperial county, and the county of Imperial.

There were three counts in the indictment, all practically the same, the first count charging forgery of the name of one Roberts, the second the name of one Shubert, and the third the name of one Main. We will first consider the first count, that of forging the name of Roberts. Certain instruments in writing were set forth in this count of the indictment; the first being a demand for $225 against the county of Imperial, for 25 days' work for road district No. 3 in the county of Imperial, alleged to have been performed in the month of November, 1924, by Roberts, with "one man and Fresno." An affidavit attached to this claim purports to have been signed by Roberts and certified as sworn to before defendant, but without designating his official title. Indorsed upon this claim is an approval of it by the defendant as chairman of the board of supervisors of Imperial county; attested by the clerk of the board, and approved by the county auditor, who thereupon issued a warrant for $225, directed to the county treasurer in favor of said Roberts, upon the back of which was indorsed "Charles Roberts, J. Roy Adams," and the warrant was marked, "PAID Dec. 10, 1924, J. M. Adair, County Treasurer."

The second and third counts in the indictment were in the same form excepting as to the amounts stated in the demands and the names of the claimants. The defendant demurred to the indictment on the grounds that no public offense was charged, uncertainty as to what instruments were alleged to have been forged, and other grounds which we will consider in reviewing appellant's argument.

[1] The first point discussed by appellant is that each count in the indictment is "duplicitous," and purports to state three separate and distinct offenses. The contention is that the instruments are wholly separate and distinct instruments—the demand, the warrant, and the indorsements on it. It may be conceded that the indorsements on the

warrant were separate and distinct from the warrant, and that a charge of forging the warrant does not include the forging of the indorsements. It is contended that it was impossible to ascertain what instrument defendant was accused of forging. We cannot commend the indictment in this case as an example of good pleading, but we hold that it was sufficient to enable a person of ordinary understanding to know that in the first count the name of Roberts purports to have been signed by Roberts, and that this name was forged; otherwise we should have to come to the absurd conclusion that defendant was charged with having forged his own name, as well as the other names which were signed on the demand after the presentation of the demands were approved by defendant as chairman of the board of supervisors, and there could have been no object in forging the other names if the claim was a just demand, regularly presented. The defendant is not in the position of a party not acquainted with all the officials whose names are signed to the documents. There was no defect or imperfection in the matter of form which tended to the prejudice of a substantial right of this defendant on the merits. This contention is made more clear by a consideration of the charge that the defendant uttered the forged instrument with the intention to defraud, etc. From the foregoing it is plain that no more than one offense was charged in the first count of the indictment.

[2] It is further contended by appellant that the demand alleged to have been forged did not subject defendant to a prosecution for forgery, in that it was not verified. This contention cannot be upheld. The oath imports to have been administered by defendant, who appears in the approval of the demand as chairman of the board of supervisors. He certified to it as verified by Roberts, and accepted it and approved it as genuine, and represented it to the other officers as genuine, and himself indorsed the warrant which was issued upon that demand. For the purposes of this case, the signing of the name of Roberts, whether he was a real or fictitious person, and his appearing to have sworn to it before defendant, and the utterance of the document by defendant in the manner alleged in the indictment, was sufficient to make out a charge of forgery. What we have said with regard to the first count in the indictment applies to the second and third counts.

[3] There was no prejudicial error in admitting in evidence the indorsements on the warrants; they were pertinent to the charge of uttering a false demand with intent to defraud.

[4] The court did not err in sustaining an objection of the prosecution to the introduction of evidence that the demand did not comply with section 2644 of the Political Code. It appears that the claim was not in the form required by law, but the defendant's allowance of the same, knowing the forgery, and the utterance of the same as a valid claim, estopped him from contending that the allegations of the indictment did not constitute forgery, and the irregularity of the making and uttering of the demand does not afford an avenue of escape from the charge in the indictment or the proof of the facts alleged on the trial.

[5-9] Appellant contends that the court erred in refusing certain of defendant's requested instructions. In charging a jury, the court is required to state to them all matters of law necessary for their information. Giving instructions not pertinent to the issues tends to confuse the jury, and the court is required by section 1127 of the Penal Code to refuse to give all requested instructions not pertinent. An instruction in the abstract need not always be given, although it is in the language of the Penal Code. An instruction in the language of the Penal Code may be ambiguous as an instruction if not pertinent to any issue in the case. The object of instructions is not to instruct the jury generally, but specifically as to the issues involved in a given case. General instructions not pertinent to the issues are confusing to a jury, and, instead of enlightening them, tend to confuse them and impede the administration of justice. Thus one of the defendant's requested instructions was asked in the language of section 125 of the Penal Code and it was refused. Appellant's contention is that the refusal was a fatal error, in that a witness (Poore) testified to a fact he did not know to be true. If appellant is correct in his statement of Poore's testimony, he has shown that it was error for the trial court to refuse the instruction. We have reviewed the testimony of Poore, and find that he did not state, as claimed by appellant, that he knew of the men working on the road in district No. 3. What he said was he knew them all except these three men mentioned (Roberts, Shubert, and Main). Our attention has not been called to any other witness who is claimed to have made an unqualified statement of fact of that which he did not know to be true. Hence it is clear that such an instruction, as applied to this case, would have been confusing, and would tend to create an inquiry in the minds of the jury of whom the court believed had so testified. If a requested instruction correctly states the law applicable to the facts before the jury, and the court refuses to give it as requested, but gives instead an instruction containing all that was material in the requested instruction, in different language, it is not error under the circumstances. In all the contentions by appellant that the court erred in refusing to give correct instructions, we find that the court's instructions given fully covered those refused, and defendant was not prejudiced. After an ex-

amination of all the instructions asked and refused, and the instructions given, we hold that the court committed no error in instructing the jury, wherein the instructions were pertinent to the facts. Appellant has no cause for complaint in the instructions to the jury. They were instructed that, if they had a reasonable doubt of the guilt of the defendant they should acquit him, and the court informed the jury what a reasonable doubt is.

The court instructed the jury that they should keep in mind the importance to the accused of the result of their deliberations; that the jury were the sole and exclusive judges of the effect and value of the evidence; and of the credibility of the witnesses who had testified in the case; that the burden of proof was upon the prosecutor; that all the presumptions of law, independent of evidence, are in favor of innocence; that no fact or circumstance could be used by the jury as a basis for any inference of guilt against the defendant, unless such fact or circumstance was proven beyond a reasonable doubt; and that every fact or circumstance in the case which was not proven beyond every reasonable doubt should be wholly dismissed from the consideration of the jury and must not be permitted to influence them to any extent against the defendant. The instructions given by the court were lucid and fair to the defendant, and cautioned the jury not to find the defendant guilty unless they should believe him guilty beyond any reasonable doubt, and the court correctly informed them what a reasonable doubt is. To the utmost fairness to the defendant, and at considerable length, the court admonished the jury not to allow any prejudice to affect their verdict. The instructions were too long to be fully discussed in this opinion, and longer than necessary, and contained abstract instructions which were questionable as pertaining to the facts of this case, but not prejudicial to the defendant. The substantial rights of the defendant were not prejudiced or affected by any technical errors or defects.

[10] Although we have held that the indictment was sufficient to enable a person of ordinary understanding to know certain things from the indictment, yet we do not mean to hold that the indictment was in all respects certain; in fact, we hold that the indictment was uncertain, in that, as between the demand and the warrant, the indictment does not show which one of those two instruments was forged or in what particular the instrument was forged. If the forgery was of the name of the maker, the forged name in the demand was the name of Roberts (in the first count). But if the forgery of the warrant was the forgery of the name of the maker, it must have been a forgery of the name of the auditor. The demand and the warrant were separate instruments, executed by different persons and at separate times. Therefore, although the demurrer should have been sustained, it does not necessarily follow that the judgment should be reversed. The case was tried upon the theory that the alleged forgery consisted in the false and unauthorized use of the names of the makers of the demands, viz. Roberts, Shubert, and Main. The defendant had as good as opportunity to defend against these charges, as he would have had under any other form of indictment, and he availed himself of that opportunity, although not successfully. For this reason the case comes within the provision of the Constitution (article 6, § 4½), which is intended to guard against reversal of any judgment on account of errors in pleadings, unless the errors resulted in a miscarriage of justice. We are of the opinion that it did not result in any such miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

79 Cal. App. 383

KNIGHTS OF THE KU KLUX KLAN, Inc., v. FRANCIS et al. (Civ. 5633.)

(District Court of Appeal, First District, Division 2. California. Sept. 22, 1926.)

1. Beneficial associations 🔑16.

Charter of a subordinate lodge and Constitution and by-laws of parent organization constitute a contract between lodge and parent organization.

2. Constitutional law 🔑276.

Right to organize, to collect dues from members, and to acquire and hold property, is a right coming to a lodge through contract between it and parent organization, of which lodge may not be deprived without due process of law.

3. Beneficial associations 🔑10(4).

A member of a subordinate lodge may not be expelled without a hearing, and a by-law authorizing such procedure is unreasonable and void.

4. Beneficial associations 🔑16—Action of parent organization of Ku Klux Klan, suspending charter of subordinate lodge for indefinite period without notice and hearing, held void.

Action of Imperial Wizard of parent organization of Ku Klux Klan, pretending to suspend charter of subordinate klan for indefinite period without notice and hearing, *held* void, where there was no provision either in charter or constitution of parent organization authorizing such action.

5. Beneficial associations 🔑16 — Parent organization of Ku Klux Klan held not entitled to property of subordinate organization on suspension of its charter without hearing.

Under constitution of parent order of Ku Klux Klan providing that, in event charter of a klan was revoked or canceled for any cause,

all its money should automatically become property of parent organization, parent organization was not entitled to possession of property of subordinate lodge on suspension of its charter without hearing, even if suspension was valid.

Appeal from Superior Court, Alameda County; John Perry Wood, Judge.

Actions by the Knights of the Ku Klux Klan, Inc., against Leon C. Francis and others. Judgment for defendants, and plaintiff appeals. Appeals consolidated. Judgments affirmed.

James H. Boyer, of Oakland, and John H. Connaughton, of Washington, D. C., for appellant.

John L. McVey, of Oakland, and Frank W. Hooper, for respondents.

NOURSE, J. Plaintiff commenced three actions against the defendants—two in claim and delivery and one in conversion—to recover the moneys and property held by the defendants as members of the Oakland Klan No. 9. Judgment went for the defendants in each case, and the plaintiff has appealed on a bill of exceptions. By stipulation, the three appeals have been consolidated and are to be heard as one.

The plaintiff is a corporation having its main office in Atlanta, Ga.; the Oakland Klan No. 9 is an unincorporated subordinate lodge organized and chartered under the constitution of the plaintiff. The presiding officer of the plaintiff, knows as the Imperial Wizard, signed and caused to be served upon the Oakland Klan a notice of suspension of its charter, without any previous notice to the klan and without presentation of or hearing upon any charges against the klan or against any of its members. From this order of suspension an appeal was taken to the tribunal provided by the plaintiff for that purpose, and this appeal was still pending at the time of the trial of these actions.

[1-3] The consolidated appeals from the three judgments all present the question whether a subordinate lodge of a fraternal organization can be suspended by the officers of the parent body without charges and without a trial unless the charter and by-laws of the organization specifically waive those rights. The determination of the question depends upon certain fundamental principles which may be briefly referred to. The charter of a subordinate lodge and the constitution and by-laws of the parent organization constitute a contract between the lodge and the parent organization. Grand Grove, etc., v. Garibaldi Grove, etc., 105 Cal. 219, 224, 38 P. 947. The right to organize, to collect dues from members, and to acquire and hold property, is a right coming to the lodge through this contract, of which the lodge may not be deprived without due process of law. What is due process in such a case may be determined by reference to analogous proceedings. There is no essential difference between suspending or expelling a member from a subordinate lodge and from suspending or revoking its charter. Grand Grove, etc., v. Garibaldi Grove, etc., supra. A member of a subordinate lodge may not be expelled without a hearing and a by-law authorizing such procedure is unreasonable and void. Grand Grove, etc., v. Garibaldi Grove, etc., supra; Taboada v. Sociedad Espanola, etc., 191 Cal. 187, 191, 215 P. 673, 27 A. L. R. 1508.

There is no essential difference between this right to a hearing on the part of a lodge member and the right of a public officer appointed under statutory or charter limitations on the power of suspension or removal, or the right of one holding a license to practice a profession or trade. The power to remove a public officer "for cause," without other statutory limitations, implies the existence of the fact of good and reasonable cause, which can be determined only after notice to the accused and an opportunity to be heard in his defense Bannerman v. Boyle, 160 Cal. 197, 206, 116 P. 732. The suspension or revocation of a professional license is a deprivation of a property right which can be had only after a judicial, or quasi judicial, hearing. Suckow v. Alderson, 182 Cal. 247, 249, 187 P. 965; Brecheen v. Riley, 187 Cal. 121, 124, 200 P. 1042; Schomig v. Keiser, 189 Cal. 596, 598, 209 P. 550; Abrams v. Daugherty, 60 Cal. App. 297, 302, 212 P. 942.

In Bannerman v. Boyle, supra, Mr. Justice Shaw pointed out that the rule was equally applicable where the statute limited the power of suspension or removal to "cause," or "good and reasonable cause," or to any specified cause such as "misconduct," "misbehavior," and the like. The effect of the decisions is that, where the power is so limited, the existence of the cause, whether general or specified, is a matter of fact which must be found after a hearing of which the accused has been given notice and an opportunity to appear.

As applied to the suspension or removal of a member of a subordinate lodge it has been said:

> "And a society acting upon the expulsion of a member is a quasi judicial body, and its hearing is a quasi judicial hearing. Otto v. Tailors' P. & B. Union, 75 Cal. 308 (17 P. 217, 7 Am. St. Rep. 156). The proceedings of the society, in order to be regular and legal, in effect, must therefore provide for notice to the accused and afford him an opportunity to be heard. Fay v. Supreme Tent, Knights of the Maccabees of the World, 38 Misc. Rep. 427 (77 N. Y. S. 994, 996)." Taboada v. Sociedad Espanola, etc., 191 Cal. 191, 215 P. 674, 27 A. L. R. 1508.

As applied to the suspension or revocation of the charter of a subordinate lodge, it has been said:

> "Whoever would claim the right to deprive another of property or privilege, without giving

him an opportunity to defend the same, must show some consent on his part to such action." Grand Grove, etc., v. Garibaldi Grove, etc., 105 Cal. at pages 224, 225, 38 P. 947, 948.

[4] In the case at hand the charter of the Oakland Klan authorized the Imperial Wizard "to cancel, suspend, or revoke this charter * * * for the neglect or the refusal on the part of the said klan to conform to and comply with the Kloran Constitution" and for other specified causes. There is no provision, either in the charter or in the portions of the constitution of the parent organization appearing in the transcript, which authorizes this action to be taken without notice to the accused lodge or without a hearing and a determination of the truth of the charges assigned. The action of the Imperial Wizard of the parent organization pretended to suspend the charter of the Oakland Klan for an indefinite period without notice and without a hearing, and was therefore ineffectual for that purpose.

[5] Furthermore, we are unable to understand the theory upon which the appellant bases its claim to the moneys and property held by the respondents. Section 23 of the constitution of the parent order provides that:

> "In the event the charter of a klan has been revoked or canceled for any cause whatsoever, and in the event of disbandment of a klan, whether it be a chartered or provisional klan, all moneys of that klan in the possession of any officer or member thereof shall automatically become the actual moneys of the Imperial Treasury of this Order, and same must be freely and promptly turned over, on demand, to the properly accredited officer who is authorized by the Imperial Wizard to receive same in the name of this Order."

Thus, even if the suspension were valid for any purpose, the appellant is not entitled to the possession of the property of the Oakland Klan until the charter of the latter has been "revoked or canceled for any cause," and such cause, as we have seen, must be found after a hearing of charges.

Judgments affirmed.

We concur: CABANISS, Presiding Justice pro tem.; STURTEVANT, J.

---

79 Cal. App. 357

PEOPLE v. PIERO. (Cr. 1304.)

(District Court of Appeal, First District, Division 2. California. Sept. 16, 1926.)

1. Criminal law 🔑1134(2)—Reviewing court may refer to evidence offered on motion for new trial, where necessary to determine whether errors assigned resulted in miscarriage of justice (Const. art. 6, § 4½).

Reviewing court may refer to evidence offered on motion for new trial in addition to that tendered to jury, under Const. art. 6, § 4½, where necessary to determine whether errors assigned resulted in a miscarriage of justice.

2. Rape 🔑38(3) — Evidence of assault and robbery of prosecutrix by others of party, after she was alleged to have been raped by defendant, held admissible in corroboration of her testimony.

Evidence as to assault and robbery of prosecutrix, committed by others of the party after defendant was alleged to have raped her, *held* admissible as tending to corroborate prosecutrix's testimony that she had first been assaulted by defendant, and that he had then turned her over to the others for the same purpose.

3. Criminal law 🔑369(15)—Evidence of defendant's subsequent possession of stolen jewelry of ravished female, his admission that he had received it from one of party committing second assault, and her testimony that it was taken from her at that time, held admissible on question of defendant's identity.

In prosecution for rape, which occurred in middle of the night, evidence of defendant's subsequent possession of stolen jewelry of prosecutrix, his admission that he had received it from one of the party who had committed the second assault, and prosecutrix's testimony that it was taken from her possession at that time, *held* admissible on question of defendant's identity.

4. Criminal law 🔑721½(1)—Reference of district attorney, in closing argument, to defendant's failure to call witness whose testimony might have been believed held not error.

Where defense in prosecution for rape had called two musicians employed at café where prosecutrix was taken and a hanger-on, who attempted to controvert her testimony that she did not dance or drink while in the café, which witnesses were wholly discredited in their cross-examination, reference of district attorney, in closing argument to jury, why defense had not called proprietor, whose testimony might have been believed, *held* not error.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Charles Piero was convicted of rape, and he appeals. Affirmed.

Albert Mansfield, J. J. Bullock, both of Redwood City, and Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried on an information charging rape. He was convicted as charged, and from the judgment following the verdict and from the order denying his motion for a new trial he has appealed on a typewritten record. The assignments of error are: (1) The admission of evidence of a separate rape in which the defendant did not participate; (2) the admission of evidence of a robbery of which defendant was not guilty; (3) the admission of evidence of a crime against nature in which the defendant did not participate; and (4) misconduct of the district attorney in his argument to the jury.

[1] A proper understanding of the ground of appeal requires a more complete statement of the story of the case than we would otherwise be inclined to give, and for this purpose it is necessary to refer to the evidence offered on the motion for a new trial in addition to that tendered to the jury. This we are permitted to do under section 4½ of article 6 of the Constitution, in order to determine whether the errors assigned resulted in a miscarriage of justice.

At about 12 o'clock midnight of August 2, 1925, the defendant and four companions, one of whom was a woman, took into their automobile the prosecutrix, who was standing on the corner of Gough and Market streets, San Francisco. The prosecutrix asked to be taken to her home on Valencia street, and was assured that this would be done. The machine, however, continued on out Market street, over the Twin Peaks road and on down to Brighton Beach in San Mateo county. The prosecutrix frequently demanded that she be taken to her home or released from the car, but was forcibly restrained by the defendant, who held his hand over her mouth to prevent an outcry. When the party arrived at the Brighton Café they immediately left the machine and entered the café, except the defendant and the prosecutrix, who was forced to remain in the car by the defendant. While the others were dancing and drinking in the café, the defendant forcibly committed the assault upon the prosecutrix and then entered the café and told the others what he had done. The prosecutrix entered the dressing room of the café and locked herself in, but was forced to come out by the proprietor on the demand of other members of the party. She was then dragged to the machine and driven down an unfrequented road by four men, three of whom were members of the original party, while the other one was picked up at the café. These four took her from the machine and each assaulted her. At this time one of the four robbed her of her jewelry, which he turned over to this defendant to sell, and which was subsequently recovered from this defendant by the police. After the assault last referred to, these four drove the prosecutrix back to the café, where they turned her over to two other men of like character whom they had met in the café. The original party, without the prosecutrix, then returned to San Francisco. A few days later they were all arrested, and the foregoing story of the prosecutrix was corroborated in every material detail by the confessions which some of them made to the district attorney.

In the trial of this case before the jury, the testimony of the prosecutrix was confined to the assault made by this defendant before she entered the café at Brighton, except that she was permitted to say that she was afterwards taken down the road by four men and assaulted and robbed, and that this defendant was not one of the four. The jewelry which had been taken from her was then offered in evidence, and this defendant's subsequent possession of this jewelry and its delivery to the police was also shown.

[2, 3] The first two assignments of error relate to the assault and robbery committed by others of the party after the act charged to have been committed by this defendant. This evidence was admissible, as it tended to corroborate the testimony of the prosecutrix that she had first been assaulted by this defendant and that he had then turned her over to the others for the same purpose. It also tended to identify the defendant as one of the members of the party—the one who had forcibly restrained her from leaving the machine during the ride to Brighton, and after its arrival there was satisfied to let the other members of the party continue the outrage upon her. The whole affair occurred in the middle of the night. The prosecutrix was in the hands of strangers whom she had never seen before. It was proper for the district attorney to complete her identification of this defendant by evidence of defendant's subsequent possession of the stolen jewelry, his admission that he had received it from one of the four who committed the second assault, and her testimony that it was taken from her possession at that time.

The third assignment of error relates to a circumstance occurring in the trial of one of the other defendants. No such evidence was offered in the trial of this defendant.

[4] The fourth assignment of error goes to the alleged misconduct of the district attorney in his closing argument to the jury. Complaint is made of his reference to the fact that defendant had not called as a witness the proprietor of the Brighton Café. The defense had called two musicians employed at the café and a hanger-on, who attempted to controvert the testimony of the prosecutrix that she did not dance or drink while in the café. These witnesses were wholly discredited in their cross-examination, and it was in reference to this that the district attorney asked why they had not called the proprietor, whose testimony might have been believed. The defendant merely claims error and cites no authority. We find no error in this or in the reference by the district attorney to the stolen jewels.

Judgment and order affirmed.

We concur: STURTEVANT, J., CABANISS, Presiding Justice pro tem.

79 Cal. App. 366

PEOPLE v. CRAIB. (Cr. 1303.)

(District Court of Appeal, First District, Division 2. California. Sept. 16, 1926.)

1. Criminal law ⚿782(3)—Instructions in effect that, notwithstanding admissions of counsel, jury was to determine all circumstances of alleged assault and robbery and whether defendant participated in either, held not error.

Instructions in effect that, notwithstanding admissions of counsel that prosecutrix had been ravished, and, without regard to any views of court or counsel, it was duty of jury to determine all the circumstances of the alleged assault and robbery and to determine whether defendant participated in either, *held* not error.

2. Criminal law ⚿1141(2).

Reviewing court cannot presume error, but appellant must show that error was committed and that it was prejudicial.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Albert Craib was convicted of robbery in the second degree and rape, and he appeals. Affirmed.

Albert Mansfield and J. J. Bullock, both of Red Wood City, and Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

NOURSE, J. The defendant was tried on an information in two counts charging robbery and rape. He was convicted of robbery in the second degree and of rape as charged. From the judgment following the verdict and from the order denying his motion for a new trial, he has appealed on a typewritten record.

The facts of the case are the same as those related in People v. Piero, 249 P. 541, this day decided, and it is not necessary to repeat them here. It should be added, however, that it was this defendant who drove the car both on the trip from San Francisco to the Brighton Café and from the café to the place where the second assault and the robbery were committed, and that this defendant was one of the four who participated in the second assault. All the material facts of the case, in so far as they relate to this defendant were admitted by him when a witness in his own behalf except the actual commission of the assault and robbery. In this connection he testified that he drove the prosecutrix and his three companions down the road to the place where they left the car, that he drove on further down the road for about 20 minutes, and that he then returned and picked them up, driving back toward the café until he met Piero and Garibaldi, with whom he left the prosecutrix.

The only question raised on this appeal relates to the portion of the instructions given to the jury, which read:

"Now, members of the jury, I might say to you that there is no question of difference between the attorneys on one point, and that is, that they agree that on the 2d of August of this year this woman was standing on Market street and Gough, in the city of San Francisco. Upon that there is no question on the part of the people or of the defendant. Now what was done there, there is some question, but that is for you to pass upon. Nevertheless, she did get into an automobile—there is no question about that; there is no question but what she was driven in an automobile by some one away out to Brighton Beach, called Brighton Beach Inn I believe, or some place of that kind. Now there is no question as to those facts, as I have just stated to you. Whether she wanted to be left out at Twenty-Ninth or Nineteenth and Valencia is a matter for you to determine, and the court and the attorneys cannot determine that for you. There is no question, either, upon either side, the people or the defendant, but what the defendant drove the automobile to Brighton Beach Inn. Upon that point there is no question. As to what occurred on the way out there, there is some question, and that is for you, as sensible men and women, to determine what occurred going there, and what occurred after they arrived at Brighton Beach Inn. There is no question also among the attorneys but what some jewelry was taken from the person of this defendant. Who took it is for you to determine. There is no question but what this prosecuting witness was raped. There is some question as to the circumstances surrounding that, and that is for you to determine, and neither the attorneys nor the court can determine that for you."

It is true, as stated by the trial judge, that all the material facts preliminary to the actual assault and robbery were admitted by the defendant and as to them there was no controversy. The defendant testified that he drove the prosecutrix and his three companions down this unfrequented road, knowing fully what his companions intended to do; that he left her with these three and drove on, because he did not want to be mixed up in it. The prosecutrix testified positively that the defendant did not leave her, but that he joined with his companions in the assault upon her. If defendant's case rested upon this theory—that the commission of the crime by his companions was admitted, but that he, in order to avoid participation in it, left the scene before the commission of the crime—we can see no harm in the reference to such admissions by the trial judge.

In his closing argument to the jury, the district attorney referred on several occasions to the fact that defendant's counsel, in their argument to the jury, admitted that the prosecutrix had been ravished, and it was to this admission that the trial judge referred in his instruction when he stated that there was no question among the attorneys but that the prosecutrix was raped. Neither of these statements was challenged by the defendant at the time or on his motion for a new trial, and we may therefore assume that the admissions were made as stated.

[1] The plain meaning of all the instructions, taken as a whole, is that, notwithstanding these admissions of counsel, and without regard to any views of court or counsel, it was the duty of the jury to determine all the circumstances of the alleged assault and robbery and to determine whether the defendant participated in either. The case is similar to a trial for murder where the killing is admitted by the defendant, but the defense rests on a plea of justification. In such a case we can see no error if the trial judge were to state the admitted facts to the jury in order to confine its consideration to those facts which were controverted. It is analogous to People v. Ross, 115 Cal. 233, 238, 46 P. 1059, where the charge to the jury referred to the admissions that defendant had led a dissolute life. In holding that there was no error in this, Mr. Justice Temple said (page 238 [46 P. 1059]):

> "In the instructions, these sentiments are mentioned as admissions or statements made by counsel for the defense in his address to the jury. If the propositions were admitted by counsel and the case submitted on that basis, there was nothing wrong about it. I have no doubt such was the case; at all events the contrary does not appear. The evidence would fully justify the jury in so concluding, but would not authorize the positive statement by the judge. I do not think error is shown here."

[2] If the trial court or the district attorney had misquoted defendant's counsel in their reference to these admissions, the way was open for defendant to correct the error by objection at the time or on his motion for a new trial. The record discloses that this was not challenged at any time, and the failure to raise the point on the motion for new trial lends support to the claim that the asserted error did not result in a miscarriage of justice. We cannot presume error, but it is incumbent upon the appellant to show that error was committed and that it was prejudicial.

Judgment and order affirmed.

We concur: STURTEVANT, J.; CABANISS, Presiding Justice pro tem.

79 Cal. App. 403

McGEE v. JONES. (Civ. 4494.)

(District Court of Appeal, Second District, Division 1, California. Sept. 28, 1926.)

Limitation of actions ⊂⊃15—Waiver of statute of limitations in renewal agreement by maker of note held continuous.

Waiver of statute of limitations in agreement by maker renewing note and agreeing to pay it *held* continuous, where attendant circumstances did not justify inference that it was limited to specific time.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Lola K. McGee, executrix of the estate of Anna K. Jones, deceased, against S. Jones. Judgment for defendant, and plaintiff appeals. Reversed.

Carl W. Faucett and William M. Rex, both of Los Angeles, for appellant.

D. Z. Gardner, of Los Angeles, for respondent.

CONREY, P. J. Defendant executed in favor of the decedent, Anna K. Jones, his promissory note, which fell due on the 9th day of June, 1910. On such a note the statute of limitations is such that the right of action expires at the end of four years from the date of maturity. It was alleged in the complaint (second amended complaint) that in consideration of the forbearance of the plaintiff's testator to sue upon said note, and a change in the rate of interest thereon, and other valuable consideration, the defendant, on April 28, 1914, renewed the same in the following language:

> "I hereby renew the within note and agree to pay same one year after date and waive the statute of limitations on said note. Interest from June 9, 1914, to be 7 per cent. per annum."

It was further alleged that on April 29, 1916, upon like consideration, the defendant executed a second renewal as follows:

> "I hereby renew the within note and agree to pay one year from date with interest at 8 per cent. and waive the statute of limitations."

The court sustained a demurrer to this complaint without leave to amend and entered judgment in favor of the defendant. From this judgment the plaintiff appeals.

One of the grounds of demurrer was that it appeared from said complaint that the cause of action therein stated is barred by the statute of limitations of the state of California. The sole question presented on this appeal is the question whether or not the cause of action is thus barred. More particularly, the question is whether, upon such an agreement to waive the benefit of the statute of limitations, the waiver is continuous, or whether, on the other hand, it is limited to the statutory period of four years running from the time of maturity of the note as extended by the agreement. It will be noted that if, under the second extension agreement, the statute began to run from and after the 29th day of April, 1917, the bar of the statute would be complete on the 29th day of April, 1921. This action was commenced by the filing of the original complaint on the 13th day of March,

1923. The record does not show the date of the death of Anna K. Jones, but it does appear from the complaint that the plaintiff was appointed executrix of her will on the 6th day of January, 1923.

We are of the opinion that the statute of limitations had not run against said note at the time of the commencement of this action. In support of this conclusion nothing further is necessary than to read the decision of the Supreme Court of California in Brownrigg v. De Frees, 238 P. 714. After first stating that the privilege conferred by the statute of limitations is not a right protected under the rule of public policy, but is a mere personal right for the benefit of the individual, which may be waived, the court takes up the question as to whether the courts will place a limit of time beyond which the statute cannot be suspended. After discussing some California decisions and admitting that they leave a degree of uncertainty upon the particular question at issue, the court cited with apparent approval the case of State Trust Co. v. Sheldon et al., 68 Vt. 259, 35 A. 177, wherein, after stating that the benefit of the statute of limitations may be waived, that court said:

> "When such waiver is made it is *continuous*, unless by its terms it is *limited to a specified time*. There was no such limitation in the waiver of the defendants. We therefore hold that they are estopped from pleading the statute of limitations in bar of plaintiff's action."

After citing further decisions, our Supreme Court then said:

> "The intention of the parties must always be considered in the light of the circumstances of each particular case. A promise not to take advantage of the statute pending negotiations for allowing further time to arbitrators to report, or pending negotiations for the adjustment of the difference between litigants, will not be construed to be an agreement never to take advantage of the statute, but an agreement that the statute should not run while the settlement was pending. After negotiations have concluded, the statute will begin to run. Cowart v. Perrine, 21 N. J. Eq. 101. So, too, it has been held in cases where the circumstances seem to justify the inference that it was not intended that the statute was to be suspended for all time, it is suspended for a reasonable time only."

In the case at bar it does not appear that there were any attendant circumstances which would justify the inference that the waiver of the statute was limited. The case is clearly open to the rule stated in the Vermont case, and approved by our Supreme Court that when the waiver is made it is continuous, unless by its terms it is limited to a specified time. In the agreement made by the defendant there was no such limitation.

The judgment is reversed.

I concur: WORKS, Justice pro tem.

---

79 Cal. App. 347

SEGARINI v. BARGAGLIOTTI et al.*

(Civ. 5523.)

(District Court of Appeal, First District, Division 2, California. Sept. 16, 1924.)

1. Judgment 🔑743(2)—Adverse judgment in quiet title suit held not to preclude subsequent action in ejectment based on after-acquired commissioner's deed (Code Civ. Proc. § 1911).

Judgment against defendant in quiet title suit *held* not to preclude his subsequent action in ejectment against plaintiff, based on commissioner's deed acquired after quiet title suit was at issue, in view of Code Civ. Proc. § 1911.

2. Trial 🔑388(4).

Where facts were admitted and as matter of law constituted no defense, failure to make finding thereon *held* not basis for reversal.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action of ejectment by Giovanni Segarini against Francisca Bargagliotti, also known as Francesca Bargagliotti, and husband. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 193 Cal. 538, 226 P. 2.

William F. Herron, of Los Angeles, for appellants.

Sylvester Andriano and William R. Lowery, both of San Francisco, for respondent.

LANGDON, P. J. This appeal is by the defendants from a judgment against them in an action of ejectment. To understand the legal question presented by the appeal, matters occurring prior to the present action, as disclosed by the evidence, must be recited.

On March 19, 1920, the defendants and appellants herein, Francisca Bargagliotti and her husband, commenced an action against the plaintiff and respondent Segarini and others to remove the cloud of certain judgments from their title to the property involved in this action. The complaint, besides the usual allegations in a quiet title action, contained an averment that the Bargagliottis had declared a homestead upon said property on the 15th day of May, 1917.

Segarini filed his answer to said quiet title suit, wherein he set up as his sole defense that he had obtained a judgment against the Bargagliottis on the 13th day of March, 1918, for something over $700, and he prayed that this judgment be declared a lien upon the property.

On March 26, 1920, the Banca Popolare Fugazi, which held a mortgage upon this same property and which had not been made a party defendant in said quiet title action, commenced an action to foreclose said mortgage, making both the Bargagliottis and Segarini defendants in the foreclosure suit.

---

*Hearing denied by Supreme Court November 15, 1926; Waste, C. J., and Shenk and Finlayson, JJ., dissenting.

All defendants in the foreclosure suit defaulted, and the bank obtained a decree of foreclosure on December 5, 1921.

On January 4, 1922, nearly two years after the quiet title suit was at issue, the property was sold by the court commissioner pursuant to said decree of foreclosure, and Segarini purchased the property at said sale and obtained a commissioner's certificate of sale.

On March 23, 1922, the Bargagliottis, after they had no further interest in the property except their equity of redemption, brought the quiet title action to trial, and Segarini, having failed to appear at the trial, obtained a judgment quieting their title against him.

Later, and on January 9, 1923, Segarini obtained a commissioner's deed to the property which was duly recorded, and on March 1, 1923, this action was commenced in ejectment.

The Bargagliottis interposed the defense of res adjudicata, contending that the judgment against Segarini in the quiet title suit was conclusive and barred all his rights, even though those rights had been acquired after said action was at issue, and were not and could not have been passed upon in said action.

[1] The trial court decided against this contention of the defendants and appellants, and they are urging it now as their principal point upon appeal. We think the question is thoroughly settled against them, and that both reason and authority support the conclusion of the trial court.

Section 1911 of the Code of Civil Procedure provides:

> "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

A case presenting a principle similar to the one presented by the case at bar is People's Savings Bank v. Hodgdon, 64 Cal. 95, 27 P. 863, which was an action to quiet title. During the pendency of a former action in ejectment, one of the defendants therein, after her answer had been filed, acquired a new, independent title to the property from the purchaser at a foreclosure sale. Two years after the acquisition of such new independent title, judgment was rendered in the ejectment suit against said defendant, who had filed no supplemental answer. The court said:

> "The single question in the present case is, whether Jane Griffin and her coplaintiff, who claims under her, are concluded by the judgment rendered against her in the ejectment suit. When Hodgdon commenced his action of ejectment, and when Jane Griffin filed her answer therein, the legal title to the property in controversy was in Jane Griffin, because of the deed executed to her by Gass. The title was, however, subject to be divested by the culminating step in the foreclosure proceedings, to wit, by the execution of the sheriff's deed. The title was so divested in the year 1869. When Laidley, Hickox, and Dale received the deed from the sheriff, they took the title as of December 17, 1858, the date of the mortgage by virtue of which the foreclosure proceedings were had. McMillan v. Richards, 9 Cal. 412. They thus became vested with the legal title to the property as of a date anterior to the deed from Gass to Jane Griffin and anterior to the ejectment suit of Hodgdon; and, not being parties to that suit, they were of course unaffected by it. They could therefore undoubtedly have asserted their title against both Hodgdon and Jane Griffin. In 1870 they conveyed their title to Jane Griffin. It is true that that conveyance was made intermediate the filing of her answer in the ejectment suit and the trial of the action, but the title she got by the conveyance was not the same title she had when the suit was commenced and when her answer was filed; for the title she had at those dates was subject to the mortgage, and therefore subject to be, as it was, divested by the execution of the sheriff's deed in pursuance of the sale made by virtue of the decree of foreclosure; the title she got by the deed from Laidley, Hickox, and Dale conveyed to her the absolute fee of the property as of date December 17, 1858, unaffected by any subsequent conveyance or action. This title Jane Griffin did not hold at the time she joined issue in the action brought against her by Hodgdon, but it was acquired by her intermediate that time and the entry of judgment in that case, and was not set up by supplemental answer. It was therefore not involved in that action, and was therefore unaffected by the judgment therein rendered. Valentine v. Mahoney, 37 Cal. 396; Thompson v. McKay, 41 Cal. 221; Bagley v. Ward, 37 Cal. 121 (99 Am. Dec. 256)."

In the case of Valentine v. Mahoney, supra, it was said:

> "The position that a judgment will not estop or preclude a party against whom it is rendered from relying upon a title acquired subsequently to the rendition of the judgment, or a title not in issue in that action, is too clear and well settled to require argument. * * * The plaintiff claims that this title accrued after the suit of Mahoney v. Wilson was determined. But it is not necessary to go to that length, for if he did not hold the title at the time the issue of fact was joined in that action, or if acquired intermediate that time and the rendition of the judgment, it was not set up by supplemental answer, and it was unaffected by the judgment, for the very sufficient reason that it was not involved in the action. It is enough for the plaintiff to show that the alleged newly acquired title was not in issue in the action, without showing that it was acquired after the judgment."

The case of Metropolis Trust & Savings Bank v. Barnet, 165 Cal. 449, 132 P. 833, is also pertinent. Therein it was said:

> "It is claimed by appellants that the respondent is precluded from asserting in the present action the title derived by it through the trustee's sale pending the mechanics' lien suit brought by Fuller & Co.; that said title was involved in said action in which the respondent was defendant, and is res adjudicata by said

judgment, so that respondent is estopped from asserting it in the present suit. * * *

"The title which is asserted in the present action—the absolute title acquired by respondent under the trustee's sale—was not put in issue by the answer of respondent. In fact it did not then have the absolute title to the property, as the trustee's sale, under which that title was derived, had not then taken place. It is true that subsequent to the filing of its answer respondent acquired such title under the trustee's sale, but that title was never put in issue. It might have been, had the respondent chosen to do so by a supplemental answer. But no such answer was filed, and we are not referred to any authority which made it compulsory that such an answer should be filed. In the absence of such supplemental answer, the rule is that: 'The rights of the parties are to be determined as they were at the commencement of an action, unless some event happens subsequently which affects the matters in issue, and the court cannot consider such subsequent matter unless it is presented by a supplemental pleading.' * * *

"As said in Freeman on Judgments (4th Ed.) § 249: '* * * The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills, and equitable defenses, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But, as long as these several matters are not tendered as issues in the action, they are not affected by it. * * * The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defenses which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed. * * * Thus, in an action to recover real estate, the defendant cannot put in evidence a title acquired pendente lite, unless he has pleaded it by a supplemental answer; and therefore where he has not so pleaded it, he is not concluded from asserting it in a subsequent action.' * * *

"The absolute title which the respondent obtained, and which is asserted in the present action, was acquired after the mechanics' lien suit was at issue; it was not the title litigated in the suit, nor was it an issue in that action, and, under the authorities just referred to, the claim of appellants that the judgment in that suit was res adjudicata as to the title now asserted is not well taken."

Although the cases applying this rule are numerous in this state, further citation of authority upon this question is unnecessary.

[2] It is also contended by the appellants that the trial court failed to make a specific finding upon the facts constituting the defense of res adjudicata. All the facts of the case were admitted by the parties; there was no dispute about them. The trial court found that the judgment in the quiet title suit was not a bar to the plaintiff's recovery in this action and did not estop him from setting up his after-acquired title. Appellants contend this was a conclusion of law. Since all the facts are admitted by the parties, and since, as a matter of law, they constitute no defense to this action, it is apparent that no finding which the court might have made would have affected the result of this litigation in any manner.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

79 Cal. App. 370

VECKI v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5708.)

(District Court of Appeal, First District, Division 2, California. Sept. 16, 1926.)

1. Justices of the peace 🔑166(2)—Appeal from justice court must be dismissed, unless brought to trial within one year from date of filing, and illness of appellant furnishes no excuse (Code Civ. Proc. § 981a).

Under Code Civ. Proc. § 981a, requiring appeals from justice to superior court to be brought to trial within one year of date of filing, unless time is extended by written stipulation, superior court must dismiss such an appeal, unless it is brought to trial within time prescribed, and illness of appellant is no excuse.

2. Justices of the peace 🔑166(2)—Consent to continuances of trial of case appealed from justice to superior court does not extend time for trial beyond period prescribed (Code Civ. Proc. § 981a).

Consent of counsel to continuances of trial of case appealed from justice to superior court within one-year period provided by Code Civ. Proc. § 981a, is not equivalent to written stipulation to extend time for trial beyond period prescribed.

Application for writ of mandate by Marion Vecki, directed to the Superior Court of the State of California in and for the City and County of San Francisco and Hon. W. E. Herzinger, judge thereof. Writ granted.

Marion Vecki, of San Francisco, in pro. per.

E. De Los Magee and De Laveaga & Magee, all of San Francisco, for respondents.

NOURSE, J. This is an original proceeding in mandate to require the respondent to dismiss an appeal from a judgment of the justice's court which is pending in the respondent court. The petition alleges that on May 5, 1925, the petitioner commenced an action in the justice's court against Lea B. Meals as defendant, and that after trial of said action judgment was rendered in favor of the petitioner and duly entered on June 13, 1925; that an appeal was taken from said judgment by said defendant and duly perfected, but that said appeal had not been brought to trial in the superior court within one year from the date of the filing of the appeal. The respondent answers, setting up that the proceedings were prosecuted as alleged in the petition, but that said appeal had been set for trial before the superior court for January 28, 1926, and that the hearing thereof was continued from time to time by consent of the parties on account of the illness of the defendant. From the affidavit of defendant's counsel, which was used on the motion to dismiss the appeal, and which is made a part of respondent's answer, it appears that the appeal was on the calendar of the superior court for the last time on April 29, 1926, and that on said date it was continued, "presumably to June 10, 1926"; that the cause did not appear on the calendar of that date, and that no further proceedings had been taken until defendant was served with plaintiff's motion to dismiss the appeal on the 10th of July.

On this hearing it is respondent's contention that, because of the illness of the defendant and of the plaintiff's consent to the continuances which had been granted during the period of one year after the filing of the appeal, the defendant's failure to bring the cause to trial within that period is excused. The answer to this contention is found in the statute (section 981a, Code Civ. Proc.). This section reads, in part:

> "No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions * * * must be dismissed by the court * * * where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court."

[1, 2] It has been frequently ruled that the section is mandatory and that it is the duty of the superior court to dismiss such an appeal unless it is brought to trial within the time prescribed. The only exception specified by the statute is a written stipulation by the parties filed with the clerk and it is not competent for the courts to read into the section any exception which has not been declared by the Legislature. Thus the illness of the appealing party is not an exception, or an excuse for the failure to bring the appeal to trial within the time prescribed. Likewise, the consent of counsel to continuances of the trial within the one-year period is not equivalent to a written stipulation to extend the time for trial beyond the period prescribed. In other words, the consent of the parties to continuances of the trial within the one-year period does not postpone the running of that period from the time the consent is given, but the clear meaning of the language of the section is that the stipulation of the parties must consent to a delay of the trial *beyond* the statutory period.

Let a peremptory writ of mandate issue as prayed.

We concur: STURTEVANT, J.; CABANISS, Presiding Justice pro tem.

---

79 Cal. App. 387

FRESNO INV. CO. v. BRANDON et al.
(Civ. 5610.)

(District Court of Appeal, First District, Division 2. California. Sept. 24, 1926.)

1. Subrogation ⚿1—Subrogation is available to those who, not acting voluntarily, pay the debt of another, who pay in performance of legal duty, or to protect their own rights, and to those whose payment is favored by public policy.

Doctrine of subrogation is available to those who, not acting voluntarily, pay debt of another which in equity and good conscience should have been discharged by him, who pay in performance of a legal duty imposed by contract or rules of law, or for purpose of protecting their own rights or interests, and to those whose payment is favored by public policy.

2. Subrogation ⚿22.

Plaintiff *held* entitled to recover of defendant, under doctrine of subrogation, amount paid to tax collector to discharge a lien for taxes levied on defendant's personalty, but which had been assessed to plaintiff and had become a lien upon his real property, in view of Pol. Code, §§ 3628, 3716, 3717.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by the Fresno Investment Company against H. H. Brandon and another. Judgment for plaintiff, and defendant Mack-International Motor Truck Corporation appeals. Affirmed.

Egan & Morris, of San Francisco, and Herbert McDowell, of Fresno, for appellant.

Frank L. Simons, of Fresno, for respondent.

NOURSE, J. Plaintiff sued to recover the sum of $316.84, which it had paid to the tax collector of Fresno county to discharge a lien for taxes levied on defendant's personal property, but which had been assessed to plaintiff and had become a lien upon plaintiff's real property. Judgment went for plaintiff as prayed, and the defendant Mack-International

Motor Truck Corporation appealed on a typewritten record.

The complaint is in the usual form and contains all the material allegations; the answer denies, on lack of information and belief, matters of public record covering the tax proceedings pleaded in the complaint, and sets up as a special defense that the plaintiff was a mere volunteer; an "interloper." The trial court found adversely to the defendant on this special defense and also found that the allegations of the complaint were true. The facts are clear and uncontroverted, and these findings are not subject to attack.

The only question requiring consideration on this appeal is whether the respondent is entitled to recover the taxes paid under the equitable doctrine of subrogation. Before referring to the rule it would be well to note the provisions of our Code under which the claim arises. Section 3717, Political Code, reads:

> "Every tax due upon personal property is a lien upon the real property of the owner thereof."

Section 3716 provides that:

> "Every tax has the effect of a judgment against the person; * * * the judgment is not satisfied nor the lien removed until the taxes are paid."

Section 3628 provides that no mistake in the name of the owner of real property shall render the assessment thereof invalid.

[1] The doctrine of subrogation, extended far beyond the limitations of the early civil law, has been held available to those who, not acting voluntarily, pay the debt of another which in equity and good conscience should have been discharged by him, to those who pay in the performance of a legal duty imposed by contract or rules of law, to those who pay for the purpose of protecting their own rights or interests, and to those whose payment is favored by public policy.

[2] The application of this rule to the payment of taxes which have become a lien upon the payor's realty is aptly stated in 25 Ruling Case Law, p. 1366, as follows:

> "It is generally considered that there is nothing in the nature of a lien for taxes or assessments or in the fact that such a lien exists in favor of a sovereign taxing power to prevent the application of the equitable doctrine of subrogation, in a case where subrogation would otherwise be proper, and the rule supported by the great weight of authority is, that one who, for the protection of his own property, is compelled to pay taxes or assessments to which he is a stranger, and for the payment of which another is legally or equitably bound, becomes entitled by way of subrogation to the benefit of the lien held by the state for the payment of the taxes or assessments."

Our attention has not been directed to any authority in this state which questions the rule stated in the text. The argument advanced by appellant is that the doctrine is applicable only in the case of an assignment from the creditor to the one seeking subrogation, and that no assignment of the tax lien by the state had been pleaded or shown. Some support for the argument can be found in the old civil law where the doctrine of subrogation arose, but the rule has long since been rejected by the authorities as the equitable application of the doctrine has been invoked.

Judgment affirmed.

We concur: STURTEVANT, J.; CABANISS, Presiding Justice pro tem.

79 Cal. App. 413

PEOPLE v. SCHMIDT. (Cr. 1364.) *

(District Court of Appeal, Second District, Division 1, California. Sept. 28, 1926.)

1. False pretenses 🔑26.

Information charging defendant with obtaining money from particular persons by false pretenses *held* sufficiently definite.

2. Criminal law 🔑202(6).

Defendant selling land which he did not own to two joint purchasers *held* not twice convicted of same offense when convicted on separate charges of obtaining money by false pretenses from each purchaser.

3. False pretenses 🔑49(1).

Evidence of sale of land which defendant did not own *held* to sustain conviction for obtaining money by false pretenses.

4. Criminal law 🔑1186(4).

Permitting witness who did not know defendant's reputation where he lived to testify that his reputation where he did business was bad *held* not reversible error, in view of Const. art. 6, § 4½.

5. Criminal law 🔑1186(4)—Refusal to strike out answer to question whether character witness was enemy of defendant, if error, held not prejudicial (Const. art. 6, § 4½).

Where witness who had testified that defendant's general reputation was bad, when asked on cross-examination if he was an enemy of defendant, replied, "I am an enemy to anybody who is not straight, and he is not straight," *held* that refusal to strike out answer as not responsive to question, if error, was not prejudicial, in view of Const. art. 6, § 4½.

6. Criminal law 🔑1186(4)—Witnesses 🔑326—Refusal to permit impeachment of impeaching witness held not abuse of discretion nor reversible error, in view of constitution (Const. art. 6, § 4½).

Where state produced witness who testified that defendant's general reputation was bad, refusal to permit defendant to impeach state's impeaching witness *held* not abuse of discretion or reversible error, in view of Const. art. 6, § 4½.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court in 250 P. 1104; Waste, C. J., dissents from order of denial.

7. Criminal law ⚷676.

General rule as to limiting number of witnesses on a given point does not in strictness apply to question of impeaching witness.

8. Criminal law ⚷1186(4).

Refusal to permit impeaching witness, who had testified that defendant's general reputation was bad, to be asked question whether he knew character witness who had testified for defendant *held* not reversible error, in view of Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Oscar Schmidt was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Leonard M. Barnes, and William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

YORK, J. The appellant was convicted on two counts of an information against him charging him with obtaining money by false pretenses. He has appealed from the judgment of conviction and from an order denying a motion for a new trial.

[1] The first count was based upon his obtaining $500 from one Maessel by falsely representing that he was the owner of land that he did not own, and contracting to sell an acre of it to Maessel and one Cofer; and the other count charges the obtaining of $500 from said Cofer in the same manner, in the same transaction; the said Maessel and Cofer joining in the contract with appellant to purchase the land. The information sets forth the false representations at length and with great particularity, and also sets up other false representations made to induce said Maessel and Cofer to part with their money. The most potent of such false representations, however, were those with reference to his alleged ownership of the land, and it is not necessary to consider the other representations, except as considered with the alleged ownership. The allegations of the information were sufficient to make it plain to defendant with what he was charged, and no person with common understanding could fail to comprehend what was meant. People v. Griesheimer, 176 Cal. 49, 167 P. 521. The first count upon which the defendant was convicted was the one that charged the obtaining of $500 from Maessel, and the second count upon which he was convicted was one charging the obtaining of $500 from Cofer on the same representations and in the same transaction.

[2] Appellant contends that he was twice convicted for the same offense. There is no merit in the contention that Cofer did not know the representations made by appellant. The evidence clearly shows that representations made to Maessel and Mrs. Cofer (Mr. Cofer's wife) when Cofer was not present were communicated to Mr. Cofer, and that in a conversation between defendant and Mr. Cofer defendant was informed that Mrs. Cofer had communicated to him the statements made to Maessel and Mrs. Cofer, and statements to Mrs. Cofer made by defendant show that defendant knew that Mr. Cofer was acting upon these statements, and parted with his money to defendant by reason thereof. Proof of the representations that defendant knew Mr. Cofer was acting on and influenced by them was proof that he knew of them, and was sufficient. People v. Hong Quin Moon, 92 Cal. 41, 27 P. 1096. The gist of the crime was not the false representations made by defendant, but in the obtaining of the money by reason of them. We hold that the appellant was not twice convicted for the same offense.

[3] One point urged by appellant is that the evidence was insufficient in a material respect to warrant a conviction. We have examined the evidence fully, and we hold that the evidence was ample to sustain the verdict. The principal point made to sustain this contention is that the evidence does not show that the parties alleged to have been defrauded would not have parted with their money had not the false representations been made. But the evidence shows beyond conflict that the defendant did not own the land he represented that he owned; that his pretense that he owned the land had no foundation, except what he claims was an option to purchase from a Mrs. Coffman, the real owner. This option, if such it may be called, was obtained by him on July 29, 1925, the day before he obtained the money from the complaining witnesses, and was obtained by him by false representations made by him to Mrs. Coffman; and, although the stated price for the land was $42,500, the "option" was contingent on the owner accepting "trust deeds," not identified or described in the "option" document, which were to be passed upon in connection with certificates of title, and were to be subject to the approval of a Mr. Scherrer. When defendant entered into the contract with complainants, he knew he did not own the land which he agreed to sell them, and that he might never own it, and that he had no legal claim to it; yet he represented that he owned the land and could sell and convey it to them. He told them he had paid $3,000 an acre for it, and he had paid nothing, except $10 for the alleged option. He told them his "option" was a deed, and they seemed not to have known that it was not. They seemed not to have had business experience, and were easily deceived, and too careless to make investigation of the matters involved in the transaction; too ignorant to know how large an acre of land is, and inquisitive only as to the descriptions in

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the various contracts. But these conditions did not give him free rein to get their money by false representations and without consideration. He was under obligations to deal with them with an understanding that they were lacking in business acumen, or they would not have parted with their money to a stranger while having so little knowledge of what they were receiving for it. The defendant knew that they believed his false representations, and he knew that they were induced to part with their money by reason thereof. In the case of People v. Hong Quin Moon, 92 Cal. 41, 27 P. 1096, it was said:

> "Dong Toy did not testify that he believed the alleged statement of the defendant, or that it induced him to pay over the money; but in cases of this kind, while the testimony of the prosecutor is, ordinarily, the best evidence of the effect which the alleged statements had upon him, it is not essential to a conviction that he should testify expressly that the false pretenses induced him to act as he did. The jury may be fully satisfied on the testimony of others, and from all the circumstances in the case, that the representations did induce him to turn over the property to the defendant. State v. Thatcher, 35 N. J. Law, 449."

The defendant's representations were shown by direct and circumstantial evidence to have been the inducing cause of the complaining witnesses parting with their money to defendant without consideration. After a view of all the evidence, we hold that the evidence was sufficient to sustain the verdict We hold that there was no substantial variance between the allegations of the information and the evidence introduced. It is unnecessary to consider more than the willfully false representations with regard to the ownership of the land.

[4] Appellant further contends that the court erred in ruling on the admission of evidence. In this connection it is contended that one Hurley should not have been permitted to testify as to the general reputation of defendant. Defendant had testified as a witness in his own behalf, and he had produced several witnesses who had testified that his general reputation was good. Hurley was called in rebuttal. Hurley did not know the reputation of defendant where he lived. He knew his general reputation "where he lived and where he did business." An objection was made to Hurley's testifying, and the court overruled the objection because of his knowledge of defendant's reputation in the locality where he did business. We hold that the ruling was correct. A person in a large city may not be known to his next door neighbor, but may be known 20 miles away where he does his business. The former strict ruling on this class of testimony has been relaxed, in view of our modern methods of rapid transit, which enable a person to have his home in one place while he does business in another far away.

[5, 6] After this witness had testified that defendant's general reputation was bad where he did business, he was asked in cross-examination whether he was not an enemy to defendant and he replied: "I am an enemy to anybody who is not straight, and he is not straight." A motion was made by defendant's counsel to strike this answer out on the ground that the witness had not answered the question. The motion was denied; the court remarking that the witness had answered the question and explained his answer. Had the court stricken the answer out and required the witness to answer more directly, it would not have been error. But granting defendant's motion would have stricken the whole answer out, and therefore the ruling was within the discretion of the trial court, for it sufficiently appears from the witness' answer that the witness was an enemy of defendant. Thereafter, defendant called as a witness one Wilson, and sought by him to impeach the witness Hurley on the ground that the general reputation of Hurley was bad. The court stopped this line of inquiry and that ruling, if the question was properly put to the witness, presents the only doubtful point we are called upon to decide. Appellant's counsel cites several cases decided in other jurisdictions holding that an impeaching witness may himself be impeached. If the case of Phillips v. Thorn, an Indiana case reported in American Reports, volume 43, page 85 (84 Ind. 84) and similar cases cited, had been decided by the Supreme Court of this state, we should feel required to hold that the ruling complained of was a fatal error. But the view of the trial court in this case was the most logical view of the question. If an impeaching witness may himself be impeached on the ground that his general reputation is bad for truth, honesty, and integrity, it follows that an impeaching witness can also be impeached and so on without end. Thus A. is called for plaintiff, and testifies the general reputation of B., the defendant, for truth, honesty, or integrity is bad. C. is then called by defendant, who testified the general reputation of A. is bad. Then D. is called by plaintiff, who testifies to the bad general reputation of C., and so on indefinitely. In Greenleaf on Evidence (16th Ed.) on page 570, section 444C, under heading "Impeaching Witness Impeached," he has this to say:

> "May the impeaching witness himself be impeached? No doubt here arises (the answer being in the affirmative), except for character evidence. For such evidence it has always been thought that convenience and propriety require some limit to be put to the process of mutual abuse. Three solutions have found favor; one, to prohibit entirely the impeachment of an impeaching witness' character; another, to allow such impeachment of the impeaching witness, but no more; a third, to leave the matter to the discretion of the trial court; the last being of course the preferable rule."

[7] Professor Wigmore on Evidence (1st Ed.) § 894, contains the following on impeachment of impeaching witness:

> "Limitation in the Trial Court's Discretion. No question arises here except as to the use of character evidence. When B. is brought forward to impeach A., and C. to impeach B., it is obvious that not only might there be no end to this process, but the real issues of the case might be wholly lost sight of in a mass of testimony amounting to not much more than mutual vilification. The general rule as to limiting the number of witnesses upon a given point (post, § 1907) does not in strictness apply. Three courses are open to pursue: First, to exclude absolutely the impeachment of the character of an impeaching witness; secondly, to admit the impeachment of an impeaching witness, but no more; thirdly, to admit it only to such an extent as the discretion of the trial court deems best. The first two of these rules are represented in different jurisdictions. In such a case, however, any mere rule of thumb is undesirable; the preferable rule is the third."

Further, in his same work, in section 1907, he has this to say as to the jury being misled by circumstances put in evidence which are not directly germane to the subject matter of the trial:

> "Each witness adds new items of detail in his examination and cross-examination; each witness may be impeached by the calling of additional witnesses on the other side; each of these new ones adds his quota of details; and each may in turn lead to the calling of new impeaching witnesses on the first side; and with each of these last the same round of possibilities begins again; until amid the interminable entanglements of scores of witnesses and their statements it would become practically impossible for the jurymen to follow the thread of the substantial issue in controversy and to detect the true effect of the evidence. The result would be the stifling of the truth, not its revelation, and the decision would probably turn upon the chance effect of fragments of evidence making casual impressions, rather than upon an orderly consideration of all the salient facts. * * * It has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment or whim."

We therefore hold that it is within the discretion of the trial court to limit such testimony within reasonable bounds, ex necessitate rei, and that the court did not abuse its discretion in ruling against the impeachment of the impeaching witness.

[8] Counsel for appellant further contends that it was error not to permit him to ask the witness Hurley whether he was acquainted with character witnesses who had testified in favor of defendant. Questions as to whom Hurley had talked with concerning the reputation of the defendant were allowed with much latitude. The questions were not confined to any inquiry with regard to defendant's reputation, and, if intended by way of impeachment, they were not properly framed for that purpose. The court did not err in ruling as to that class of questions. At least, after an examination of the entire record in this case, we hold that there was no reversible error, as none of the errors or defects affected the substantial rights of the defendant. Const., art. 6, § 4½.

Judgment and order affirmed.

I concur: CONREY, P. J.

---

79 Cal. App. 422

CITY OF STOCKTON v. WILSON et al.

(Civ. 3021, 3022.)

(District Court of Appeal, Third District, California. Sept. 29, 1926.)

Eminent domain ⚷173—Where city's eminent domain proceeding against residents of another city was brought in neutral county where land was located, plaintiff held not entitled to change of venue (Code Civ. Proc. §§ 394, 1243; Civ. Code, § 3532; Const. art. 4, § 25, subds. 4, 33).

Where city's eminent domain proceeding against residents of another city was brought in county in which land was located, as required by Code Civ. Proc. § 1243, and which was neutral county, plaintiff *held* not entitled to change of venue to another neutral county, notwithstanding section 394, purpose of which is to guard against local prejudice, in view of Civ. Code, § 3532, and Const. art. 4, § 25, subds. 4, 33.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Proceeding to condemn land for reservoir site by the City of Stockton against J. N. Wilson and another. From orders granting change of venue, defendants appeal. Reversed.

Grove J. Fink, of Sacramento, and Alma M. Myers, of San Francisco, for appellants.
J. LeRoy Johnson and Thos. S. Louttit, both of Stockton, for respondent.

FINCH, P. J. The plaintiff, a city situated in San Joaquin county, commenced the above-entitled proceeding in Calaveras county to condemn the defendants' lands in the latter county for a reservoir site. The plaintiff thereafter duly moved the trial court to transfer the proceeding to some other county for trial, on the sole ground that the defendants are residents of the city and county of San Francisco, and, by two separate orders, the court transferred the proceeding to Amador county. The defendants have appealed from both orders. The facts are undisputed and the only question presented is whether the plaintiff was entitled to the transfer on the ground stated. Section 394 of the Code of Civil Procedure, provides:

> "An action or proceeding against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action or proceeding is brought by a county, or city and county, in which case it may be tried in any county, or city and county, not a party thereto. Whenever an action or proceeding is brought by a county, city and county, or city, against a resident of another county, city and county, or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a county, or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides or is doing business or is situated. Whenever an action or proceeding is brought against a county, city and county, or city, in any county, or city and county, other than the defendant, if the defendant is a county, or city and county, or, if the defendant is a city, other than that in which the defendant is situated, the action or proceeding must be, on motion of the said defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, or is doing business, or is situated, and other than the plaintiff county, or city and county, or county in which such plaintiff city is situated, and other than the defendant county, or city and county, or county in which such defendant city is situated."

Plaintiff's application for a transfer comes within the literal language of the second sentence of the section quoted. The question to be determined is whether it comes within the spirit and intent of that section. The evident purpose is to guard against local prejudices which sometimes exist in favor of litigants within a county as against those from without and to secure to both parties to a suit a trial upon neutral ground.

But, at the time the motion was made, in so far as appears, the proceeding was pending in a neutral county, a county "other than that in which the plaintiff is situated" and "other than that in which the defendants reside," so that no purpose was to be served by a transfer to another neutral county. To require a transfer under such circumstances would be to require an idle act. "The law neither does nor requires idle acts." Civ. Code, § 3532. From the terms of section 394, viewed in the light of other sections relating to venue, it seems clear that its provisions were intended to apply to actions or proceedings commenced in a plaintiff county, the county in which a plaintiff city is situated, or the county of a defendant's residence. Section 1243 of the Code of Civil Procedure provides that proceedings in eminent domain "must be commenced in the superior court of the county in which the property sought to be taken is situated." After so providing, it is not to be presumed that the Legislature intended by section 394 to give either party the right to a transfer in cases where no reason exists therefor. If the proceeding had been commenced in the city and county of San Francisco or in San Joaquin county, the grounds here urged in support of the transfer would have constituted no valid objection to the transfer for trial to Calaveras county, and the only ground upon which the orders could be affirmed would be to hold that section 394 gives either party the arbitrary right to a transfer without any cause or reason therefor. If the section was intended to have that effect, then, to that extent, it is violative of article 4, section 25, subdivisions 4 and 33 of the Constitution, prohibiting the enactment of special laws "providing for changing the venue in civil or criminal actions" and "in all other cases where a general law can be made applicable." A law giving the parties to an action or proceeding, commenced in a neutral county by a city or county against a resident of another county, the arbitrary right to a transfer to another county and denying that right to all other litigants would be a special law, within the meaning of the constitutional provisions quoted. While such a law would apply equally to all litigants embraced in the class mentioned, the class would not be founded upon any "natural or intrinsic or constitutional distinction." City of Pasadena v. Stimson, 91 Cal. 238, 251, 27 P. 604, 607; Darcy v. Mayor, etc., of San Jose, 104 Cal. 642, 647, 38 P. 500; Matter of Application of Miller, 162 Cal. 687, 698, 124 P. 427; Mordecai v. Board of Supervisors, 183 Cal. 434, 438, 192 P. 40. In City of Stockton v. Ellingwood, 248 P. 272, where the action had been commenced in the county of the defendant's residence and was thereafter transferred to another county on the plaintiff's motion, this court said:

> "It must be presumed in favor of the constitutionality of the section [394] that the Legislature determined, upon sufficient investigation, that in a case such as this, in order to avoid any local bias which would probably affect the verdict of a jury, justice requires that the place of trial be changed to a neutral county."

No such presumption, however, can be indulged in favor of the validity of a law giving one class of litigants the right to a change of venue from one neutral county to another and denying the same right to other litigants. Respondent relies upon the case of Daneri v. City of San Deigo, 55 Cal. App. 562, 203 P. 829, but the question here under consideration was not raised or discussed or even referred to in that case. The only question there considered was whether the application for a transfer "was made too late."

If it had been made to appear that the plaintiff is seeking to condemn the lands of a large number of owners in Calaveras county and that by reason thereof there exists among the residents of that county a prejudice against the plaintiff, such facts might have justified the transfer which was made, but there was no such showing. Had the showing been made, it would have presented a question of fact for determination rather than a question of law. The motion having been made upon the sole ground that the defendants are residents of San Francisco, and the affidavit in support of the motion stating no other facts to justify the transfer, it follows that the plaintiff was not entitled thereto.

The orders are reversed.

We concur: PULLEN, Justice pro tem., PLUMMER, J.

79 Cal. App. 406

LLOYD v. BOULEVARD EXPRESS et al. (three cases). (Civ. 4829.) *

(District Court of Appeal, Second District, Division 1, California. Sept. 28, 1926.)

1. Negligence 🔑68.

One who does all that ordinarily prudent person would do under circumstances to avoid accident is not guilty of contributory negligence.

2. Automobiles 🔑245(79)—Driver of automobile, colliding with driverless truck, held not, as matter of law, guilty of contributory negligence.

Driver of automobile, which collided with driverless truck, *held* not, as matter of law, guilty of contributory negligence, though she did not stop her car before collision.

3. Trial 🔑328—In personal injury action against truck driver and employer, verdict against employer only held not in favor of driver.

In personal injury action against truck driver and employer, verdict against employer only *held* not in favor of driver, but merely indicates failure to find on issue of driver's negligence.

4. Appeal and error 🔑237(6)—In personal injury action against truck driver and employer, latter cannot complain for first time on appeal that verdict was against it only.

In personal injury action against truck driver and employer, latter cannot complain for first time on appeal that verdict was against it only, where it noticed omission, and did not ask that jury be required to find on issue of driver's neglect.

5. Trial 🔑260(1).

Refusal of instructions *held* not error, where they were given in identical language or with unimportant changes.

6. Trial 🔑248.

Instruction stating inapplicable abstract rules of law *held* properly refused.

7. Trial 🔑261.

Instructions not stating law accurately *held* properly refused.

8. Appeal and error 🔑1050(2)—In personal injury action against truck driver and employer, admission of immaterial conversation of driver at time of accident held not prejudicial.

In personal injury action against truck driver and employer, admission of immaterial conversation of driver at time of accident *held* not prejudicial, where it was stricken except as against him.

9. Evidence 🔑123(11).

Statements of truck driver, after collision and before excitement had subsided, *held* admissible as part of res gestæ.

10. Appeal and error 🔑970(2)—Ruling on admission of evidence as res gestæ will not be disturbed, in absence of abuse of discretion.

Ruling on admission of evidence as res gestæ will not be disturbed, in absence of abuse of discretion, since trial judge is better prepared to pass on evidence on which ruling depends.

Appeal from Superior Court, Orange County; H. J. Forgy, Judge pro tem.

Separate actions by Marguerite Lloyd, by William H. Lloyd and another, and Helen Lloyd, by and through her guardian ad litem, Myrtle Lloyd, against the Boulevard Express and others, tried together by stipulation. A nonsuit was granted in favor of defendant C. R. Siglin, and from adverse judgments the other defendants appeal. Appeals consolidated for hearing, and judgments affirmed.

Kidd, Hardy & Elliott, of Los Angeles (Gerald F. H. Delamer, of Los Angeles, of counsel), for appellants.

Arthur E. Koepsel and Z. B. West, Jr., both of Santa Ana, for respondents.

YORK, J. We are considering here three cases, which were tried together by stipulation before a jury. They are all against the same defendants, but each by different plaintiffs. They are actions for damages incurred in an automobile accident, in which defendants were charged with negligence, resulting in the damages complained of. On the trial a nonsuit was granted in favor of defendant C. R. Siglin, and a verdict was rendered in favor of Marguerite Lloyd against defendant Boulevard Express, a copartnership, and defendant Mitchell for $25,000, and a verdict was rendered in favor of plaintiffs William Lloyd and Marguerite Lloyd against Boulevard Express in the sum of $300 for damage to their car and $500 for injuries to Myrtle Lloyd, wife of William H. Lloyd, and for $3,000 damages to Helen Lloyd against Boulevard Express for personal injuries. Judgments were entered in accordance with the verdicts. Defendants, against whom judgments were rendered, moved for a new trial, which motions were denied, and these de-

---

*Hearing denied by Supreme Court November 26, 1926.

fendants have appealed from the judgments rendered against them respectively. By stipulation of all the parties interested, such appeals were consolidated for hearing here and are heard together.

The allegations of negligence were denied in all of the cases, and defendants also pleaded contributory negligence of the plaintiff Marguerite Lloyd, who was driving the automobile in which all of the plaintiffs injured were riding at the time of the accident. The defendants sought to escape liability to the other passengers in the automobile, other than the driver, by alleging a joint venture in which all were interested, and hence estopped from recovering, because of the alleged contributory negligence of Marguerite Lloyd. The accident occurred in a public road. Defendant Siglin was driving an automobile in a northwesterly direction on a paved road, and Marguerite Lloyd was driving an automobile in the same direction about 300 feet behind him, when a collision occurred between the car of Siglin, referred to in the record as the Mitchell car, and an automobile truck operated by defendant Mitchell, who was in the employ of the defendant Boulevard Express, coming from the opposite direction. After the impact between the car driven by Siglin and the truck owned by the Boulevard Express, the defendant Mitchell, the driver of the truck belonging to the Boulevard Express, permitted his truck to proceed without any driver in the direction from which the car driven by Marguerite Lloyd was approaching, and it collided with the car driven by Marguerite Lloyd, and caused the damage complained of in each case.

[1, 2] The first contention made in appellants' brief is that Marguerite Lloyd was guilty of contributory negligence, which contributed proximately to the collision with the car she was driving and the damages resulting from such collision; the argument being based upon an assumption that it was possible for Miss Lloyd to have avoided the accident, and that she knew that the truck of the Boulevard Express, which collided with her, was approaching her driverless. The evidence does not establish the latter fact, and even if this fact was established it is difficult to perceive how she could have avoided the accident with the auto truck, which was not under the control of any one. But contributory negligence is not based upon a possibility of avoiding an accident. If a person does all that an ordinarily prudent person would do under the circumstances to avoid the accident, such person is not chargeable with neglect which proximately causes the accident and resulting damage. The evidence offered to establish contributory negligence was not, therefore, sufficient to justify the court in finding such neglect as a matter of law; hence it was a question for the jury to decide, and the evidence sustains the jury's verdicts. Indeed, had Marguerite Lloyd stopped her car, as appellants claim she should have done, it is far from certain that she would have been able to get her car off the pavement—which she partially accomplished—before the impact with the driverless car of the Boulevard Express. It was certainly open to question which was the best course for her to pursue, but she had no time for deliberation.

The conclusion we have arrived at with regard to the alleged contributory neglect of Marguerite Lloyd renders immaterial appellants' second contention, that she and the other plaintiffs were engaged in a joint enterprise.

We have reviewed the evidence of the damage suffered by Marguerite Lloyd and hold that the verdict rendered for her is not so excessive as to justify this court in interfering with it.

[3, 4] The verdicts were supported by the evidence. It is quite true, as contended by appellant, that, if the Boulevard Express were liable, defendant Mitchell was also liable. But it will be noted in these verdicts that the jury did not find either for or against Mitchell. It is the settled law in this state that the verdict of a jury against one of two defendants is not a verdict in favor of the other defendant. Such a verdict indicates simply that the jury failed to find upon the issues. The defendant Boulevard Express noticed the omission, and did not ask that the jury should be required to find on the issue of neglect as to defendant Mitchell, and hence cannot now be heard to complain. Benson v. Southern Pacific Co., 177 Cal. 780, 781, 171 P. 948. It is quite apparent, therefore, that appellants are in error in their statement "that in the case of William H. Lloyd and Marguerite Lloyd the jury found defendant Boulevard Express *alone* were negligent," or found "that in the Helen Lloyd case the Boulevard Express *alone* were negligent." Such statements are not supported by the facts or the law.

As to the instructions of the court to the jury, appellants complain of the action of the trial court in refusing to give to the jury certain instructions requested by appellants. Nearly all of these instructions were given by the court in language the same as requested, or with unimportant differences. The instructions as found in the reporter's transcript are not numbered. It would much assist in the examination of records on appeal in jury cases, if the courts and counsel would furnish the means of reference to instructions, by proper classification and numbering. In this case, the supplement to appellants' brief identifies the instructions by serial numbers, beginning with the instructions requested and not given. For convenience we here use those numbers.

[5-7] Appellants complain of the court's refusal to give instructions 18, 20, 21, 22, 23, 24, and 26. Very slight attention to the record

would have shown that these instructions, in identical language or with unimportant changes, are given under the numbers 41, 44, 45, 46, 47, 48, and 50. Appellants also object that the court erred in refusing to give requested instruction No. 29, referring to certain consequences of the nonsuit granted in favor of defendant Siglin. By the court's modification of instruction 48, as given, the point was covered, and it became unnecessary to give No. 29, if such necessity would have existed at all. Some of the instructions requested and refused state abstract rules of law, not applicable to the case at bar. Some of the instructions requested do not state the law accurately, and hence were properly refused.

[8] Appellants' contention that the trial court committed an error in ruling that H. C. Russell might testify as to what defendant Mitchell said at the time of the accident is not sustained, in that the conversation was so soon after the accident that, if material, his testimony was part of the res gestæ, and upon the further ground that Russell testified to nothing prejudicial to defendants. The court remarked at the time: "I think the conversation is entirely immaterial; no party is hurt by it." After this remark was made, the defendants' counsel cross-examined Mr. Russell, and thereafter Mr. Russell's statements were stricken out as to any defendant except Mitchell, and the court instructed the jury "that any statements made by Mr. Mitchell, as testified to by these witnesses, were not to be considered as in any way binding on the defendant Boulevard Express, or upon any defendant except himself," and the defendants there admitted that these statements were binding on defendant Mitchell.

[9, 10] Objection is made, also, to the ruling of the court permitting Myrtle Lloyd to testify to what defendant Mitchell said at the time of the accident. The time given as to the time when the conversation occurred, according to the most reliable testimony, was "very soon, almost immediately after we put Marguerite on the cushions at the side of the road." She testified he said: "I never saw this car. I run back to beat up the other fellow, and heard the crash, and ran to this car to give them what assistance I could." Another statement she said he made was: "My God, see what I have done; see what I have done!" His statements, if true, indicate that they were made before the excitement attending the accident had subsided. Questions as to the admissibility of such statements as part of the res gestæ depend upon whether such statements are the emanations of the acts done, *before* the excitement usually incident to an accident causing great injury has subsided, or are the statements made *after* the excitement has subsided, and the witness has time to calculate a policy to be pursued. Here the statements were made at the scene of the accident, and in the presence of those suffering from its results, and in the presence of the wreckage the accident created.

Again we hold that the trial judge before whom the witness appeared is better prepared to pass upon the evidence upon which the admissibility of such statements depends than is an appellate court, and his ruling should not be disturbed, unless he has abused his discretion. We cannot say, from the evidence appearing in the record, that the declarations of Mitchell were inadmissible. If the statement of the employee is spontaneous, that is, made at the time of the accident and during the excitement attending it, before the employee has time to reflect upon the consequences of his statement, or to fabricate evidence against his employer, it is admissible against the employer. In this case we take the statement of Myrtle Lloyd to be true, as the jury probably did, as to the time when the statements of Mitchell were made; her testimony as to what Mitchell said at the time was admissible, and we hold that the court did not commit reversible error in admitting it.

The cases cited on behalf of appellants do not sustain their contention, under the facts in evidence here. Thus, in Luman v. Golden Ancient Channel Mining Company, 140 Cal. 709, 74 P. 307, the court held that the party inquired of had no authority to bind his principal. In Durkee v. Central Pacific R. R. Co., 69 Cal. 535, 11 P. 130, 58 Am. Rep. 562, the injured child had been removed from under the tender, carried away nearly a quarter of a mile and brought back before the declarations of the conductor were made. In Boone v. Oakland Transit Co., 139 Cal. 492, 73 P. 243, the conductor, whose negligence was alleged to have caused the accident, had walked nearly half a block and back again before he made the statement attributed to him—a statement which for other reasons, also, was not admissible. In Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 391, 104 P. 986, the employee's statement was favorable to his employer. In Willard v. Valley Gas & Fuel Co., 171 Cal. 16, 151 P. 286, it did not appear how long after the accident the conversation occurred. The ruling of the trial court seems to be in accordance with the rule laid down in Perry v. Haritos, 100 Conn. 476, 124 A. 44; Southern Surety Co. v. Weaver (Tex. Civ. App.) 260 S. W. 622; Ahlberg v. Griggs, 158 Minn. 11, 196 N. W. 652; Stone v. Sinclair Refining Co., 225 Mich. 344, 196 N. W. 339; Hanover Railroad Co. v. Coyle, 55 Pa. 402.

The judgments are affirmed.

I concur: CONREY, P. J.

79 Cal. App. 436

LAWRENCE v. BUTLER et al. (Civ. 5378.)

(District Court of Appeal, First District, Division 1, California. Oct. 5, 1926.)

1. Automobiles 🔑245(2).

Act of driver of loaded five-ton truck, in traveling on right side of street discolored with oil, *held* not negligence as matter of law, under St. 1923, p. 557, § 121.

2. Automobiles 🔑243(3)—Where it was not shown that it was impracticable for defendant's truck to travel on right side of street, condition of left side of street held properly excluded (St. 1923, p. 557, § 122).

Where it was not shown that it was impracticable for truck to travel on right side of street, condition of left side of street *held* properly excluded in action for damage occasioned by truck backing into plaintiff's automobile on hill after slipping in oil, in view of St. 1923, p. 557, § 122, since driver could not be deemed negligent for not using left side.

3. Evidence 🔑553(2).

Where truck damaged plaintiff's automobile after slipping down hill from oil in street, objections to hypothetical questions as to whether truck would slide back if effective brakes were applied *held* properly sustained, since element of greasy condition of pavement was not included.

4. Evidence 🔑553(1)—Inquiry as to effect of locking wheels of loaded five-ton truck, sliding backwards down hill on 23 per cent. brick-paved grade, spotted with unknown quantity of grease, held not proper hypothetical question.

Inquiry as to effect of locking wheels of loaded five-ton truck, sliding backwards down hill on 23 per cent. brick-paved grade, spotted with unknown quantity of grease, *held* not proper hypothetical question, since question could not be determined from like experience or as result of professional research.

5. Evidence 🔑553(4)—Hypothetical question as to whether effective brakes on truck would lock wheels held improper in action for damage to automobile caused by truck slipping on hill, where driver testified that he tried to make truck mount curb.

Hypothetical question as to whether effective brakes on truck would lock wheels *held* improper in action for damage to automobile caused by truck slipping backwards on hill, where driver testified that he tried to make truck mount curb and rest against telephone pole, since such evidence indicates momentary release of pressure on brakes.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by John J. Lawrence against T. I. Butler and others. Judgment for defendants, and plaintiff appeals. Affirmed.

George E. Sandford, of San Francisco, and Dean Sherry, of Los Angeles, for appellant.

Cooley & Gallagher, of San Francisco, for respondents T. I. Butler and T. I. Butler Co.

KNIGHT, J. Plaintiff appeals from a judgment in defendants' favor in an action brought to recover damages on account of injuries sustained by plaintiff's automobile, which was struck by a truck owned by defendant T. I. Butler Company and operated by defendant Norman MacIntosh.

Plaintiff's cause of action was based upon an allegation charging that at the time the accident happened the truck was being negligently and carelessly controlled, driven, and operated, which allegation was denied in the answer. The cause was tried on that issue, the trial court finding thereon in defendants' favor. There appears to be little, if any, conflict in the evidence regarding the manner in which the collision occurred, the principal question presented for determination being whether the conclusion reached by the trial court to the effect that the truck was not negligently operated is fairly supported by the undisputed facts.

[1] Early in the afternoon on the day of the accident plaintiff parked his automobile along the curb on the right-hand side of Powell street, between Bush and Pine streets, San Francisco, leaving it there while he attended a theater. The ascent in the grade on Powell street between the two intersecting streets mentioned is about 23 per cent., and up the center of the street run the double tracks of a cable car line. A black streak of oil or grease eighteen inches or two feet wide had been accumulating for some time on the brick pavement close to the curb, on the right-hand side of Powell street, for the entire distance of the block, as a result of oil dripping from motor vehicles which had been driven up the hill and from those parked along the curb. This condition of the pavement was similar to that existing on many other hills in San Francisco, according to the testimony. On the day mentioned MacIntosh, the truck driver, had been hauling gravel with a five-ton Kleiber truck up the Powell street hill to a construction job on Pine street, between Powell and Mason streets. Shortly after 4 o'clock in the afternoon he started to ascend the Powell street hill on his third trip, his truck being loaded with five tons of gravel. As he entered Powell street at Bush and proceeded toward Pine, his truck was traveling in the "low-low" gear at a rate of speed not exceeding five miles an hour, "straddling" the outer rail of the right-hand cable car track. When he was nearly opposite plaintiff's parked automobile, a cable car approached from the rear, sounding the gong, and in order to give it clearance, MacIntosh, having then passed plaintiff's automobile which was the last one parked on that side of the street, pulled away from the cable car tracks to the right. As he reached

a spot near the curb, the right rear wheel of the truck rolled into a spot of oil or grease on the pavement, causing the rear wheels to lose traction. The truck then started to slide backwards, "bursting out" the clutch, and, despite the efforts of MacIntosh to control its movements by the application of the brakes, continued its backward course slowly down the hill. Meanwhile MacIntosh, seeking to check its movement, tried to make it "jump" the curb and to back it into a telephone pole, but was unable to do so, and it proceeded backwards until it jammed into plaintiff's automobile, damaging the front end thereof and the motor. After the impact, the wheels of the truck gained traction and the truck proceeded up the hill. The collision occurred about 60 or 70 feet from the Pine street intersection with Powell street.

Appellant contends that, considering the weight of the load the truck was carrying and the grade of the street in that block, the driver failed to use due caution and circumspection, as is required by section 121 of the Motor Vehicle Act (Stats. 1923, p. 557), in turning onto a pavement which he knew was more or less spotted with grease, and that consequently he stands charged as a matter of law with negligence, citing in support of this contention the case of Raymond v. Sauk County, 167 Wis. 125, 166 N. W. 29, L. R. A. 1918F, 425. The principle of the case cited is not in point here, however, because the facts there showed that the driver knew that the highway onto which he was about to drive his automobile had just received a fresh application of tar and oil, and the court therefore held that common knowledge should have dictated that it was in a slippery and dangerous condition. The evidence here shows that at the time the accident happened there was no moisture on the street, the weather was clear, and the condition of the pavement on the right half of the street was no different in appearance from that of many other hilly streets in the city over which motor vehicles of all kinds passed daily.

Section 122 of the Motor Vehicle Act (Stats. 1923, p. 557) requires that:

> "On all occasions, the driver of a vehicle shall drive the same upon the right half of a public highway and close to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway. * * *"

The right half of the street beyond the point where plaintiff's automobile was parked was unobstructed, and, therefore, in pulling away from the street car tracks and over toward the curb on the right-hand side of the street, the driver of this truck was doubtless obeying the provisions of the law above quoted, but in doing so came in contact with a spot of oil recently deposited, as the proof indicates, which could not be readily detected in the black streak while traveling up the hill, and it resulted in placing the truck temporarily beyond the control of its own mechanism.

In any event, the question of whether or not it should have appeared to the truck driver, as a reasonably prudent man, that it was impracticable to travel on the right half of the street was one of fact to be determined by the trial court from all the circumstances then before it, and we are unable to declare, as a matter of law, from the mere fact of the discoloration of the pavement with oil that the trial court's conclusion on this issue was erroneous.

[2] Appellant furthermore contends, upon the assumption that the presence of the black streak of oil on the right-hand side of the street made it impracticable to travel on that side, that if it were necessary for the truck driver to divert his course at all, in order to let the cable car pass, he should have turned onto the left side of the street, and, in furtherance of this theory, sought to show on cross-examination of the truck driver the condition of the pavement on the left side of the street; but the trial court excluded the testimony, and the ruling is assigned as error. We find no merit in the point, because, as already shown, the evidence failed to establish that it was impracticable to travel on the right half of the street, and, therefore, the question of the condition of the left half thereof became immaterial. As was said by the trial court when making the ruling complained of, the law required the driver, under the circumstances present, to use the right side of the street, and hence he could not be deemed guilty of negligence for not using the left side thereof.

[3] We find no error in the trial court's rulings sustaining respondent's objections to certain hypothetical questions propounded to appellant's expert witness. One of the questions asked was, "If the brakes on a truck are in proper condition, and the brakes are properly applied, even going up a hill, will the truck slide back?" Another was, after particularizing the Powell street hill with which the witness said he was familiar, "State whether or not if the brakes of a truck going up that hill, a five-ton truck carrying approximately a five-ton load, are properly applied, whether or not the proper application of the brakes would stop the truck." It will be noted that the very element which was shown by the testimony of all witnesses to the accident, including that of a traffic officer, to have been the sole contributing cause of the backward movement of the truck, namely, the greasy condition of the pavement, was wholly omitted from both questions. If, therefore, appellant was seeking to prove that the accident could have been averted by the proper application of effective brakes, the substance of the questions asked was foreign to the situation described by the undisputed evidence in the case.

[4] But, assuming that such hypothetical

questions had included the essential element mentioned, they would still have been objectionable for the reason that the question of what the effect would be of locking the wheels on a loaded five-ton truck sliding backwards down hill on a 23 per cent. brick-paved grade, spotted with an unknown quantity of grease, obviously would be problematical, and could not be determined from like experiences or as a result of professional research, which is substantially the basis of expert testimony.

There was no question involved here as to the distance in which a motor vehicle might be stopped, under ordinary road conditions, by the proper application of effective brakes, as was presented in Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; nor does the question arise as to whether the driver negligently omitted to do something which a prudent person would have done in handling the truck after the emergency arose, which was the issue in the case of Alameda County v. Tieslau, 44 Cal. App. 332, 186 P. 398, for the only evidence given on this point was that the brakes were fully and effectively applied as soon as the wheels lost traction in the grease. The rules of the cases cited upon which appellant relies are therefore not controlling here.

[5] MacIntosh testified that when the wheels of the truck first lost traction and the clutch "burst out," he fully applied the brakes and that they were in good working order, but that the application of the brakes did not prevent the retrograde movement of the truck; that thereafter it continued to slide, the rear wheels at times revolving slowly backwards. In this connection the third hypothetical question objected to was, "If the brakes of a large truck are in good working condition and those brakes are applied, will the wheels of that truck revolve?" Plaintiff did not plead the matter of defective brakes as an element of negligence, but, assuming that under the general issue the trial court might well have allowed the question to be answered, a negative reply thereto would not necessarily have been in conflict with the testimony given by MacIntosh that the brakes were fully applied and that they were effective, for he further testified that in his endeavor to avoid striking appellant's automobile with the truck during its retrograde movement, he tried to make it mount the curb and rest against a telephone pole, from which testimony the inference may be fairly drawn that he may have momentarily released the pressure on the brakes and thus allowed the rear wheels to revolve backwards in his effort to steer the truck into and over the curb.

Appellant urges additional points relating to the sufficiency of the evidence supporting a finding of the trial court that appellant's loss was covered by a policy of indemnity insurance, and that the damaged automobile had been repaired by the insurance carrier and not by plaintiff; also that, regardless of the cost of the repairs, appellant was entitled to damages for the loss of the use of the automobile; but in view of our conclusion that the trial court's finding to the effect that respondents were not negligent is fairly sustained by the evidence, we deem it unnecessary to inquire into the additional points mentioned.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PEOPLE v. WEITZEL. (Cr. 1354.) *

(District Court of Appeal, Second District, Division 1, California. Sept. 29, 1926.)

1. Criminal law ⚷9.

Crimes in California are statutory, in view of Pen. Code, § 6.

2. Bribery ⚷1(2) — Conviction of member of common council who allegedly offered for a consideration to vote favorably on certain issues cannot be sustained in absence of agreement to pay such consideration (Pen. Code, §§ 68, 93, and section 165, as amended 1905; Deering's Gen. Laws 1923, Act 5166, § 3).

Conviction for bribery, under Pen. Code, § 165, as amended 1905, of member of common council who allegedly offered for a consideration to vote for purchase of water system and for annexation of another city by election, under Deering's Gen. Laws 1923, Act 5166, § 3, cannot be sustained in absence of agreement by party to whom offer was made to pay such consideration, where no money was paid and indictment did not allege that defendant acted as executive or judicial officer, Pen. Code, §§ 68, 93, being inapplicable.

Appeal from Superior Court, San Diego County; Geo. H. Cabaniss, Judge.

Harry K. Weitzel was convicted of bribery, and he appeals. Judgment reversed.

Sample & Harden, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Chester C. Kempley, of San Diego, for the People.

YORK, J. The defendant was convicted under the first and third counts of an indictment, based on section 165 of the Penal Code of the state of California, of bribery. The evidence sufficiently discloses that the defendant on or about the 20th day of June, 1923, was a duly elected, qualified, and acting member of the common council of the city of San Diego, and that on that day he offered to one Ed Fletcher and Charles F. Stern to

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion of Supreme Court 255 P. 792.

cast his official vote in said common council in favor of the purchase by the city of San Diego of the reservoirs, impounding and water distributing system owned by the Cuyamaca Water Company, in consideration of the payment to him of the sum of $100,000. The evidence, introduced under a separate count of the indictment, also is sufficient to prove that on the 23d day of June, 1923, while still a member of the common council, he offered to one Ed Fletcher, in consideration of the payment to him of the sum of $4,000, to cast his official vote as hereinafter stated, as a member of the said common council in the matter of calling an election for the purpose of submitting to the electors of the city of San Diego the question of the ratification of the annexation to the city of San Diego of the territory formerly known as the city of East San Diego. The evidence in this case does not disclose anything as to the nature of the offer, except the fact that the defendant approached Ed Fletcher and Charles F. Stern and proposed that they pay him the sum of $100,000 for his vote in the matter charged in the first count of the indictment, and that as to the separate count referred to herein, that he likewise approached Ed Fletcher and proposed to him that he would favor ratification of the annexation of the city of East San Diego to the city of San Diego by way of an election, rather than by resolution of the council, if Colonel Fletcher would pay to the defendant the sum of $4,000 for his services. Municipal Consolidation Act of 1913, Deering's Gen. Laws 1923, Act 5166, § 3.

The only point at issue on the appeal is whether or not *such proof* establishes a crime of "*agreeing to receive*" a bribe. The defendant contends that it was the intention of the Legislature, in enacting the first part of section 165 of the Penal Code, to make it a crime for any person to "offer" a bribe to a member of the common council, but in enacting the remaining portion of that section, to make a special provision exempting a member of the common council who merely "offers" to receive a bribe. The defendant contends that the Legislature, in the several sections of the Penal Code relating to bribery, denounced as a crime every "offer" or "proposition" advanced by any officer in the state of California to "accept" or "receive" a bribe, save only members of the common councils, boards of supervisors, and boards of trustees of any city, and that, as to these officers, it was not the intention and purpose of the Legislature to punish them for offering to receive any bribe, unless such offer was in some way accepted, and some action of some other party intervened so as to make it an acceptance or agreement to accept, or unless they actually did receive such a bribe.

[1, 2] As we have no criminal common law, crimes in California are statutory. Unless a statute exists making an act a crime or public offense (Pen. Code, § 6), no one can be punished for the commission of such act, however heinous it may be. Therefore the charge herein does not state a public offense, unless the facts alleged constitute a crime under section 165 of the Penal Code, which at the time of the offense read as follows:

> "Every person who gives or *offers* a bribe to any member of any common council, * * * with intent to corruptly influence such member in his action on any matter or subject pending before, or which is afterward to be considered by, the body of which he is a member, and every member of any of the bodies mentioned in this section who *receives*, or *agrees to receive* any bribe upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter, upon which he may be required to act in his official capacity, is punishable," etc.

We can find no other section of our Code which denounces only the act on the part of the official of receiving or agreeing to receive a bribe. Each of the other sections of our Code covers and denounces the asking of a bribe, as well as the agreeing to receive a bribe, as an offense. The first and third counts of the indictment do not charge any *asking* of a bribe. They charge that defendant did willfully, etc., "*agree to receive*" a bribe. Neither do they allege that the defendant, at the time, was acting as an executive or as a judicial officer. It cannot therefore be claimed that the indictment is based on section 68 of the Penal Code, nor can it be claimed that the indictment is based on section 93 of the Penal Code. By an amendment passed by the Legislature in 1905 (St. 1905, p. 650), the offense on the part of any person giving or offering a bribe to a member of a common council *was not* modified. The latter half of the section, dealing with offenses on the part of members of common councils, was changed so that instead of reading as formerly that every member of any such body "*who receives or offers to receive* any such bribe, is punishable," etc., the statute by such amendment was made to read:

> "Every member of any of the bodies mentioned in this section who receives, or *agrees* to receive any bribe upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, is punishable," etc.

In the case of United States v. Bashaw, 50 F. 749, 754, 1 C. C. A. 653, 658, it was said:

> "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the

particulars touching which we find a material change in the language of the act."

By referring alone to the mere wording of section 165 of the Penal Code before its amendment in 1905 and after such amendment, it will have to be held that the Legislature intended a change in the meaning of said section, and a change in the offense of bribery as therein defined and denounced. Before said amendment, said section denounced as punishable by imprisonment every member of every common council who receives or offers to receive any bribe. Whereas, by the amendment, the statute was changed so that thereafter it denounced only "every member of any of the bodies mentioned in this section who receives or agrees to receive any bribe upon any understanding that his opinion, vote, judgment, or action shall be influenced," etc.

Therefore, under section 165 of the Penal Code, as it now reads, and as it read at the time of the commission of the alleged offense, there must have been a meeting of the minds. In other words, the party to whom the offer was made must have agreed to make such payment. In People v. Squires, 99 Cal. 327, 33 P. 1092, the conviction was upheld on the ground that, under section 93 of the Penal Code, it is a crime to ask, as well as to receive, or agree to receive any bribe, and the conviction was sustained for the reason that the evidence supported the charge in that the defendant had asked for a bribe, which was all that was necessary to warrant an affirmance of the judgment, inasmuch as asking for a bribe was prohibited by the statute on which that indictment was founded; namely, section 93 of the Penal Code. But that case holds that to complete the offense of asking it is not necessary that the party approached shall consent to give a bribe. "Unless he does so there could be no agreement or understanding." The party defendant in the Squires Case was a juror, and hence would come under said section 93 of the Penal Code. In the case of People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704, the Supreme Court was passing on a case where the defendant was prosecuted under the identical statute under which the prosecution proceeded in the case at bar. In that case, they state, on page 436 (119 P. 902):

> "Defendant was indicted under section 165 of the Penal Code, and was charged as a supervisor with having 'agreed to receive and receiving' a bribe of four thousand dollars from James L. Gallagher, Abraham Ruef, and Tirey L. Ford. It was alleged that the agreement to receive the bribe and the reception of the bribe were 'with the willful, felonious, unlawful and corrupt intent' upon the part of Coffey that his official vote, opinion, judgment, and action should be influenced thereby in the matter of granting to the United Railroads of San Francisco a franchise for an overhead trolley system."

Also, on page 450 (119 P. 908) in said case, the following was held:

> "The charge against this defendant, as we have seen, is under section 165 of the Penal Code. It is not for *asking* or *soliciting* a bribe. It is for '*agreeing*' to receive and '*receiving*' a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime."

It necessarily follows that in the case at bar no public offense was proven by the evidence introduced, as there was no evidence to show that any of the parties approached by the defendant ever agreed or promised to pay any bribe solicited by him.

The judgment and order are reversed.

I concur: CONREY, P. J.

GORDON et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5111.)

(District Court of Appeal, Second District, Division 1, California. Nov. 10, 1925.)

1. Master and servant ⚷417(5).

Where nothing appears in petition for review of proceedings before Industrial Accident Commission or brief indicating what evidence is claimed to have been excluded, it must be assumed that specification of error in excluding evidence has been abandoned.

2. Master and servant ⚷416.

Finding based on stipulation that wages of deceased workmen were in excess of maximum prescribed by Workmen's Compensation Act *held* sufficient as to amount of average earnings.

3. Master and servant ⚷416.

Finding as to lack of contributory negligence *held* unnecessary in workmen's compensation proceeding, in view of Const. art. 20, § 21, and St. 1917, p. 831, §§ 1 and 6(a).

4. Master and servant ⚷347.

St. 1917, p. 834, § 6(b), as amended by St. 1919, p. 912, § 2, and St. 1923, p. 375, § 1, providing for additional compensation to injured workman to be assessed against individual members of copartnership, employer guilty of misconduct, *held* constitutional.

5. Master and servant ⚷387.

St. 1917, p. 831, § 6(b), as amended by St. 1919, p. 912, § 2, and St. 1923, p. 375, § 1, providing additional compensation for injury from employer's misconduct, manifests intention, in view of § 9(c) (1), to permit increase of one-half of total award, including allowance for expense of burial and disability indemnity.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Master and servant 🔑387—Placing employee at work under overhanging wall of sand and gravel held to constitute "serious misconduct" (St. 1917, p. 834, § 6[b], as amended by St. 1919, p. 912, § 2, and St. 1923, p. 375, § 1).

Placing employee at work under overhanging wall of sand and gravel 12 feet high *held* to constitute "serious misconduct," within St. 1917, p. 834, § 6(b), as amended St. 1919, p. 912, § 2, St. 1923, p. 375, § 1, providing additional compensation for injury from serious misconduct of employer or managing representative.

Curtis, J., dissenting.

Proceeding under the Workmen's Compensation Act by Hester Findley and others, opposed by Thomas Gordon and others, copartners doing business as Gordon & Harrison, employers, and their insurer. To review an order of the Industrial Accident Commission, granting an award against both employer and insurer, the former applies for certiorari. Award affirmed in part, and annulled in part.

Judgment modified on hearing in Supreme Court 249 P. 849.

See, also, 241 P. 912.

John F. Poole and Charles L. Chandler, both of Los Angeles, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

HOUSER, J. By this proceeding an order made by the Industrial Accident Commission is sought to be reviewed. It appears that the petitioners, Gordon, Harrison, and Russell, were copartners engaged in the business of crushing rock and excavating sand and gravel for commercial use; that in the course of the operation of the business a sand bank caved upon one of the workmen named Findley, causing injuries to him which resulted in his death; that in due time, and under the provisions of the Workmen's Compensation Act (Stats. 1917, p. 831, as amended), an application was made by the widow and the minor children of said deceased to respondent Industrial Accident Commission for adjustment of their claim against the said copartnership and its insurer, which application resulted in a final order of award being made by said commission in favor of said applicants and against the insurer in the total sum of $5,000, and a further award in favor of said applicants and against the individual members of said copartnership in a total sum of $2,500.

[1] On petition to this court for a review of the proceedings had before said commission, several reasons are suggested as sufficient to justify an annulment of said award, the first of which being that the commission acted without, or in excess of, its powers in excluding material evidence offered by the defendants in the proceedings before the commission. Without deciding whether such point is maintainable in a proceeding of this nature (see Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150), in view of the fact that beyond a mere specification of such alleged error nothing appears in either the petition or the brief of petitioners which in any way would indicate what evidence is claimed to have been excluded, or what facts or circumstances appeared at the time such evidence was offered, it must be assumed that the point has been abandoned.

[2] It is also urged by petitioners that there was no finding by the commission as to the amount of the average weekly or annual earnings of the deceased employee upon which the award is based. Such objection is fully met by the finding by the commission, which was based upon a written stipulation by the parties to the proceeding, that the wages of the deceased were in excess of the maximum prescribed by the Workmen's Compensation Act.

[3] Another of petitioners' suggestions, but which is not urged, is that there was no finding by the commission as to the lack of contributory negligence on the part of the deceased employee. There was no necessity therefor. The point is covered by the provisions of section 21 of article 20 of the Constitution, as well as by sections 1 and 6(a) of the Workmen's Act. (Stats. 1917, p. 831.)

[4] It is further urged by petitioners that the provision of the act, under which the compensation as against the individual members of the copartnership employer was awarded, is unconstitutional. In that connection it need only be said that the question is settled against petitioners' contention by the cases of E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 193 P. 105, 16 A. L. R. 611, and De Carli v. Associated Oil Co., 57 Cal. App. 310, 207 P. 282.

The authority of the commission to award additional compensation either to an injured employee or to his dependents is contained in section 6(b) of the Statutes of 1917, page 831, as amended by Statutes of 1919, page 912, and Statutes of 1923, page 375, as follows:

> "* * * Where the employee is injured by reason of the serious and willful misconduct of the employer, or his managing representative, or if the employer be a partnership, on the part of one of the partners (or a managing representative or general superintendent thereof), or if a corporation, on the part of an executive or managing officer or general superintendent thereof, the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half, any of the provisions of this act as to maximum payments or otherwise to the contrary notwithstanding; provided, however, that said increase of award shall in on event exceed two thousand five hundred dollars."

[5] While the total award as against the insurer was the sum of $5,000, it is claimed

by petitioners that because of the fact that such award was composed of the sum of $100 allowed for burial expenses and the remainder thereof, to wit, $4,900, allowed for actual compensation, the authority of the commission under the terms of the statute was, in any event, limited to awarding to the applicants one-half of the compensation of $4,900, or the sum of $2,450.

Other than the section of the statute itself heretofore quoted herein, no authorities are cited by petitioners in support of such contention. The effect of the language of the statute is that, where the injury is the result of the serious and willful misconduct of the employer toward the employee, the amount of the compensation allowed to the dependents of the employee may be increased one-half, but in no event to exceed $2,500. In section 9 (c) (1) of the statute it is provided that:

> "In case the deceased employee leaves a person or persons wholly dependent upon him for support, such dependents shall be allowed the reasonable expense of his burial, not exceeding one hundred dollars, and a death benefit, which shall be a sum sufficient, when added to the disability indemnity which at the time of death has accrued and become payable, under the provisions of subsection (b) hereof, and the said burial expense, to make the total disability indemnity, cost of burial and death benefit equal to three times his average annual earnings, such average annual earnings to be taken at not less than three hundred thirty-three dollars and thirty-three cents nor more than one thousand six hundred sixty-six dollars and sixty-six cents."

Such provisions of the statute would seem to indicate that the entire amount of the compensation, including the expense of burial and such disability indemnity as may have accrued and become payable at the time of the death of the injured employee, should not exceed the sum of $5,000. Giving effect to the last clause of the section of the statute first quoted herein, which provides "that said increase of award shall in no event exceed two thousand five hundred dollars," it is plain that if petitioners' contention as to the construction of the statute is correct, in no case, where there were any funeral expenses or any disability indemnity theretofore paid or payable at the time the award was made, could the Industrial Accident Commission have authority to increase the award in the sum of $2,500 because of "serious and willful misconduct" of the employer; in other words, even where death followed the injury, only in the event there had been no expense of burial of the employee, and no disability indemnity paid or payable to the deceased, would the commission have the lawful power to increase an award in the sum of $2,500, no matter how palpable the misconduct or how reckless of consequences had been the act of the employer toward the employee. While it may be that the statute is susceptible of such a construction, in view of the expressed possibility in the language of the act that an increase of $2,500 in the award may be made we are constrained to hold that the intention of the Legislature was to permit an increase of one-half of the total award, including an allowance for expense of burial and disability indemnity. Any other construction would have the effect of preventing the full operation of the statute.

[6] The principal objection raised by petitioners to the award by the respondent commission consists in the contention that in awarding to the widow and the minor children of the deceased an additional benefit of $2,500 as against the individual members of the copartnership, who were the employers of said deceased, the commission acted in excess of its powers.

With respect to the claimed "serious and willful misconduct" of the individual defendants, the finding by the respondent commission was that:

> "The said injury was proximately caused by the serious and willful misconduct of the employer in this: A managing representative of said partnership, to wit, Walter J. Schienle, knowingly placed the employee at work in a position where a wall of sand and gravel at least 12 feet high was hanging over him. That at said time said managing representative knew, or ought to have known, that said wall was in imminent danger of caving in upon the employee and causing either serious injury to or the death of the employee; and that said managing representative took no precaution to prevent said wall from caving in upon the employee; that said wall of sand and gravel did cave in, and the caving in thereof was the proximate cause of the death of the employee."

It will be noted that the statute provides that the serious and willful misconduct of the "managing representative" of the employer shall be sufficient reason for increasing the award as much as $2,500, and that the findings by the commission in that regard in effect are that Walter J. Schienle was the managing representative of the employer. It is not contended by petitioners that the statute is lacking in its provisions to authorize an increase in the award where the facts of the case warrant it; but it is earnestly urged by petitioners that in the instant case the evidence is wholly insufficient to justify the conclusion that under a proper construction of the phrase, Walter J. Schienle was the "managing representative" of the petitioners; or that, in fact, his conduct in connection with the accident was such that it was properly subject to adverse criticism from a legal standpoint. However, with respect to the latter specification, an examination of the transcript of the evidence received on the hearing before the commission leads to the conclusion that it was ample to warrant the finding heretofore set forth herein, to wit, that "Walter J. Schienle knowingly placed the employee at work in a position where a wall of sand and gravel at least 12 feet high was hanging over him," etc.

That such action on the part of the employer toward an employee is sufficient to constitute "serious misconduct" is settled in the case of E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 188, 193 P. 105, 108 (16 A. L. R. 611), where it is said:

> "The first question presented is, then, Was the Commission justified in finding that the petitioner was guilty of 'serious misconduct'? There is no statutory definition of this term. In this connection we may again quote from Beven, page 401: 'To constitute "serious misconduct," it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow-workman's safety.' In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees."

As shown by the result, it is clear that the action of the employer in placing the employee in a position where a wall of sand and gravel 12 feet high was hanging over him was "conduct likely to jeopardize the safety" of the employee; and the finding by the commission, supported by the evidence, was that if the managing representative did not know, he at least should have known, "that such wall was in imminent danger of caving in upon the employee and causing either serious injury to or the death of the employee."

But in order that the award of the commission may stand, it is necessary that the evidence support the finding that Walter J. Schienle was the "managing representative" of the individual defendants composing the partnership which operated the plant at which the deceased was employed. The following questions and answers thereto, although not arranged in the order in which the examination took place, will serve to show the several capacities of the persons connected with the industry:

> "Mr. Kingsland (the witness): Q. How many branches are there to the business? A. Mr. Russell takes charge of the production business; under him Mr. Cobb; Mr. Cobb appoints a foreman to take care of the extra work. Mr. Cobb just doesn't do any actual work himself. He just superintends and sees that everything is running.
>
> "Q. Are there other men in that department of the same rank as Mr. Russell? A. Mr. Russell is one of the partners. Mr. Gordon takes care of the sales. Mr. Harrison the purchase of materials and such matters. * * *
>
> "Q. Well, was there any one in authority between Mr. Cobb and Mr. Schienle? A. No; there was not.
>
> "Q. Was Mr. Cobb in authority over any other part of the business than the gravel pit where Mr. Schienle was foreman? A. No.
>
> "Q. You spoke of Mr. Russell having charge of the production; what do you mean by having charge of the production? A. Well, we have to get out a certain number of yards of material a day and he looks after that end of it.
>
> "Q. By material you mean sand and gravel gotten out from the pit? A. Yes, just as a supervisor, and he gives his order to Mr. Cobb what he wants done, he calls practically once a day, spends probably an hour at this particular pit. Mr. Cobb is there all the time, practically all the time except when he might be out purchasing parts.
>
> "Q. Mr. Cobb spends his time at the pit where the accident occurred? A. Probably 80 per cent. of the time.
>
> "Q. (to Mr. Schienle). Mr. Schienle, do you know where Mr. Cobb was at the time you gave this order? A. He was on his way up to work. I met him just as the accident happened; he was on his way up there to work. This happened at 7 o'clock in the morning.
>
> "Q. Then at the time this happened Mr. Cobb was not on duty? A. No, sir; he was on the place but he was not there at the accident.
>
> "Q. You were in full charge of the gang there at the time of the accident? A. Yes, sir.
>
> "Q. And at the time the orders were given by you? A. Yes, sir. * * *
>
> "Q. The previous witness spoke of some man who was over him in authority; who was it, a member of the partnership? A. Mr. Cobb was superintendent of the production and was at the plant. * * *
>
> "Q. (addressed to Mr. Schienle). You are the foreman for Gordon & Harrison? A. Yes, sir. * * *
>
> "Q. You were in charge of that gravel pit, were you? A. Yes, sir. * * *
>
> "Q. Mr. Russell was there nearly all the time, wasn't he? A. Well, practically all the time. He would come in there and go whenever he saw fit to go around there.
>
> "Q. You were the managing representative of Gordon & Harrison at that time? A. Yes, sir. * * *
>
> "Q. Did any member of the firm of Gordon & Harrison ever give you any instructions about working, in the presence of Mr. Cobb? A. I don't understand what you mean; I was foreman and went on with the work.
>
> "Q. Did you ever receive any instructions from any member of the firm? A. You mean from Cobb, or the firm itself?
>
> "Q. The employer itself. A. No, sir; I took instructions from Cobb."

It thus appears that the business of the partnership was so divided that defendant Russell was in direct charge of the production branch of the enterprise, with one Cobb as superintendent of the rock-crushing plant, and Schienle as the foreman directing the work in the gravel pit where the deceased was employed.

No "serious and willful misconduct" on the part of either of the partners is claimed to have existed. The findings by the commission place no blame even on Mr. Cobb, who is shown to have been the superintendent in charge of the rock-crushing plant. According to the findings, the entire responsibility for the happening of the accident rests on Schienle. The evidence shows that, instead of Schienle being a "managing representative" of the copartnership, he was the foreman in charge of the gang at the gravel pit; that he was working under Cobb, the superintendent of the plant, and took his instructions from him. While at the very instant that the accident occurred Schienle was the highest in authority actually at the plant of the copartnership, his duties were not of that character in the business of the copartnership that properly they may be said to rise to the dignity and importance of managing it. He "had nothing to do with the office or the sending out of the trucks." His duties consisted in "getting the material out of the hole and putting it into the bunkers;" just as a foreman of a gravel pit, operated by a railroad company for its own use, probably would have been charged with like duties. As stated in the testimony of one of the witnesses, Russell (who was one of the partners) "takes charge of the production business; under him Mr. Cobb; Mr. Cobb appoints a foreman (Schienle) to take care of the extra work. Mr. Cobb just doesn't do any actual work himself. He just superintends and sees that everything is running." And he was not "in authority over any other part of the business than the gravel pit, where Mr. Schienle was foreman."

The provision of the statute which, because of the misconduct of the employer, authorizes an increase in the award to the employee, contains what might be termed a classification of possible employers and designates the persons who, for the purpose of fixing liability of the employer, may act in his stead. The first attempted classification of employers is as to an individual, the second effects a copartnership, and the third relates to a corporation. By the terms of the statute, as to either the individual or the copartnership, the acts of the "managing representative" will be binding, as will also the acts of the "general superintendent" of a copartnership. The person whose "serious and willful misconduct" will bind a corporation must be "an executive or managing officer, or general superintendent thereof." It must be presumed that in enacting the statute the Legislature intended, so far as was practicable in the circumstances, to treat each of the several classes of employers with equal fairness and make no discrimination as to their respective liabilities, and to that end used language to describe the several persons occupying similar positions with the different classes of employers. For the purposes of the particular legislation, a "managing representative" for an individual might closely correspond to a "managing representative or general superintendent of the partnership," and a "managing representative or general superintendent of a partnership" for similar purposes would in his official duties approximately represent "an executive or managing officer or general superintendent of the corporation."

That the language of the statute is subject to a construction deviating somewhat from the ordinary meaning thereof is shown by a consideration of the case of E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 193 P. 105, 16 A. L. R. 611, where it is ruled that the word "officer," as used in the statute, did not necessarily mean one who had been elected to his position, or even one who had been appointed in accordance with the provisions of the articles of incorporation or the by-laws of the corporation; but "that by an 'executive or managing officer' was meant a person in the corporation's employ, either elected or appointed, *who is invested with the general conduct and control of a particular place of the business of a corporation.*"

If it be assumed, as in the Horst Co. Case, that in order to bind employers because of "serious and willful misconduct" toward the employee, the person presumed to represent the employer therein must be invested with the general conduct and control at the particular place of business of the employer, it becomes apparent that as Mr. Schienle did not possess or exercise such authority at the plant of the employer, his personal "serious and willful misconduct," as set forth in the findings by the commission, was not binding upon the partnership of petitioners.

It follows that that part of the order of the Industrial Accident Commission which awards to the applicants in the proceeding before said commission the sum of $2,500, as against the individual defendants therein, to wit, Thomas Gordon, George W. Harrison, and Charles W. Russell, should be annulled; that otherwise the award of said commission should be affirmed. It is so ordered.

I concur: CONREY, P. J.

CURTIS, J. (dissenting). I cannot agree with the conclusion reached in the majority opinion that there was no evidence to support the finding of the commission that Walter J. Schienle was the managing representative of the petitioners. The testimony of Schienle himself was as follows:

"Q. You were in charge of that gravel pit, were you? A. Yes, sir.

"Q. And you were so placed in charge by Gordon & Harrison, the defendant in this action? A. Yes, sir.

"Q. Who gave you your instructions on those occasions when Mr. Cobb was not there? A. I know what I was to do; it was my duty to start the plant, and do that every morning. It was a common occurrence for me to start the plant and keep it going.

"Q. At the time that this accident happened you were in full charge, weren't you? A. Yes, sir.

"Q. All orders concerning management of the work and starting were given by you? A. The running of the plant; yes, sir.

"Q. The whole plant and the pit? A. Yes, sir, the pit, not the plant, I had nothing to do with the office or the sending out of the trucks.

"Q. The production end of it was all under your management at that time? A. Getting the material out of the hole and putting it into the bunkers.

"Q. There was no one else in authority between you and the partners at that time, was there, on the place?

"Mr. Poole: Objected to; that is for the commission to decide.

"Mr. Backus: Russell, Gordon, Harrison, and Cobb was not there, you were in sole and complete charge of the plant, weren't you? A. Yes, sir."

Charles W. Russell, one of the petitioners, testified that:

"He (Mr. Schienle) is the foreman in charge of the pit and that sort of thing when Mr. Cobb is there, as well as when Mr. Cobb is not there. Of course, under Mr. Cobb's direction naturally."

The testimony shows without contradiction that Mr. Cobb, the superintendent, was rarely at the plant when the work started in the morning. On the day in question, he did not arrive until after the accident happened. Mr. Schienle was the sole representative of petitioners at the place where the work was being carried on on that morning. He, and he alone, was in charge of the work, and as such directed the deceased to take his place in the pit, where he met his death. Under these circumstances, to hold that Schienle was not the managing representative of petitioners at the time deceased met his death, is, in my opinion, to emasculate the statute of its wise and humane purposes to protect employees from injuries sustained by reason of the serious and willful conduct of the employer. For these reasons, I dissent from the foregoing opinion.

199 Cal. 420

GORDON et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(S. F. 11893.)

(Supreme Court of California. Sept. 30, 1926.)

1. Master and servant 🔑387—Placing employee at work under overhanging wall of sand and gravel held to constitute "serious misconduct" (St. 1917, p. 834, § 6(b), as amended by St. 1919, p. 912, § 2, and St. 1923, p. 375).

Placing employee at work under overhanging wall of sand and gravel 12 feet high *held* to constitute "serious misconduct," within St. 1917, p. 834, § 6(b), as amended St. 1919, p. 912, § 2, and St. 1923, p. 375, § 1, providing additional compensation for injury resulting from serious misconduct of employer or managing representative.

2. Master and servant 🔑387—Gravel pit foreman in charge held "managing representative," though he worked under superintendent of plant (St. 1917, p. 834, § 6[b], as amended St. 1919, p. 912, § 2, and St. 1923, p. 375, § 1).

Gravel pit foreman in complete charge at time of accident *held* "managing representative" of partnership, within St. 1917, p. 834, § 6 (b), as amended St. 1919, p. 912, § 2, and St. 1923, p. 375, § 1, providing for additional compensation for injury resulting from misconduct of "managing representative," though he worked under superintendent of plant, "managing representative" being one with general discretionary powers of direction and control.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Representative.]

In Bank.

Proceeding under Workmen's Compensation Act by Hester Findley and others for the death of Charles P. Findley, opposed by Thomas Gordon and others, copartners doing business as Gordon & Harrison, employers, and their insurer. Award against employer and insurer was annulled in part by the Court of Appeals, and the cause was transferred to the Supreme Court on petition of the Industrial Accident Commission. Award of Industrial Accident Commission affirmed.

For opinions of District Court of Appeal, see 249 P. 844. See, also, 241 P. 912.

John F. Poole and Charles L. Chandler, both of Los Angeles, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

NOURSE, Justice pro tem. This is a proceeding in certiorari to review an order of the Industrial Accident Commission awarding compensation for the death of Charles P. Findley, who was killed during the course of his employment with the petitioners. The order of the respondent commission carried an award in favor of the widow and children of the deceased and against the insurance carrier in the sum of $5,000, and an additional award against the employers of $2,500, based on a finding of serious and willful misconduct. A writ of certiorari, issued out of the District Court of Appeal, Second District, Division One, to review the entire proceedings, and that court, on November 10, 1925, entered its judgment affirming the portion of the order covering the award of $5,000 and annulling the portion relating to the award of $2,500 against the employers. Upon the petition of the respondent, Industrial Accident Commission, the entire cause was transferred to this court for hearing and decision.

Briefly, the facts of the case are that Gordon, Harrison, and Russell were copartners doing business as Gordon & Harrison; they were engaged in crushing rock and excavating sand and gravel for commercial use, and in the course of their business employed the deceased in the excavation of a gravel pit at Montrose, Los Angeles county; this gravel pit was excavated by means of a large steel bucket pulled along a wire cable which could be swung from side to side, so that the pit or "groove" could be widened as the increasing depth added to the danger of cave-ins from the overhanging sides. This pit had been excavated over a length of about 400 feet with a varying width of from 8 to 30 feet and to an irregular depth of from 12 to 50 feet. On the morning of the injury, the day foreman of the copartnership, one Schienle, sent the deceased and three other men into the bottom of the pit to bore a hole and prepare a blast to loosen the gravel. At this point the pit was 6 or 8 feet wide at the base, with one wall about 25 feet high and the other about 12 feet high with a slight overhang. The material in the walls was loose sand and gravel with occasional large rocks which required drilling and blasting. Previous to the injury, the men had blasted one of these rocks at the bottom of the pit, and immediately thereafter the foreman directed the men to go into the pit and bore into the side wall for another blast. While they were engaged in this work, the wall caved in and caught the deceased covering him, while standing upright, under 5 feet of gravel.

The evidence was in conflict as to the exact cause of the cave-in. Witnesses testified that the wall upon which the deceased was working was overhanging at the top, that it was perpendicular or nearly so, and that it was within 30 degrees of perpendicular, and that the wall was composed entirely of soft gravel and sand. Witnesses testified that it commenced to cave from the top, others from the side, and others from the bottom. The opinion was expressed that the blasting of the rock at the bottom of the pit made this wall unsafe, and it is in the testimony that some of the workmen protested against going into the pit, that they told the foreman that it looked like a "grave," that the foreman told his men that if they did not "shoot the bank" it would cave in on the bucket. It was also shown that the hazard which the men were compelled to take could have been avoided by an adjustment of the cable upon which the bucket was operated, and that by this means the sides of the pit could have been shaved off. Testimony was offered to show that this safe method was not used by the employer because, on several occasions, the sides of the pit had caved in on the bucket causing considerable delay in the operations of the plant.

[1] At this time the petitioners urge that the award of $2,500 against the individual members of the copartnership was in excess of the powers of the commission because (1) the evidence is insufficient to support the finding of "serious and willful misconduct" on the part of the employers, and (2) the evidence is insufficient to support the finding that the foreman in charge was a "managing representative" of the employer. The first point was correctly disposed of by the District Court of Appeal in the opinion written by Mr. Justice Houser and concurred in by the entire court. 249 P. 844. We adopt the portion of that opinion reading as follows:

"With respect to the claimed 'serious and willful misconduct' of the individual defendants, the finding by the respondent commission was that, 'The said injury was proximately caused by the serious and willful misconduct of the employer in this: A managing representative of said partnership, to wit, Walter J. Schienle, knowingly placed the employee at work in a position where a wall of sand and gravel at least 12 feet high was hanging over him. That at said time said managing representative knew, or ought to have known, that said wall was in imminent danger of caving in upon the employee, and causing either serious injury to or the death of the employee; and that said managing representative took no precaution to prevent said wall from caving in upon the employee; that said wall of sand and gravel did cave in, and the caving in thereof was the proximate cause of the death of the employee.'

"It will be noted that the statute provides that the serious and willful misconduct of the 'managing representative' of the employer shall be sufficient reason for increasing the award as much as $2,500, and that the findings by the commission in that regard in effect are that Walter J. Schienle was the managing representative of the employer.

"It is not contended by petitioners that the statute is lacking in its provisions to authorize an increase in the award where the facts of the case warrant it; but it is earnestly urged by petitioners that in the instant case the evidence is wholly insufficient to justify the conclusion that under a proper construction of the phrase, Walter J. Schienle was the 'managing representative' of the petitioners; or that, in fact, his conduct in connection with the accident was such that it was properly subject to adverse criticism from a legal standpoint. However, with respect to the latter specification, an examination of the transcript of the evidence received on the hearing before the commission leads to the conclusion that it was ample to warrant the finding heretofore set forth herein, to wit, that 'Walter J. Schienle knowingly placed the employee at work in a position where a wall of sand and gravel at least 12 feet high was hanging over him,' etc.

"That such action on the part of the employer toward an employee is sufficient to constitute 'serious misconduct' is settled in the case of E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 188, 193 P. 105, 108, 16 A. L. R. 611, where it is said: 'The first question presented is, then, Was the Commission justified in finding that the petitioner was guilty of "serious misconduct"?' There is no statutory definition of this term. In this connection we may again quote from Beven, page 401: 'To constitute "serious misconduct," it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow-workman's safety.' In our opinion, the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee.

" ' "Serious misconduct" of an employer must, therefore, be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of the employees.'

"As shown by the result, it is clear that the action of the employer in placing the employee in a position where a wall of sand and gravel 12 feet high was hanging over him was 'conduct likely to jeopardize the safety' of the employee; and the finding by the commission, supported by the evidence, was that if the managing representative did not know, he at least should have known, 'that such wall was in imminent danger of caving in upon the employee and causing either serious injury to or the death of the employee.' "

[2] With respect to the finding of the commission that Schienle was a "managing representative" of the petitioners, Mr. Justice Curtis, dissenting from the majority of the court, said (249 P. 844):

> "The testimony of Schienle himself was as follows:
>
> " 'Q. You were in charge of that gravel pit, were you? A. Yes, sir.
>
> " 'Q. And you were so placed in charge by Gordon & Harrison, the defendant in this action? A. Yes, sir.
>
> " 'Q. Who gave you your instructions on those occasions when Mr. Cobb was not there? A. I know what I was to do; it was my duty to start the plant, and do that every morning. It was a common occurrence for me to start the plant and keep it going.
>
> " 'Q. At the time that this accident happened you were in full charge, weren't you? A. Yes, sir.
>
> " 'Q. All orders concerning management of the work and starting were given by you? A. The running of the plant; yes, sir.
>
> " 'Q. The whole plant and the pit? A. Yes, sir; the pit, not the plant; I had nothing to do with the office or the sending out of the trucks.
>
> " 'Q. The production end of it was all under your management at that time? A. Getting the material out of the hole and putting it into the bunkers.
>
> " 'Q. There was no one else in authority between you and the partners at that time, was there, on the place?
>
> " 'Mr. Poole: Objected to; that is for the commission to decide.
>
> " 'Mr. Backus: Russell, Gordon, Harrison and Cobb was not there, you were in sole and complete charge of the plant, weren't you? A. Yes, sir.'
>
> "Charles W Russell, one of the petitioners, testified that 'he (Mr. Schienle) is the foreman in charge of the pit and that sort of thing when Mr. Cobb is there as well as when Mr. Cobb is not there. Of course, under Mr. Cobb's direction naturally.' The testimony shows without contradiction that Mr. Cobb, the superintendent, was rarely at the plant when the work started in the morning. On the day in question, he did not arrive until after the accident happened. Mr. Schienle was the sole representative of petitioners at the place where the work was being carried on on that morning. He, and he alone, was in charge of the work, and as such directed the deceased to take his place in the pit, where he met his death. Under these circumstances, to hold that Schienle was not the managing representative of petitioners at the time deceased met his death, is, in my opinion, to emasculate the statute of its wise and humane purposes to protect employees from injuries sustained by reason of the serious and willful conduct of the employer."

The portions of the Workmen's Compensation Act requiring consideration read (Stats. 1917, p. 834, §§ 6[b]):

> "Where the employee is injured by reason of the serious and willful misconduct of the employer, or his managing representative, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an executive or managing officer thereof,"

—the amount of compensation recoverable shall be increased one-half. The section was amended in Statutes of 1919, page 912, by adding the words "or general superintendent" after the words "managing officer," where the employer is a corporation. In Statutes 1923, page 376, the section was again amended by adding "(or a managing representative or general superintendent thereof)" after the word "partners." Prior to the latter amendment the expression "managing officer," as applied to an officer of a corporation, was interpreted to mean "a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control at a particular place of the business of a corporation." E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 190, 193 P. 105, 109 (16 A. L. R. 611). We do not find that the expression "managing representative" has been subject to judicial interpretation. The expression is similar to the words "managing agent," an expression which is frequently used in statutes relating to the taking of depositions of officers and employees of corporations and in statutes relating to the powers and liabilities of general agents of insurance concerns. In interpreting these statutes, the general tendency of the authorities has been to draw a line of similarity between a managing agent and a general agent and to declare a managing agent to be one who is invested with general powers involving the exercise of judgment and discretion, as distinguished from a special agent who acts in an inferior capacity and with limited powers and duties under a superior. Thus, a managing agent or a managing representative is one who has general discretionary powers of direction and control—one who may direct, control, conduct, or carry on his employer's business or any part or branch thereof. In amending the Workmen's Compensation Act, as above noted, the Legislature clearly intended to recognize the distinction between a managing representative and a general superintendent, both in relation to corporations and copartnerships; otherwise there would have been no reason for the addition of the words "general superintendent," and nothing more, in the amendment of 1919.

In the case before us, it appears that Russell, one of the three partners, was in charge of the production of the material, while the other two partners gave their attention to other branches of the partnership business. A Mr. Cobb was employed as general superintendent, with general charge of production under Mr. Russell. Schienle had full charge of the work of excavating the gravel out of the pit where the accident occurred. At times he was visited by both Russell and Cobb, who came to see how the work was getting along and often gave him instructions or suggestions as to the manner of operation of the plant. At all other times, however, he was in full charge and control of the operations exercising his own discretionary powers as to the operation of the cable and the bucket and as to the time, place, and circumstances under which the work of blasting the rock and sides of the pit was carried on. On the morning of the accident neither of his superior officers had been at the pit, and Schienle had been in full charge and control of the work, and he alone gave the orders to the workmen which resulted in the accident. Under such circumstances, we are satisfied the evidence fully justifies the finding of the respondent commission that Schienle was a "managing representative," as that term is used in the Workmen's Compensation Act.

Other points which were raised in the District Court of Appeal and which are not seriously pressed here do not require consideration.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.

---

199 Cal. 437

FOUCH et ux. v. JOHNSTON et al.
(L. A. 8453.)

(Supreme Court of California. Oct. 1, 1926.)

1. Appeal and error 🔑877(2).

Defendant in quiet title action, who had no interest in land, cannot, after judgment for plaintiff, raise question of inconsistency between judgment and findings showing legal title in third party which had allowed default to be taken against it and did not appeal from judgment.

2. Quieting title 🔑10(2), 12(7).

Where plaintiffs at commencement of action were owners in fee and in exclusive possession, court had jurisdiction of action to quiet title.

3. Quieting title 🔑10(2).

Holders of equitable title might maintain action to quiet title against one having no title or interest in property.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to quiet title by H. E. Fouch and wife against D. Johnston and others, in which D. Johnston filed cross-complaint. Judgment for plaintiffs, and defendant D. Johnston appeals. Affirmed.

Grant Holcomb, of San Bernardino, for appellant.

E. W. Bartlett, of Colton, for respondents.

NOURSE, Justice pro tem. This is an action to quiet title to a section of land situated in Riverside county. The defendant D. Johnston appeared and filed a cross-complaint setting up a claim that he was the equitable owner of one-half of the property because H. E. Fouch had acquired the property through funds furnished by said defendant under an agreement that he and said defendant should own an equal undivided one-half thereof. Judgment went for plaintiff and against the defendant, from which the latter has appealed upon a typewritten record.

On August 31, 1910, H. E. Fouch and Ella Fouch, his wife, became the owners of the land in dispute. On October 22, 1915, the defendant D. Johnston, without having any title or interest in said property, executed a deed purporting to convey the same to Raymond Johnston. On April 11, 1917, H. E. Fouch and Ella Fouch commenced this action to quiet title to the premises, joining as parties defendants D. Johnston and his wife, Julia, and Raymond Johnston, the grantee under the deed of October 22, 1915. On the day the suit was filed Raymond Johnston and his wife executed a deed conveying all their interest in the property to Ella Fouch.

On December 16, 1920, defendant D. Johnston and his wife gave a deed to the Johnston Realty Corporation covering an undivided one-half interest in said property, and during the trial of this case this corporation and Raymond Johnston filed their disclaimers of any interest in the property, and the trial court found that these various deeds executed by the defendant Johnston were wrongfully executed for the purpose of placing a cloud upon the title. The trial court also found that no trust agreement ever existed between defendant D. Johnston and the Fouches covering the property in dispute; that D. Johnston never had any interest or right in the property; that at the time of the commencement of the action and long prior thereto plaintiffs were owners in fee and in the exclusive possession of the property, but that on April 22, 1920, and prior to the date of the trial, H. E. Fouch and his wife deeded the property to the Riverside Title Company, a corporation. The judgment declared that Ella Fouch was at the time of the commencement of the action sole owner in fee absolute of all the property described and in the actual and peaceable possession and occupancy thereof, but that the Riverside Title Company was, at the time of the entry of the judgment, the legal holder in trust of the title of the said property. It was also adjudged and decreed that no person other than the plaintiff Ella Fouch had any estate, interest, right, either legal or equitable, in the premises.

[1] The appellant attacks the judgment on the ground that the evidence does not support the finding that the respondent was the owner of either the legal or equitable title and that there was no evidence showing actual occupancy or possession. Furthermore, it is claimed that the findings do not support the judgment because they show that the legal title to the land was in the Riverside Title Company, while the decree quieted the title as being in the respondent.

It cannot be questioned that the findings and judgment are inconsistent, but what the trial court apparently intended to do was to find that the equitable title was in the respondent and that the legal title was in the Riverside Title Company, in trust, however, for the benefit of the respondent. This was the situation presented by the appellant in his supplemental cross-complaint, filed during the course of the trial, wherein it was alleged that the conveyance to the Riverside Title Company was in trust to reconvey the same on the order or request of the respondents, and that such conveyance was wholly voluntary on the part of the respondents and without any consideration passing to the Title Company. If the question were presented on this appeal between the respondent and the Title Company this conflict in the findings might require serious consideration, but the company allowed its default to be taken and has not appealed from the judgment. The appellant is not in a position to raise the question because, it having been specifically found that he had no interest of any character in the premises, he has not been able to show to us how he can possibly be prejudiced by the portion of the findings to which he directs his attack. Though he alleged that he had furnished the funds for the original purchase of the property and that he and Fouch were each to become an owner of an undivided one-half thereof, he failed to sustain his allegations with proof, and the trial court found that none of those allegations was true. The appellant has not attacked that finding, and we may therefore assume that his various activities were for the purpose of unjustly placing a cloud upon respondents' title.

[2, 3] The trial court found that at the time of the commencement of the action the respondents were the owners in fee and in the exclusive possession of the property, and, this being so, the court had jurisdiction to hear and determine the controversy. If, at the time of the trial, the respondents were the holders of the equitable title only, they were still entitled to maintain their action against this appellant, who was found to have no title or interest in the property of any character.

The appellant has wholly failed to point to any error in the record which he claims to be prejudicial to him.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.

---

199 Cal. 428

WHITING FINANCE CO. v. HOPKINS et al. (L. A. 8449.)

(Supreme Court of California. Sept. 30, 1926.)

1. Taxation ⚷**124.**

So-called conditional sales contracts between purchasers of automobiles and dealers *held* taxable as "solvent credits" in hands of transferee finance company, under Const. art. 13, § 1; Pol. Code, §§ 3607, 3617, subd. 6.

[Ed. Note.—For other definitions, see Words and Phrases, Solvent Credits.]

2. Taxation ⚷**469—Finance company's creation of large savings deposit, which was left in bank but short time, held ineffective attempt to evade taxation, and assessment properly increased (Pol. Code, §§ 3672, 3673).**

Where finance company on February 17 opened a savings deposit in bank, depositing $1 on March 1, negotiated a loan of $175,000 from same bank which it deposited in savings account, and on March 7 withdrew all of such account and repaid its loan, *held* board of equalization, acting under Pol. Code, §§ 3672 and 3673, on disclosure of facts, properly increased company's assessments accordingly.

3. Taxation ⚷**452.**

Pol. Code, § 3672, fixing date for completion of investigation by board of equalization, is directory only, and action of board taken after such date is not illegal.

Curtis, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by the Whiting Finance Company against Ed. W. Hopkins and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Loewenthal, Collins & Loewenthal, of Los Angeles, for appellant.

Edward T. Bishop, Co. Counsel, J. A. Tucker and Everett W. Mattoon, Deputy Co. Counsels, Jess E. Stephens, City Atty., Chas. B. MacCoy, Deputy City Atty., all of Los Angeles, for respondents.

RICHARDS, J. [1] This action is one wherein the plaintiff seeks to recover from the defendants in their respective official capacities certain moneys paid as taxes under protest upon property of said plaintiff which it asserts to have been not subject to the taxes imposed and collected. The trial court upheld as legal the imposition of said taxes, and from its judgment to that effect the plaintiff prosecutes this appeal. The cause comes before us upon an agreed statement of facts from which it appears that there were two separate levies of taxes to which the plaintiff and appellant objected and the amount of each of which he was required to pay and did pay under protest. The first of these relates to the imposition by the defendant Ed. W. Hopkins, as county assessor of the county of Los Angeles and also as city assessor of the city of Los Angeles, of an assessment upon certain alleged solvent credits of which the plaintiff was the owner and in possession on the first Monday in March, 1923, and consisting of certain conditional sales contracts for the disposition of motor vehicles to various purchasers, the aggregate cash value of which was on said date the sum of $291,867.14, the stipulation of facts showing that said motor vehicles were on said date assessed to the respective purchasers thereof and that the tax so levied and assessed thereon was paid respectively by said purchasers. The form of the conditional sales contracts thus sought to be subjected to taxation was set forth in said stipulation and was and is the usual and ordinary form of such contracts used by the trade in the sale of motor vehicles. It may be stated generally as to said agreed form of contract that by its terms the purchaser of the specified motor vehicle agreed to purchase and the seller thereof to sell the described vehicle for the agreed purchase price, which sum the purchaser agreed to pay in certain installments at specified times, the contract providing that until the purchaser had fully complied with the terms, covenants, and conditions of said contract to be by him performed and made all of the payments as therein provided the said personal property should belong to and the title thereto remain in the seller, the purchaser to be given the immediate possession of said personal property and to have the right to retain the same so long as he was engaged in complying with his obligation under said contract; but in the event of the violation thereof by him the seller retained the full right to retake possession of said property and thereupon the right of the purchaser therein should cease, the seller, however, being given the right to enforce full payment of the unperformed obligations of said contract against the purchaser, notwithstanding the retaking by the seller of said property in consequence of the purchaser's breach thereof. The contracts in question had been transferred to the plaintiff by numerous so-called "sellers" or dealers in motor vehicles in its capacity as a "finance" corporation organized to facilitate the business of selling motor vehicles on credit by financing such transactions. It was the aggregate amount of such contracts in the hands of the plaintiff as such transferee thereof, on the first Monday in March, 1923, which were sought to be subjected to taxation as "solvent credits" by the defendants herein in their aforesaid official capacities, and the question presented to us upon the first phase of this appeal is as to whether said contracts are such solvent credits within the meaning of the Constitution and laws of this state as to be subject to taxation.

The Constitution, in article 13, § 1, thereof, provides:

> "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation."

The Political Code, in section 3607 thereof, provides as follows:

> "*Property Subject to Taxation.*—All property in this state [except as otherwise provided in the Constitution of this state] * * * is subject to taxation. Nothing in this Code shall be construed to require or permit double taxation."

Section 3617 of the Political Code, in subdivision 1 thereof, further provides:

> "The term 'property' includes moneys, credits, bonds (except railroad or quasi public corporation), stocks, dues, franchises, and all other matters and things real, personal, and mixed, capable of private ownership."

Subdivision 6 of said section 3617 further provides:

> "The term 'credits' means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation, or association assessed. The term 'debt' means those unse-

cured liabilities owing by the person, firm, corporation, or association assessed to bona fide residents of this state, or firms, associations or corporations doing business therein; but credits, claims, debts, and demands due, owing or accruing for or on account of money deposited with savings and loan corporations or with building and loan associations, shall, for the purpose of taxation be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof."

At the threshold of our consideration of the question as to whether the contracts involved in the issue herein are "solvent credits" in a sense which would subject them to taxation under the foregoing provisions of the Constitution and laws of this state, it may be well to take note of the fact that these contracts, while denominated "conditional sales contracts," are not wholly or strictly such; for while as to the seller of the personal properties covered by their terms the title is retained by him and the sale is conditioned upon the fulfilment by the purchaser of the obligations of the contract to be by him performed, the contract is not conditional in so far as the purchaser is concerned, since his agreement to purchase and pay for the property is absolute and may be enforced against him by the seller, regardless of whether the latter may have retaken the property and otherwise disposed of the same on account of some breach in the purchaser's obligation. These contracts, therefore, in the hands of the plaintiff constitute in effect the absolute promise of the respective purchasers of the properties covered by them to pay the sum set forth therein, and they amount, in effect, to the promissory note of the signer thereof to make the required payments at the time and in the manner set forth therein. This unconditional promise on the part of the purchaser of the personal property of which it constitutes the purchase price, to pay the same, has for its security the purchased article of which he has received possession and control, with the indicia and liabilities of ownership and subject only to the reserved right of the seller to retake the same in the event of the violation of his obligation as the purchaser thereof.

That contracts of this character constitute "solvent credits," whether they relate to real or personal property, has, we think, been established with a fair degree of uniformity. With relation to the sale of land it has been held by practically every state in the Union where constitutional exemptions similar to those existing in California do not prevail that such contracts are subject to taxation as "solvent credits," or as a taxable species of property separate and distinct from the land affected by their terms. The following are typical cases: Griffin v. People, 184 Ill. 275, 56 N. E. 397; In re Spurgeon, 72 Ind. App. 580, 126 N. E. 238; Gish v. Shaver, 140 Ky. 647, 131 S. W. 515; Williams v. Board, etc., of Osage County, 84 Kan. 508, 114 P. 858, 34 L. R. A. (N. S.) 1221; In re Aurora Gaslight, Coal & Coke Co., 64 Ind. App. 690, 113 N. E. 1012. By the amendment to the Constitution of California, adopted in 1910, it was provided that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered subject to taxation; but otherwise the provision of said article and section of the Constitution providing for the taxation of "all property" expressly including in such designation "credits" and also "all other matters and things, real, personal, and mixed, capable of private ownership," remain unchanged.

Under the foregoing provisions of the Constitution and also of the sections of the Political Code above referred to, various forms of solvent credits have been subjected to taxation in this state, and such subjection has heretofore been held legal by this court. In the case of San Francisco v. La Société, etc., 131 Cal. 612, 63 P. 1016, suit was brought by the city and county of San Francisco to recover certain taxes levied on solvent credits of the defendant, consisting of loans evidenced by promissory notes held by it and secured by pledges on nontaxable stocks and bonds. This court upheld the assessment of these credits as coming clearly within the constitutional definition of taxable property, and further held that the fact that such loans were secured by the pledge of nontaxable personal property was an immaterial factor in the case. The same ruling was made in the case of Security Sav. Bank v. City and County of San Francisco, 132 Cal. 599, 64 P. 898, a similar case. We can perceive no real distinction between a credit owned by a creditor, evidenced by a promissory note and having as its security a pledge of personal property, and an equally unqualified credit evidenced by an absolute obligation of a would-be purchaser of personal property and having for its security the property purchased, delivered to and held by him, subject only to be repossessed by the seller in the event of the debtor's violation of his said obligation. The fact that the seller holds the naked title to the property with such qualified right of repossession does not, in our opinion, render the transaction other than one whereby an unqualified credit is created and secured by the property of which it constitutes the purchase price. While this court has not heretofore had occasion to pass upon this precise question, the courts of other states have done so and have held that these forms of transactions resulted in the creation of solvent credits which were subject to taxation as such. The most persuasive case upon that subject is that of Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A. L. R. 552, wherein an exactly similar situation was presented to the Supreme Court of Utah, and wherein that court not only held that the contract in question constituted a solvent credit which was properly subject to taxation under the Constitution and laws of that state, but also held that the assessment of the credit to the seller and of the motor vehicle to the purchaser did not constitute double taxation. The Constitution and laws of Utah upon the subject of taxation are practically identical with those of California. We discover no essential difference between that case and the case at bar and fully approve the reasoning and conclusions of that court.

It is therefore our conclusion upon the first phase of the appellant's case upon appeal that the solvent credits held by it in the form of contracts for the conditional sale of motor vehicles were properly assessed as such by the officials charged with that duty, and that the taxes paid by said plaintiff under protest pursuant to such assessment and tax levy are not recoverable.

[2] The second phase of the appellant's case as presented in the trial court and upon this appeal relates to the assessment of certain other of the plaintiff's properties under the following conditions as disclosed by the agreed statement of facts: It appears therefrom that the plaintiff, on February 17, 1923, opened a savings account with the Security Trust & Savings Bank of Los Angeles and deposited therein the sum of $1. On March 1, 1923, the plaintiff negotiated a loan of $175,000 from the commercial department of the same bank, and on the same day deposited said sum so borrowed in its said savings account in said bank. On March 7, 1923, the plaintiff withdrew from its said savings account the whole of said sum and repaid its loan thereof to the bank. The board of equalization of the county of Los Angeles, upon an investigation of the foregoing facts, held under the provisions of section 3673 of the Political Code, determined that the foregoing series of transactions on the part of the plaintiff had been undertaken for the purpose of evading taxation, and it accordingly acted under the provisions of section 3681 of the Political Code by ordering the plaintiff's assessment raised so as to make it conform to the true value of its assessable property. The trial court determined from the statement of facts showing the foregoing transactions, the testimony taken by the board of equalization with regard thereto, and the conclusions and order of said board, that it had acted within its powers, and approved its said action, and, having done so, adjudged that the plaintiff was not entitled to recover the amount of taxes which it had been compelled to pay and had paid under protest as a result of such increase in its assessment. We are of the opinion that the trial court committed no error in its ruling upon this phase of the plaintiff's case. The weight of authority, in our opinion, as well as the dictates of decency, honor, and loyalty, uphold the right of boards of equalization to fully inquire into transactions of this character with a view to preventing the evasion of taxation by individuals or corporations seeking by these and similar methods so to do. The case of Holly Springs Savings & Insurance Co. v. Supervisors, 52 Miss. 281, 24 Am. Rep. 668, is quite in point. That case arose out of the act of a banking institution in the investment of its taxable funds in nontaxable securities of the government where it was satisfactorily shown that such investment was not intended to be permanent, but was made for the sole purpose of evading taxation and with the predetermined purpose of reconverting its said funds as soon as practicable after the date of assessment. In dealing with such a state of facts the Supreme Court of Mississippi aptly said:

> "When the state imposes the burden of taxation upon the property possessed by the citizen, it means both that of which he is the open holder and that which he has secreted and concealed. His cunning may in practice defeat the imposition upon the latter, but it is legally no less liable to the burden, and, when discovered, the duty will be exacted no matter what the shifts and devices which may have been resorted to in order to escape."

A similar ruling was made in Poppleton v. Yamhill County, 8 Or. 338; Jones v. Seward Co., 10 Neb. 154, 4 N. W. 946; In re People's Bank, etc., 67 N. E. (Ill.) 777. In the case of Columbia Savings Bank v. Los Angeles, 137 Cal. 467, 70 P. 308, this court, while upholding the decision of the trial court based upon conflicting evidence that the property in question in that case had not been transferred for the purpose of evading taxation, sustained the principle declared in the Nebraska cases.

[3] Practically, the appellant's contention as to the illegality of the action of the board of equalization consists in the claim that the action of the said board in raising its assessment was taken on a date subsequent to the time within which the board was required to act with regard to such matters under the provisions of section 3672 of the Political Code. The question of the power of boards of equalization to continue in session after the date fixed for the completion of its investigation under the foregoing section of the Political Code has frequently heretofore been before this court for decision, and it has been uniformly held that such provisions in the statutes regulating the time within which the acts of administrative officers are to be done are directory, in the absence of a clear intent on the part of the Legislature to the contrary. The case of Buswell v. Supervisors, 116 Cal. 351, 48 P. 226, correctly states the rule in that regard and cites the previous cases declaring it. We are satisfied that these cases have application to the facts in the case at bar, and that the contention of the appellant to the contrary is without merit.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.

CURTIS, J. (concurring). I dissent from the foregoing opinion in so far as it is held therein that the conditional sales contracts were properly assessed as solvent credits and that the owner thereof is required to pay taxes thereon in addition to the taxes paid on the motor vehicles covered by the contracts. By the contract the title to the motor vehicle remained in the seller, and he is by law liable for the taxes assessed against it. To require him also to pay a tax upon the amount remaining due on the agreed purchase price thereof would be to exact of him a double tax, which finds no warrant in the law. The fact that in the contracts involved herein between the sellers and purchasers of the motor vehicles the latter have agreed to pay taxes assessed against said motor vehicles can have no bearing upon the legality of the tax involved herein. Presumably, the purchasers have received an adequate consideration for their agreement to pay said taxes, either in the price paid for the property or in the terms of the agreement of purchase. That is purely a personal matter between the parties to the contract and cannot in any way affect the validity of the tax imposed upon the balance due under the contract.

In all other respects I concur in the opinion written by Mr. Justice RICHARDS.

---

199 Cal. 446

PERELLI-MINETTI et al. v. LAWSON et al.

(S. F. 12035.)

(Supreme Court of California. Oct. 4, 1926.)

1. Appeal and error 🔑757(1).

Code Civ. Proc. § 953c, relating to filing of briefs on appeal, is satisfied when briefs and supplements thereto present for consideration sufficient of record to enable appellate tribunal to pass upon merits of appeal.

2. Appeal and error 🔑763.

In determining whether Code Civ. Proc. § 953c, has been complied with, appellate court may examine all supplement briefs filed with permission of the court.

3. Appeal and error 🔑757(1)—Appellant's brief with supplements held sufficient compliance with statute requiring briefs on appeal "to illustrate points made and to enable court to determine those points" (Code Civ. Proc. § 953c).

Brief containing concise statement of allegations in complaint, brief survey of denials and answer thereto, discussion of contentions, statement purporting to set forth facts and law applicable, citation of authorities, copy of first opinion of trial court, appendix containing statement of certain pleadings, stipulations and testimony, with supplemental briefs containing findings of fact and conclusions of law, judgment and notice of appeal, an attack on several findings of fact and conclusions of law, an assertion that trial court erred in receiving certain quoted evidence, and a repetition of certain of appellant's contentions, *held* sufficient compliance with Code Civ. Proc. § 953c, requiring briefs on appeal "to illustrate points made and to enable court to determine those points."

In Bank.

Appeal from Superior Court, Sonoma County; Rolfe L. Thompson, Judge.

Action by Joseph V. Perelli-Minetti and others by their guardian ad litem, Jeanne Perelli-Minetti, and Charles Perelli-Minetti, as executors of the last will and testament of Anton Julius Perelli-Minetti, against W. H. Lawson and others. From the judgment, plaintiffs appeal. On motion to affirm judgment. Motion denied.

W. F. Cowan, of Santa Rosa, and Edwin V. McKenzie and Harry A. McKenzie, both of San Francisco, for appellants.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondents.

PER CURIAM. [1, 2] Motion to affirm judgment. Respondent W. H. Lawson moves to affirm the judgment appealed from on the ground that the appellants have failed to print or set forth in their brief, or any supplement thereto, in accordance with the provisions of section 953c of the Code of Civil Procedure, any part of the record sufficient to justify a reversal or present any issues on appeal. The appeal was taken by the alternative method, and the transcript, under the provisions of section 953a, Code of Civil Procedure, consists of a copy of the judgment roll and notice of appeal, a reporter's transcript of the evidence and proceedings at the trial and a volume containing copies of the various exhibits introduced at the trial.

The opening brief of appellants was filed on June 3, 1926. On June 10, 1926, respondent W. H. Lawson filed his motion to affirm the judgment on the above-mentioned ground. After leave first obtained from this court, the appellants on June 21, 1926, filed their first supplemental brief. On June 28, 1926, the appellants filed their second supplemental brief with permission of the court.

If respondent's contention that he is entitled to have his motion to affirm "considered in the light of the state of the record at the time the motion was filed" be meritorious, it will be necessary to examine but the opening brief of appellants to the exclusion of their two supplemental briefs, for the motion was filed immediately following the presentation to this court of appellants' opening brief. However, should said contention be found without merit the court will be called upon to examine all of appellants' briefs on file herein to determine whether they satisfy the provisions of section 953c, Code of Civil Procedure. We will therefore take up this contention preliminarily in order to determine which briefs of appellants should be examined by the court in passing upon respondent's motion.

Section 953c of the Code of Civil Procedure provides in part:

> "* * * In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.
>
> "*Extension of Time for Filing Briefs.* The court may in all cases, upon good cause shown, extend time to a party to print and file his brief, provided that the application is made before calling of the calendar for oral argument on the appeal or upon good cause being shown the court may extend time to a party to print and file a supplemental brief."

It is apparent from a reading of this section of the Code that its provisions are adequately complied with if the required portions of the record are printed in either the opening brief or in a supplement thereto or in both. In other words, said Code section does not require that any one brief contain the requisite portions of the record, but, on the contrary, it is expressly provided that such portions of the record may be printed in the brief "or in a supplement thereto." That is to say, the provisions of section 953c, Code of Civil Procedure, are satisfied when the briefs and the supplements thereto present for consideration sufficient of the record to enable the appellate tribunal to pass upon the merits of the appeal. And the final paragraph of the section expressly authorizes the appellate court, upon good cause being shown, to permit the filing of supplemental briefs. In view of the foregoing and in the absence of direct authority upon the point, we are inclined to hold, and do so hold, that in determining whether the provisions of section 953c, Code of Civil Procedure, have been complied with by a party the appellate court may examine not alone the brief or briefs of said party, but in addition thereto all supplemental briefs filed with the permission of court. We conclude, therefore, that in considering the sufficiency of appellants' briefs in the instant case, under section 953c, Code of Civil Procedure, it will be proper for us to examine not alone their opening brief, but also their two supplemental briefs filed with the permission of this court. We find nothing in the authorities cited by respondent opposed to this conclusion. Those authorities merely hold that a motion to dismiss an appeal is to be determined "by the facts as they existed at the time the notice of motion was given," and that the subsequent and tardy filing of points and authorities will not work to the prejudice of said motion to dismiss. The conclusion reached in those cases was directed by rule 5 of this court, which expressly provides for the dismissal of appeals where appellants fail to file their points and authorities within the time prescribed. As already indicated, however, a motion to affirm the judgment is not necessarily to be determined "by the facts as they existed at the time the notice of motion was given," for section 953c, Code of Civil Procedure, declares that its provisions are complied with when the brief or supplements thereto contain the required portions of the record, and this, apparently, even though the supplements may have been filed, as in the instant case, subsequent to the notice of motion to affirm. We will therefore examine the appellants' opening brief and the two supplements thereto to ascertain whether, when considered together, they satisfy the provisions of section 953c, Code of Civil Procedure.

[3] Appellants' opening brief contains the following: A concise statement of the allegations contained in the complaint; a brief survey of the denials and allegations of the answer thereto; a discussion of the asserted "primary" and "secondary" contentions; a statement purporting to set forth the facts; a discussion of the law asserted to be applicable; a citation of, and quotations from, innumerable authorities touching upon the law asserted to be involved; an enumeration and discussion of several contentions; a copy of the first opinion of the trial court which was, however, not its final disposition in the matter; an appendix containing a statement of certain of the pleadings, stipulations and testimony.

The first supplemental brief of appellants contains: The findings of fact and conclusions of law, the judgment, and the notice of appeal. Appellants' second supplemental brief consists of the following: An attack on several of the findings of fact, which are quoted, upon the ground of the insufficiency of the evidence to sustain said findings; an attack on several quoted conclusions of law; an assertion that the trial court erred in receiving certain quoted evidence; and a repetition of certain of appellants' contentions.

That the necessary contents of the briefs depends upon the peculiar circumstances of the particular appeal was recognized by this court in California Savings & Commercial Bank v. Canne, 34 Cal. App. 768, 770, 169 P. 395, 396, when, in denying a petition for hearing herein, it was declared:

> "Just exactly what must be printed in any particular case in order to comply with this requirement [section 953c, C. C. P.] necessarily depends upon the circumstances of the case. * * * It is impossible to lay down any rule for the government of attorneys in deciding what to print in their briefs where the record is prepared, under section 953a of the Code of Civil Procedure. If it is understood that enough should be printed to illustrate the points presented, the good sense of attorneys should be sufficient to inform them on the subject."

We are of the opinion that appellants' briefs might have more fully quoted from the reporter's transcript to illustrate the asserted insufficiency of the evidence to sustain the findings complained of. But, on the whole, we are satisfied that said briefs contain sufficient "to illustrate the points made and to enable the court to determine those points." California Savings & Commercial Bank v. Canne, supra. As stated in 2 Cal. Jur. 729, § 420, "The rule requiring an appellant to point out errors relied upon is not a hard and fast one." In the instant case, as indicated by the above statement of the contents of their briefs, the appellants have evidently in good faith attempted to comply with the provisions of section 953c, Code of Civil Procedure, and print in their briefs all portions of the record essential to the appeal, and we are of the opinion, therefore, that the merits of said appeal should be considered by the court at the proper time. Estate of Berry, 195 Cal. 354, 359, 233 P. 330.

The motion to affirm the judgment appealed from is denied.

---

199 Cal. 451

PEOPLE v. HALL. (Cr. 2830.)*

(Supreme Court of California. Oct. 5, 1926.)

1. Homicide 🔑314.

Verdict that jury found defendant guilty of murder of first degree, "but cannot come to an unanimous agreement as to degree of punishment," *held* not to justify death penalty under Pen. Code, § 190.

2. Criminal law 🔑1186(4).

Defect in verdict of guilty for first degree murder in failing to fix penalty, after which court fixed penalty at death, *held* not an error, in "matter of procedure" under Const. art. 6, § 4½, but in effect a denial of trial by jury.

3. Criminal law 🔑1202(3).

Evidence in murder case, that defendant was an escape from prison, where he had been serving life term for murder, *held* admissible as bearing on question of punishment.

4. Homicide 🔑174(7).

In murder case, rifle and cartridges found in defendant's possession *held* admissible as evidence of flight, though obtained after time of crime.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Floyd Hall was convicted of murder in the first degree with sentence of death, and he appeals. Reversed and remanded.

Raymond T. Coughlin, of Sacramento, and Francis W. Murphy, of San Francisco, for appellant.

Milton T. Farmer and Henry E. Monroe, both of San Francisco, amici curiæ.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHENK, J. [1] This is an appeal by the defendant from a judgment of conviction and from an order denying his motion for a new trial. By an indictment of the grand jury of Sacramento county the defendant and Joseph Tanko were charged with the murder of H. J. Litzberg on the 17th day of April, 1925. The defendant herein was apprehended and brought to trial, but Tanko is still at large. The jury returned the following verdict:

> "We, the jury in the above-entitled cause, find the defendant Floyd Hall guilty of the crime of murder as charged in the indictment, of the first degree. But cannot come to an unanimous agreement as to degree of punishment."

The trial court received the verdict, caused the same to be recorded, and, in pursuance thereof, sentenced the defendant to suffer the penalty of death. The main contention on the appeal is that the court was without power to fix the penalty when the defendant was on trial before a jury on a plea of not guilty; that such power was vested solely in the jury on the trial of such issue; and that the discharge of the jury following the return of said verdict resulted in a mistrial. The effect of a verdict returned in that form presents a novel question, and depends upon the proper construction of section 190 of the Penal Code. As enacted in 1872, that section provided: "Every person guilty of murder in the first degree shall suffer death." As amended in 1873, the section was made to read as presently framed:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; or, upon a plea of guilty, the court shall determine the same. * * *"

It is the contention of the Attorney General that, under the amended section, the accused, when the jury has determined that he is guilty of murder in the first degree, must suffer death, unless the jury by unanimous agreement fix the penalty at life imprisonment notwithstanding the fact that the verdict on its face discloses that the jury could not and did not arrive at a unanimous agreement as to either penalty. The amended section was first considered by this court in October, 1874, in the case of People v. Welch, 49 Cal. 174. In that case the jury returned the following verdict:

> "We the jurors, do find the defendant Welch guilty of murder in the first degree, as charged in the indictment."

It was declared, in view of the amendment:

> "Here their [the jurors'] discretion is limited, at most, to determining which of two punishments shall be inflicted."

It was decided that by that form of verdict the jury had determined that the defendant must suffer the death penalty. In further discussion of the question the court stated:

> "And we think that it [the discretion of the jury] is still more restricted, and is to be em-

*Rehearing denied November 4, 1926.

ployed only where the jury is satisfied that the lighter penalty should be imposed,"

—and that the amended section should be construed as if it read "shall suffer death, or (in the discretion of the jury) imprisonment in the state prison for life." This further discussion was unnecessary to the decision, and we see no reason for limiting the discretion to either penalty. The language of the amended section plainly vests the jury with discretion as to both penalties, and the practical application of that language from the time of the enactment, as disclosed by the decisions of this court, plainly indicates that said discretion is so vested, and is to be exercised in the manner provided by law and the instructions of the court. What was really decided in the Welch Case was that, in the exercise of its discretion to determine which of the two punishments should be inflicted, the jury fixed the penalty at death when it returned a verdict of guilty of murder in the first degree, and said nothing in the verdict as to the penalty. That case, as to the material point there involved and decided, was followed in People v. McCurdy, 68 Cal. 576, 10 P. 207, and in People v. French, 69 Cal. 169, 10 P. 378. In each of those cases, as in the Welch Case, 49 Cal. 174, the verdict was a simple verdict finding the defendant guilty of murder in the first degree, and was silent as to the penalty. An examination of the records in those cases discloses that, under the instructions of the court, there could have been no misapprehension on the part of the jury as to the fact that, pursuant to a verdict returned in that form, the sentence of death would necessarily follow, and that the court would have no alternative in the premises. This rule has been uniformly adhered to since those early cases. A few citations will suffice: People v. Leary, 105 Cal. 486, 39 P. 24; People v. Sainz, 162 Cal. 242, 121 P. 922; People v. Ellis, 188 Cal. 682, 206 P. 753; People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585; People v. Ure, 68 Cal. App. 545, 229 P. 987. The subject is treated and the rule reiterated in the recent case of People v. Bollinger (Cal. Sup.) 237 P. 25, 30, where, after quoting section 190 as amended, it is said:

> "It is true the jury alone shall determine in a case of murder in the first degree whether the punishment shall be death or confinement in the state prison for life, and that the jury after exercising such discretion shall by its verdict, either by its terms or when read in the light of instructions, plainly indicate the punishment fixed. * * * The silence of the verdict as to the punishment must, therefore, in the light of the instruction, be taken as the equivalent of a finding that appellant shall suffer the death penalty."

In People v. Perry, 195 Cal. 623, 639, 234 P. 890, 897, it was said:

> "It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty."

From a consideration of our decisions it appears to be the settled law of this state that in the trial on a charge of murder it is first incumbent upon the jury to determine the guilt or innocence of the accused. If he be found guilty of murder in the first degree, it is then incumbent on the jury to fix the penalty. If the accused enter a plea of guilty as charged, it then becomes the duty of the court to determine the degree in accordance with law, and then to fix the penalty. In the one case the jury has the discretion to fix the penalty at death or confinement in the state prison for life. In the other case the court exercises a like discretion after the offense is determined by the court to be first degree murder. The power of each is exclusive and independent of the other. The court has no more the power to determine the penalty when a verdict of guilty of murder in the first degree is returned than the jury has the power to determine the penalty when the accused enters a plea of guilty. Under the law, the verdict in such a case must be the result of the unanimous agreement of the jurors, and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements: First, a finding that the accused is guilty of murder in the first degree; and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion. The jury may exercise its discretion as to the penalty in one of three ways. It may fix the death penalty by so wording its verdict, or by remaining silent as to the penalty, or it may by so wording its verdict fix the penalty at life imprisonment. When the penalty is fixed at death or at imprisonment for life be definite and specific wording of the verdict, no difficulty is, or has been, encountered, and, since the early case of People v. Welch, supra, it has been the established and uniformly enforced rule that a verdict, which finds the accused guilty of murder in the first degree, and is silent as to the penalty, affords conclusive evidence to the court and to the world that the jury has, by that form of verdict, exercised its discretion, and thereby fixed the penalty at death. The rule, of course, has been and is applied under appropriate instructions by the court such as were given in this case as follows:

> "It is provided by the law of this state that every person convicted of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same. You will observe, therefore, that, if you find from all of the evidence in the case to a moral certainty and beyond a reasonable doubt that the defendant is guilty of murder of the first degree, then, upon such find-

ing, the discretion is vested in you of determining what the punishment shall be whether death or imprisonment for life. * * * If you render a verdict of guilty of murder of the first degree, and say nothing about the penalty, it will be the duty of the court to impose the penalty of death."

The duty of the jury was thus made plain. Its discretion was to be exercised in the manner pointed out in the instructions and under section 190 of the Penal Code that discretion applied both to the fixing of the death penalty and the penalty of life imprisonment. The result of the exercise of that discretion must appear on the face of the verdict either by the use of specific words to express it, or, in the absence of such words, by necessary inference in the light of the instructions. It may, therefore, not rightly be said that, when the jury found the defendant guilty of murder in the first degree, but disagreed as to the penalty, it thereby fixed the death penalty. It was the duty of the jury to exercise its discretion and fix the penalty. Failing to do so, no penalty was determined upon. The jury could not exercise its discretion and not exercise it in one and the same verdict. When a verdict, such as the one here under consideration, discloses on its face that such discretion was not exercised as to either penalty, it is not a verdict upon which the court is authorized to pronounce judgment of either death or life imprisonment. In receiving such a verdict and in imposing the sentence of death upon the defendant, the court usurped the function of the jury, and its judgment was a nullity. The proceeding therefore resulted in a mistrial, and the judgment must be reversed. It is obvious, from what has been said, that the trial court should not have received the verdict in its present form, but should have caused the jury to return a verdict in conformity with law, or should have discharged the jury and retried the cause.

[2] It is earnestly insisted by the respondent that the defect in the form of the verdict constitutes no more than "matter of procedure"; that under section 4½ of article 6 of the Constitution the judgment should not be reversed, for the reason that, upon an examination of the entire cause, including the evidence, the guilt of the defendant is shown, and that an affirmance of the judgment would not constitute a miscarriage of justice. We cannot agree that the defect in the verdict was merely an error in "matter of procedure" as contemplated by said section 4½. On the contrary, the defect involved matter of substantial and substantive right. It was in effect the denial of a trial by jury. The amendment by which said section 4½ was added to the Constitution was not "designed to repeal or abrogate the guarantees accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases." People v. O'Bryan, 165 Cal. 55, 130 P. 1042; People v. Frey, 165 Cal. 140, 131 P. 127; People v. Wilson, 23 Cal. App. 513, 138 P. 971; People v. Ho Kim You, 24 Cal. App. 451, 141 P. 950. Trial by jury is guaranteed to every person charged with a felony, and the denial of that right is in itself a miscarriage of justice. See Farrell v. City of Ontario, 39 Cal. App. 351, 178 P. 740. In view of the fact that the cause must be remanded for a new trial, we express no opinion as to the sufficiency of the evidence to sustain a verdict, but this much may properly be said, generally, that, however degraded and hardened a criminal the evidence may disclose an accused to be, he is entitled under the Constitution to trial by jury. In legal effect this right was denied to the defendant in the case at bar. The proceedings before the trial court amounted to the same as if the court had denied the defendant a trial by jury in the first instance, and, having heard the evidence and found the defendant guilty, proceeded to impose the judgment of death. Such a judgment may not stand even though there be the clearest proof of guilt.

[3] Since the judgment must be reversed, it seems necessary to pass upon other contentions presented by the defendant to the end that they be determined for the purposes of a new trial. At the time of his apprehension on the present charge the defendant was an escape from the state prison at San Quentin. At the trial the prosecution, over the objection of the defendant, was permitted to prove that at the time of the defendant's escape he was undergoing a sentence of life imprisonment resulting from a former charge of murder. He urges the admission of this evidence as prejudicial error. This evidence was not offered nor admitted as affecting in any manner the question of the defendant's guilt of the crime for which he was then on trial, but solely as bearing on the question of punishment to be meted out to him in the event of a conviction. The court fully instructed the jury to that effect. A similar situation was presented in the case of People v. Hong Ah Duck, 61 Cal. 387, where it was held that such evidence was admissible. It was there stated, with reference to the determination by the jury of the penalty:

> "In order to exercise that discretion in a wise and intelligent manner, the jury should be put in possession of all the facts of the case; and if it be true, as it was in respect to this defendant, that a verdict fixing the punishment at imprisonment for life, would in effect be no punishment at all, we think it was proper to inform the jury of that fact."

Counsel for the defendant calls attention to the fact that, when that case was decided, a sentence of imprisonment for life meant what it said, and not a life sentence, following which the defendant might live out a long life at large after his discharge under our present parole laws, and that under those laws another life sentence might add to his present punishment by increasing the minimum time in prison. Even so, we think the principle is the same in each case, and that said evidence was admissible as tending to enlighten the jury on the very important matter of the extent of the punishment to be fixed by the jury in the exercise of its discretion.

[4] It is further contended by the defendant that the court erred in the admission in evidence of a box containing seventeen cartridges, together with a Savage rifle which had been sawed off by the defendant. When these articles were offered in evidence, it was objected that they were inadmissible, in that they did not constitute a part of the res gestæ, that the proper foundation for their admission had not been laid, in that it was not made to appear that the cartridges were the same as those taken from the defendant or that they were in the same condition as when found in the possession of the defendant; and that their possession by the defendant was too remote in point of time from the commission of the crime. If it be assumed, as in effect the defendant claimed to the arresting officers, that he obtained these articles subsequent to the time when the crime was alleged to have been committed, then, of course, they could not have been connected with the commission of the alleged crime, and would have been inadmissible under the rule ordinarily obtaining that evidence of the possession of weapons not connected with the offense charged is irrelevant. It does not appear, however, that the articles in question were offered in evidence upon the theory that they were in anywise connected with the commission of the offense, and it is fairly inferable, from the record before us, that they were offered in evidence as a circumstance attending the alleged flight of the defendant. The prosecution offered proof of the search for the defendant by officers of the law, his pursuit, and his capture. It is elementary that the flight of a person after the commission of a crime, while not of itself sufficient to establish guilt or to raise a presumption of guilt, is a circumstance to be considered by the jury in connection with all the other facts and circumstances in the case as tending in some degree to prove a consciousness of guilt, and evidence thereof is admissible, not as part of the res gestæ, but as indicative of a guilty mind. It is permissible, in proof of the fact of flight, to show all of the facts and circumstances attending the flight either to increase or decrease, as the case may be, the probative force of the fact of flight. In other words, when testimony as to flight is resorted to, it is proper to show the extent of the flight and the circumstances thereof, including the acts and doings of the defendant, which tend to characterize and increase its significance. It was, therefore proper for the prosecution to show, as bearing upon this question, that the defendant had ammunition and firearms in his possession which were adapted to further his flight, and thereby accentuate the fact of flight. For this purpose the articles in question were admissible in evidence. We are satisfied from the record that the proper foundation for the introduction of these articles was laid.

Numerous instructions given by the court are complained of, and it is insisted that certain instructions offered by the defendant were erroneously refused. It is unnecessary to quote them for the purposes of a ruling thereon. An examination of the record satisfies us that the charge to the jury was full and fair, and that just complaint may not be predicated on any instruction given or on the refusal to give any of the instructions proposed by the defendant.

Prejudicial misconduct is charged against the trial judge and the district attorney. Numerous specifications are presented by the defendant. Upon examination of the record we find nothing that requires discussion in view of the necessity of a new trial.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

---

199 Cal. 440

WOOD v. ANDERSON et al. (L. A. 8456.)

(Supreme Court of California. Oct. 1, 1926.)

1. Appeal and error 🔑927(3).

On appeal from judgment granting motion for nonsuit, reviewing court must view evidence in light must favorable to appellant.

2. Specific performance 🔑28(2).

Contract for conveyance of real property will not be enforced by a court of equity unless it contains all the material terms and expresses each in a sufficiently definite manner.

3. Specific performance 🔑28(2).

Contract for conveyance of realty, indefinite as to land to be conveyed, time, place, and conditions of payment of purchase price, *held* not specifically enforceable in equity.

4. Specific performance 🔑41.

Where contract for conveyance of realty was oral, plaintiff seeking specific performance was required to prove sufficient part performance to take it out of statute of frauds, within meaning of Civ. Code, § 1741.

5. Frauds, statute of 🔑129(4).—Vendee, to take oral contract for conveyance of realty out of statute by possession, must show visible, notorious, and exclusive possession.

Possession of vendee, to take oral contract for conveyance of realty out of statute, must be visible, notorious, and exclusive, manifesting clearly that vendee is asserting a distinctive ownership of property inconsistent with possession or ownership in any other person.

6. Specific performance ⚷121(5)—Evidence of possession under alleged oral contract to purchase realty held insufficient to take contract out of statute of frauds, so as to be specifically enforceable (Civ. Code, § 1741).

Evidence showing only that vendor offered to let purchaser use portion of lot temporarily, and that purchaser hauled a few loads of gravel, planted some trees, and claimed property as his own before third persons, but did not offer to pay any portion of purchase price until commencement of action, and made no offer to pay taxes levied against property, *held* insufficient evidence of possession to take oral contract of purchase out of statute of frauds, within Civ. Code, § 1741, so as to be sufficiently enforceable.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Charles L. Wood against E. E. Anderson, H. W. Armstrong, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hardy, Elliott & Aberle, of Los Angeles, for appellant.

Clark & Law, of Los Angeles, for respondents.

NOURSE, Justice pro tem. Plaintiff commenced this action for specific performance of an oral agreement between plaintiff and the defendants for the sale of certain real property in Los Angeles county. The complaint alleged that the title to the property stood in the name of defendant Armstrong, but that the defendant Anderson was the real owner thereof; that in the month of June, 1922, the plaintiff and the defendants Armstrong and Anderson entered into an agreement to sell the property to the plaintiff for the sum of $1,175; that immediately following the making of said agreement the said defendants set off said property to the plaintiff and delivered possession thereof to him, and that thereafter, with the knowledge and consent of said defendants, the plaintiff expended considerable money in improving said property; that at the time of the making of said agreement and ever since the plaintiff has been ready, able, and willing to pay the sum of $1,175 in cash or on terms and has on numerous occasions offered to pay said defendants the said price; that said agreement was a just and equitable contract. The defendant Anderson filed an answer denying the execution of any agreement with the plaintiff for the sale of said property for the sum of $1,175 or for any other sum, denying that he had delivered possession of said property to the plaintiff, but admitting that the plaintiff had attempted to exercise rights of possession over the same. This answer also denied that the contract was equitable, and alleged that the reasonable value of said property at the time of the alleged agreement was the sum of $2,500. The defendant Armstrong and the wives of Anderson and Armstrong later appeared by stipulation and joined in the answer of Anderson. The cause went to trial before the court, sitting without a jury, and upon the conclusion of plaintiff's evidence the defendants moved for a nonsuit upon the grounds that there had been no proof of any contract, and that, if such contract existed, it was oral, and that there had not been sufficient part performance to take the contract out of the statute of frauds. This motion was granted, and, the plaintiff appeals on a typewritten record.

The appellant contends that the evidence established a prima facie case as to the existence of a partly executed oral contract sufficient to take the case out of the operation of the statute of frauds and that sufficient part performance was shown to entitle appellant to a decree of specific performance.

It appears that some time in the month of June, 1922, the appellant and Anderson had a conversation wherein the appellant offered to purchase and the respondent offered to sell to the appellant a strip of land adjoining the easterly boundary line of appellant's property. The other details of the alleged agreement are indefinite and uncertain. The appellant testified at one time that the property to be conveyed was 25 feet wide by approximately 150 feet deep, while at another time he testified that it should have a width of 27 or 27½ feet in the front and 25 or 30 feet in the rear. The respondent who was called as a witness by the appellant testified that they talked of a 20-foot strip and two other witnesses testified that the conversation related to a 25-foot strip. The appellant testified that the strip was to be "150 feet on the westerly side and more on the easterly side." The description of the property found in the complaint is full of errors as to both courses and distances and does not check with any of the testimony offered at the trial. Testimony as to the price to be paid is equally uncertain, the appellant testifying that the sum of $1,175 was agreed on, but that this amount was arrived at by computing the area of the land to be sold at the same price per square foot as he had paid for the property which he had purchased from the defendant Armstrong in the preceding year. It was conceded that if the price was fixed upon this basis it would be considerably more than the sum of $1,175. The only evidence as to the time and conditions of payment of the purchase price is found in the testimony of the appellant in repeating a conversation had with Anderson in June, 1922: "Now we can go to escrow most any time you want." I says, "I will go down in the *usual way* any time you want." "All right." "There is no hurry,

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Wood." (Emphasis ours.) The same witness also testified that he had not offered to pay Anderson any of the purchase price at any time, but that he told him that he would go down town and fix it up in escrow "as I had done with the former piece." No testimony was offered to show what was meant by "the usual way" or what method was used in the purchase of the former piece.

The evidence as to part performance is that a few days after the alleged agreement Anderson placed a post in the rear of his lot at a point approximately 25 feet easterly of appellant's easterly line for the express purpose of erecting a fence; that at that time he asked the appellant if he intended to purchase the property, and that, when he (appellant) told him that he did, he asked him if the location of the post was satisfactory to him; that thereafter the appellant hauled in some 15 or 16 loads of dirt which was spread upon a portion of the land covered by the alleged agreement, and he planted some trees on the rear portion of that property but not on the dividing line thereof. It appears without conflict that the land covered by the purported agreement was not surveyed or marked off upon the ground in any manner; that no post had been set in the front portion of the lot; that Anderson had given the appellant permission to use temporarily so much of the property as he needed for a driveway; that about ten days after the date of the alleged agreement Anderson notified appellant that he would not go further with the sale; and the total expenditures made by the appellant upon the property did not exceed $50. In answer to the question whether he had used the driveway over the property proposed to be purchased, the appellant answered:

> "Part of it, yes; not as a driveway. Well, I did, yes, partly, but not as far, because he later, within a few days after, a week I think—I hadn't gotten the top dressing on—no; I did not use it right away."

[1-3] Viewing the evidence in the light most favorable to the appellant, as we must do on an appeal from a judgment of nonsuit, we are nevertheless confronted by the well-established rule that a contract, particularly one for the conveyance of real property, will not be enforced by a court of equity unless it contains all the material terms and also expresses each in a sufficiently definite manner. Reymond v. Laboudigue, 148 Cal. 691, 694, 84 P. 189; Buckmaster v. Bertram, 186 Cal. 673, 676, 200 P. 610; Patterson v. Reddish, 56 Cal. App. 197, 202, 204 P. 565; Allman v. Rich (Cal. App.) 245 P. 439. Viewing the evidence in this light, the alleged contract falls far short of that degree of certainty which is essential to justify a court of equity in decreeing its specific performance. It is indefinite as to the land to be conveyed, the time, place, and conditions of payment of the purchase price, and, in fact, as to the amount of the purchase price itself. The question is not one of conflict between the testimony of the appellant and that of the respondent, but it is one of such uncertainty and indefiniteness in appellant's testimony concerning the terms and conditions of the alleged contract as would require the court to indulge in mere conjecture and speculation in order to arrive at the intent of the parties.

[4-6] It would seem that in principle the same rule should be applicable to the second branch of the case. The contract being oral, it was essential that appellant prove sufficient part performance to take it out of the statute of frauds within the meaning of section 1741, Civil Code. When the vendee, under an oral contract for the conveyance of real property, depends upon possession alone to take the contract out of the statute of frauds—

> "such possession must be an actual possession by the vendee; * * * a possession visible, notorious, and exclusive, such as manifests definitely and clearly that the vendee is claiming and asserting a distinctive ownership of the property, which is inconsistent with the right of possession or ownership in any other person." Hambey v. Wise, 181 Cal. 286, 290, 184 P. 9, 11.

The evidence upon which appellant depends as showing possession in himself is based upon the same character of testimony as was employed to prove the terms of the alleged contract. It was shown that, though the respondent Anderson offered to let appellant use a portion of the lot temporarily, the appellant replied that he desired to purchase the entire strip. Without any authorization on the part of the respondents, the appellant hauled a few loads of gravel on to the lot planted some trees, and on some occasions claimed the property as his own before third persons, but did not pay or offer to pay any portion of the purchase price until the commencement of this action. The appellant made no effort to measure off the property on the ground nor to have it re-assessed in his name upon the assessment rolls of the county. He did not pay or offer to pay the taxes levied against the property, and, in fact, did nothing to evidence his right of possession after the repudiation of the contract by Anderson except to assert his claim before third parties. The case is a clear example of the danger noted in the admonition of Browne on the Statute of Frauds (5th Ed.) 473, and quoted in Hambey v. Wise, supra:

> "To allow a mere technical possession, not open to the observation of the neighborhood, and capable of being proved only by select and confidential witnesses, to be sufficient for obtaining a decree to enforce the contract, would manifestly afford an opportunity for and an encouragement to dishonest testimony."

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

199 Cal. 461

PEOPLE v. VANDERBILT. (Cr. 2903.)

(Supreme Court of California. Oct. 11, 1926.)

1. Indictment and information 🔑190.

Under Pen. Code, §§ 663, 1159, accused may be acquitted of completed crime charged and convicted of attempting to commit such crime, every completed crime necessarily involving attempt to commit it.

2. Criminal law 🔑878(4)—Verdict acquitting accused of sodomy held not inconsistent with conviction under count charging attempt to commit sodomy, regardless of state of evidence.

Verdict acquitting accused under count of information charging sodomy *held* not inconsistent with his conviction under count charging attempt to commit sodomy, even if evidence disclosed that, if guilty at all, he was guilty of sodomy and not of attempt to commit it.

3. Criminal law 🔑878(4)—Conviction of contributing to delinquency of minor by sodomy held not inconsistent with acquittal under count charging sodomy, in view of conviction for attempting to commit sodomy.

Verdict of guilty of contributing to delinquency of minor by committing sodomy on him, under one count of information, *held* not inconsistent with acquittal of sodomy on such minor under another count, where accused was convicted of attempting to commit sodomy on minor under another count.

4. Criminal law 🔑1177—Convictions and sentences, if erroneous because imposing punishment for separate crimes arising out of same acts, held not prejudicial where sentences ran concurrently.

Verdicts of guilty and sentences for attempting to commit sodomy and for contributing to delinquency of minor by sodomy, if erroneous because punishing for two separate crimes growing out of same acts, *held* not prejudicial where sentences were made to run concurrently.

In Bank.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge

Jade Vanderbilt was convicted of contributing to the delinquency of a minor by committing sodomy on him and of attempting to commit sodomy on said minor, and he appeals. Affirmed.

Shreve, Green & Shreve, and George H. Shreve, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Chester C. Kempley, Dist. Atty., of San Diego, for the People.

CURTIS, J. Appellant was charged in count 1 of the information with the crime of sodomy committed upon the person of a minor, a boy 9 years of age; in count 2, with contributing to the delinquency of said minor by committing sodomy upon said minor's person; and in the third count of an attempt to commit sodomy upon said minor. The jury before whom he was tried acquitted him under the first count and found him guilty of the crime charged in the second and third counts, respectively. The judgment of the court was that the defendant be confined in the county jail for the term of two years upon the verdict of the jury finding him guilty as charged in count 2, and that he be confined in the state's prison for the term prescribed by law upon the verdict finding him guilty of the crime charged in count 3 of the information. The sentences were made to run concurrently. From this judgment and the order denying his motion for a new trial the defendant appeals.

Appellant contends that the verdicts under the second and third counts of the information are inconsistent with that rendered under the first count. In other words, it is the appellant's contention that the verdict acquitting him of the crime of sodomy purged him of the charge of contributing to the delinquency of said minor and of an attempt to commit the crime of sodomy.

This cause was first appealed to the District Court of Appeal, Second District, and a decision was rendered therein by the Second Division of said court, from which a hearing was asked and granted by this court. We think the contention of appellant in so far as it relates to the verdicts under counts 1 and 3 of the information and the claim that they are inconsistent with each other, is conclusively answered by Mr. Justice Finlayson in a dissenting opinion written by him when said cause was before the District Court of Appeal. This opinion, with slight modifications, we approve, and adopt the same as expressing our views upon the questions therein considered. The changes made therein by us are shown by the words inclosed in brackets. Said opinion, as modified, is as follows:

[1] "If there be any inconsistency between the verdict of acquittal under the first count and the verdict of guilty under the third, it is not one which appears upon the face of those two verdicts. This must be so, since there is no reason in the nature of things why a defendant may not be guilty of an attempt to commit a crime without being guilty of the crime attempted to be perpetrated. It is not disputed, nor could it well be disputed, that, as an abstract proposition, every completed crime necessarily involves an attempt to commit it. As was said by Mr. Justice Hart in People v. Horn, 25 Cal. App. 583, 592, 144 P. 641, 645: 'It is not conceivable that any crime can be committed in the absence of an attempt to commit it. There must be a starting point in the actual commission of crime and obviously such starting point is the attempt.'

[2] "Though no repugnance appears upon the face of the two verdicts, it is said that a fatal inconsistency between the verdicts under the first and third counts appears when those verdicts are considered in the light of the evidence. The position taken in the majority opinion is substantially this: The evidence shows beyond all question that if appellant is not guilty of sodomy, as charged in count 1, he is not guilty of an attempt to commit that offense, as charged in count 3; wherefore it is argued that there is a fatal inconsistency between the verdict acquitting appellant of the charge of sodomy and the verdict which convicts him of the crime of attempting to commit sodomy.

"[It will be conceded that the evidence discloses that appellant was guilty of the crime of sodomy instead of an attempt to commit sodomy.] But does it therefore follow that the two verdicts are fatally inconsistent with one another? There can, I think, be no question but that, even with the evidence as it is, a verdict finding appellant guilty of an attempt to commit sodomy would have been perfectly proper if the third count had been entirely omitted from the information and appellant had been charged only with the substantive crime of sodomy as set forth in count 1. This conclusion seems to be justified by the following well-established principles: (1) Under the statutes of this state a person charged with the infamous crime against nature may be convicted of an attempt to commit that crime, though he be not specifically charged with such attempt. Pen. Code, §§ 663 and 1159; People v. Oates, 142 Cal. 12, 75 P. 337. See, also, People v. Horn, supra. (2) If the offense of sodomy be committed, an attempt to commit it—a lesser crime—is necessarily included within the greater and completed offense. People v. Horn, supra; People v. Parker (Cal. App.) 241 P. 401, 22 Cal. Jur. 366. (3) If there be evidence sufficient to support a verdict finding an accused person guilty of a lesser offense which is included within the offense charged against him, he may be found guilty of such lesser and included offense, notwithstanding the evidence shows that [he is guilty of the greater and including offense instead of the lesser offense]. People v. Muhlner, 115 Cal. 303, 47 P. 128. See, also, People v. Coulter, 145 Cal. 66, 78 P. 348; People v. Dong Pok Yip, 164 Cal. 143, 148, 127 P. 1031; and People v. Hamilton, 49 Cal. App. 30, 38, 192 P. 467. The reason for this last rule is that a defendant cannot complain where the determination of his case was more favorable to him than the evidence warranted. People v. Hamilton, supra; People v. Edwards (Cal. App.) 236 P. 944.

"If, then, a verdict finding appellant guilty of the attempt would have been upheld provided the crime of sodomy only had been charged—and this notwithstanding the fact that the evidence shows that [he was guilty of the greater crime instead of the lesser]—upon what theory can it be said that because the information charges, in two counts, both sodomy and an attempt to commit that crime, the verdict finding appellant guilty of the lesser offense cannot stand for the reason that it is inconsistent with the verdict acquitting him of the greater offense? By what magic does the presence of two counts, in lieu of only one, work such an extravagant difference in result? Is it because, by pleading the including and the included crimes separately in two counts, the jury was afforded an opportunity expressly to acquit appellant of the major offense? That, in the final analysis, whether it be expressly so stated or not, is the essence of the argument pursued in the majority opinion. The idea permeating that opinion is that because appellant has been directly and expressly acquitted of the crime of sodomy he cannot be convicted of the included crime of an attempt to commit sodomy, where, as here, the evidence shows that he [is guilty of the major offense instead of the lesser].

"Does the mere fact that appellant has been expressly acquitted of the major crime afford a rational basis for the claim that the verdict convicting him of the lesser crime is inconsistent with the one acquitting him of the greater offense? I think not. If there had been but one crime charged in the information, and that the major crime, i. e., sodomy, and if appellant, under that sole charge, had been convicted of the lesser crime of attempting to commit sodomy, he just as effectually would have been acquitted of the greater offense as he has been acquitted of it by the express verdict of acquittal rendered under count 1. People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Gordon, 99 Cal. 227, 33 P. 901; People v. McDaniels, 137 Cal. 192, 194, 69 P. 1006, 1007 (59 L. R. A. 578, 92 Am. St. Rep. 81); People v. McFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L. R. A. 245; People v. Dong Pok Yip, supra; 16 C. J. p. 271. Says the court in the McDaniels Case: 'It is well settled that a conviction of a lower offense embraced in a higher one, for the commission of which a defendant was tried, is an acquittal of the higher offense.' Though the jury in such cases does not expressly acquit the accused of the higher or including offense, it does acquit him of it indirectly, i. e., he is acquitted of it by operation of law. 'The plea and proof were, that he [defendant] had been convicted of the offense of manslaughter, by virtue of which the law acquitted him of the higher offense.' People v. McFarlane, supra. In the Gilmore Case the court says: 'A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, *by legal operation,* amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty.' (Italics mine.) In People v. Dong Pok Yip, supra, the defendant was tried upon a charge of assault with intent to commit the infamous crime against nature and was convicted of simple assault. There the court uses this language: 'Where the evidence clearly would support a verdict for a higher offense, the conviction of a lesser crime necessarily included therein will not be set aside. People v. Muhlner, 115 Cal. 306, 47 P. 128. The only *acquittal* in this case was of the major crime charged.' (Italics mine.) The decisions in other states are to the same effect. In Cates v. Commonwealth, 111 Va. 837, 69 S. E. 520, 44 L. R. A. (N. S.) 1047, the accused was indicted and tried for rape. On the first trial he was found guilty of an attempt to commit the offense charged. He moved for a new trial, which was granted. On the retrial, over his objection, he was tried for rape and was found guilty of that crime. The Virginia Supreme Court, in reversing the judgment, said that 'where there is but one count in an indictment and on that accused may be convicted of one of several offenses which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the offenses charged is a verdict of acquittal of all the others of a higher grade of offense.' See, also, 27 Ruling Case Law, p. 857, where the author says: 'The action of the jury in returning a verdict of guilty on some only of the counts charged, being silent as to others, is equivalent to an acquittal on those not mentioned.' In Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225, from which our Supreme Court quotes in People v. Gilmore, supra, the Mississippi court, addressing itself to a situation where the accused had been charged with a greater offense and found guilty of a lesser one, says: 'The jury, in such a case, in contemplation of law, render two verdicts; the one acquitting him of the higher crime; the other convicting him of the inferior.' So here, if there had been but one charge in the information, and that a charge of sodomy, and if a verdict had been returned finding appellant guilty of only an attempt to commit sodomy, the jury, in contemplation of law, would have rendered two verdicts; one acquitting appellant of sodomy; the other convicting him of the inferior crime of attempting to commit sodomy.

"The conclusion at which I have arrived cannot be overcome upon the theory that one charged with a single offense, in which a lesser offense is included, and who is convicted of the lesser offense, has only been put in jeopardy for the greater offense and has not been acquitted of it. As was said by the Mississippi court in Hurt v. State, supra: 'The verdict of manslaughter [the charge was murder] is as much an acquittal of the charge of murder *as a verdict pronouncing his entire innocence would be.*' (Italics mine.) But we need not go so far from home to find even more persuasive authority for holding that in such cases the accused not only has been put in jeopardy for the major offense, but has been acquitted of it. In People v. Gordon, supra, the defendant was charged with an assault with intent to commit murder. He pleaded not guilty. On his first trial he was found guilty of an assault with a deadly weapon. On appeal the judgment was reversed. When the case again was called for trial he entered two additional pleas: (1) Former acquittal of the major offense; and (2) once in jeopardy for that offense. The trial court erroneously instructed the jury to find for the people on both of these pleas. If the plea of 'once in jeopardy,' rather than that of 'former acquittal,' was the proper one, a more opportune situation for saying so could hardly have presented itself. And yet we find our Supreme Court using this language in that case: 'It is also settled law that when one is charged with an offense which includes another offense of lower grade, and is regularly tried and found guilty only of the lesser offense, the verdict operates as an *acquittal* of the offense charged.' (Italics mine.)

"In the light of the foregoing it seems clear to me that had appellant been charged with the major offense only, and had he been convicted of an attempt to commit that offense, he would in effect have been acquitted of the greater and including crime. He would not have been merely put in jeopardy for the major offense; he would have been acquitted of it. I find no hint in the decisions of our Supreme Court, or in the decisions of the courts of sister states, to warrant the theory that an accused person, charged only with the greater crime and convicted of the lesser offense, has only been put in jeopardy for the major offense and has not been acquitted of it. On the contrary, all the decisions to which my attention has been called treat such a situation as one involving an acquittal of the accused on the major offense.

"If appellant had been charged only with sodomy, and if, as is held in the cases cited by me, a verdict finding him guilty of the lesser and included crime of attempting to commit sodomy would have withstood an attack based upon the charge of inconsistency and this notwithstanding the nature of the evidence in this case and notwithstanding the fact that such a verdict would have amounted to an acquittal of the greater offense, then by what process of reasoning can it be said that a verdict finding appellant guilty of the lesser offense may not stand where, as here, the greater and the lesser offenses have been separately charged and there has been an express acquittal of the greater crime? Does the direct verdict of acquittal of the major offense, expressly rendered in this case, possess some subtle potency which would not have been possessed by an indirect and implied verdict of acquittal on the major offense, had that offense alone been charged? I confess I am unable to see any sound reason to differentiate an express from an implied acquittal. Each must have the same force and effect. And if the two are equally effective, then, under the principles announced in the cases cited by me supra, it must follow as an inevitable conclusion, the nature of the evidence in this case notwithstanding, that there is no inherent repugnancy between the verdict acquitting appellant of the larger and including offense and the one which convicts him of the lesser and included crime."

[3] As to the contention that the verdict under the first count is inconsistent with the verdict rendered under the second count of the information, we think this also is without merit. It is true that by the verdict under the first count appellant was acquitted of the charge of sodomy and this same charge of sodomy was made the basis of the charge of contributing to the delinquency of said minor. Had the verdict stopped there the contention of appellant might be well taken. But as we have already seen, the verdict went further and found appellant guilty of an attempt to commit the crime of sodomy. We have further seen that the verdict acquitting the appellant of sodomy is not inconsistent with the verdict finding him guilty of an attempt to commit the same crime and that the acquittal of the greater offense is not an acquittal of the lesser included therein where the jury expressly found appellant guilty of the lesser crime. Had the appellant been charged simply with the crime of contributing to the delinquency of a minor by committing sodomy upon his person and had the evidence failed to show that he had committed the completed act, but, on the other hand, that he had attempted to commit such act, there would be no question in our opinion but that such evidence would not only be admissible under an information charging the crime of contributing to the delinquency of a minor by the commission of sodomy upon his person, but that it would be sufficient to support a verdict finding the accused guilty as charged in such information. In order to justify such a verdict it would not be necessary to prove all the acts that are alleged in the information, but only such acts which are either alleged in the information directly, or which are impliedly alleged therein by reason of the fact that they are necessarily included in the acts which are directly alleged, and which in themselves are sufficient to prove the act of contributing to the minor's delinquency. In the present action, therefore, when the jury found the appellant guilty of an attempt to commit sodomy upon the person of a minor, the facts thus found were sufficient to establish his guilt of contributing to the minor's delinquency, and such verdict was, under the circumstances under which it was rendered, not inconsistent with the verdict acquitting him of sodomy.

The case before us differs in a marked degree from the case of People v. Andursky (Cal. App.) 241 P. 591, wherein the defendant was charged in one count with the crime of rape upon a female minor and in a second count with contributing to the delinquency of said minor by committing rape upon her. The jury found him not guilty of rape but guilty of contributing to the delinquency of said minor. It was held by the District Court of Appeal that the verdicts were inconsistent, and the order granting a new trial was affirmed. It was so held for the reason that by the verdict acquitting the defendant of the crime of rape the defendant was acquitted not only of said crime but of all lesser crimes included in the greater. He was accordingly acquitted of every act of which he was charged and which went to make up the charge of contributing to the minor's delinquency. In the present action, as we have already seen, the jury, while acquitting the appellant of the greater offense, expressly found him guilty of the lesser offense included therein, namely, of an attempt to commit sodomy, which offense was of itself of such a character that its commission tended to contribute to the minor's delinquency. There is not only no inconsistency between the verdicts under counts one and two of the indictment, but they are in our opinion in perfect harmony.

[4] The further claim is made by appellant that by the two verdicts and judgments pronounced thereon he is found guilty of and punished for two separate and distinct crimes growing out of the same state of facts or out of the same act. Conceding that the appellant has been found guilty of two crimes arising out of the same state of facts, we are not prepared to say that the judgment should be reversed for this reason in view of the fact that the sentences were made to run concurrently. The punishment imposed by the judgment against appellant under count 2 of the information was imprisonment in the county jail for a period of two years, and the punishment fixed by the statute for attempt to commit sodomy is imprisonment in the state's prison for a term not exceeding 20 years. "It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term." In re Lee, 177 Cal. 690, 693, 171 P. 958, 959. The maximum punishment, therefore, which appellant might suffer under this judgment cannot exceed 20 years. Had he been convicted simply of an attempt to commit sodomy the term of imprisonment could not have been less than that fixed by the court as punishment for the two crimes. The judgment, therefore, if erroneous, is not prejudicially so.

The other objections to the judgment raised by appellant have been considered by us. We find nothing in them that would justify a reversal of the judgment nor a detailed discussion of their asserted merits.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.

---

79 Cal. App. 273

GARRETT v. SUPERIOR COURT, KERN COUNTY, et al. (Civ. 5390.)

(District Court of Appeal, Second District, Division 2, California. Sept. 11, 1926.)

1. Criminal law 🔑260(3)—Writ of review lies to review conviction of recorder's court after appeal therefrom to superior court.

Writ of review lies to review a judgment of conviction in a recorder's court after appeal therefrom to the superior court, where such writ is an attack on the jurisdiction of the superior court.

2. Criminal law 🔑260(4).

Provisions of Penal Code relating to appeals from justices' courts (Deering's Gen. Laws 1923, Act 5233, §§ 806, 882) govern appeals from recorder's court in criminal cases.

3. Criminal law 🔑260(7)—Recorder's docket held to be before District Court of Appeal on writ to review conviction in superior court after appeal from recorder's court (Pen. Code, §§ 1246, 1467).

On writ to review judgment of conviction in superior court after appeal from recorder's court, where recorder's docket was returned by superior court under writ, such docket could be considered by District Court of Appeal, since provisions of Pen. Code, § 1246, requiring transmission of papers which are equivalent of judgment roll, are imported into appellate practice by section 1467.

4. Criminal law 🔑260(7)—Statute requiring transmission of papers on appeal from justice's and recorder's courts held applicable, though such courts have no clerk (Pen. Code, § 1246).

Pen. Code, § 1246, requiring transmission of papers equivalent to judgment roll, applies to appeals from justice's and recorder's courts, notwithstanding such courts have no clerk.

5. Criminal law 🔑260(7).

Statement of case required by Pen. Code, § 1468, as amended by St. 1925, p. 950, § 3, to be filed as prerequisite to appeal, is equivalent to bill of exceptions, except that statement must contain grounds on which appellant intends to rely.

6. Criminal law 🔑260(7)—Statement, prerequisite to appeal under statute, need not set out papers equivalent to judgment roll (Pen. Code, § 1246, and section 1468, as amended by St. 1925, p. 950, § 3).

In setting forth grounds on which appellant intends to rely, as required by Pen. Code, § 1468, as amended by St. 1925, p. 950, § 3, it is not necessary to state them so fully as to include any of the papers or minutes mentioned in section 1246, and, where explanatory evidence need not be set out, statement will consist merely of recital of grounds which appellant expects to argue from face of papers transmitted under section 1246.

7. Criminal law 🔑260(11)—Attempted appeal from judgment of recorder's court held not ground for presumption of entry of judgment not disclosed by docket.

Where docket of recorder's court failed to disclose judgment of conviction, District Court of Appeal, on writ of review, cannot presume entry of such judgment in aid of docket merely because of attempted appeal from judgment.

8. Criminal law 🔑260(11)—Attempted appeal from judgment of recorder's court held not to estop appellant from denying existence of such judgment.

That petitioner for writ of review to review conviction in superior court after appeal from recorder's court gave notice of appeal from judgment *held* not to estop him from subse-

quently asserting that no judgment was in fact entered.

Application by Della Garrett for certiorari to review the action of the Superior Court of Kern County, J. W. Mahon, Judge, in trying petitioner after trial in a recorder's court. Judgment annulled.

George M. Cook, of Taft, for petitioner.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for respondents.

WORKS, J. As shown by the return made by respondent to the writ of review, which we issue in this proceeding, petitioner was tried upon a criminal complaint in a recorder's court. The trial was by jury, and resulted in the return of a verdict of guilty on March 5, 1926. If we are to consider the docket of the recorder, copy of which was filed with respondent court, and which appears as a part of the record brought to us in this proceeding, it appears that no judgment was pronounced in the action by the recorder. The docket shows, under the date just mentioned:

> "Jury returned verdict of guilty. Notice of appeal by Atty. Cook for defense."

On the next day petitioner filed with the recorder a written notice of appeal, in which it was stated that she appealed to respondent court "from a judgment heretofore made and entered in the above-entitled action on the 5th day of March, 1926." Pursuant to the appeal thus taken, or at least attempted to be taken, the cause came on for trial in respondent court, after an order had been made reversing "the judgment of conviction" in the recorder's court and granting a new trial in respondent court. At the inception of the trial, and before a jury was called, petitioner objected that the court had no jurisdiction of the action for the reason that the recorder had pronounced no judgment and that the appeal was therefore premature. The objection was overruled, the trial went forward to a conclusion, and the jury found petitioner guilty. Petitioner then filed in this court her petition for the writ of review.

[1] Petitioner makes here the same point upon which she grounded her objection in respondent court. She says, specifically, that her attempted appeal was abortive, for the reason that it was in effect an effort to appeal from the verdict of a jury, and this even though her written notice of appeal recited that she appealed from a judgment. Respondent essays to meet this argument by the counter contention that the writ of review will not lie to review the judgment of a justice's or recorder's court after appeal therefrom to the superior court, citing the well-known case of Roberts v. Police Court, 185 Cal. 65, 195 P. 1053. We think this position of respondent is untenable. The proceeding here is in our opinion an attack upon the jurisdiction of respondent court. The direct question is presented whether the notice of appeal given by petitioner transported the cause in which she was defendant from the recorder's court to the appellate tribunal, respondent court, for its consideration.

The point is also made by respondent that the docket of the recorder is not before us, despite the fact that a copy of it was filed with respondent court, and is incorporated in the record returned to us under the writ heretofore issued. The determination of this point involves considerations of a complex and far-reaching character, imposing upon us, as it does, the duty of construing some of the latest enactments of the Legislature. Section 3 of an act of the Legislature passed in 1858 reads as follows:

> "The appeal to the county court from the judgment of a justice's, recorder's, mayor's, or police judge's court, shall be heard upon a statement of the case settled by the justice, police judge, recorder, or mayor, embodying the evidence, and such rulings of the court as are excepted to." Stats. 1858, p. 218.

[2, 3] Appeals from recorder's courts in criminal cases for many years have been governed by the provisions of the Penal Code relating to appeals from justice's courts. Deering's Gen. Laws 1923, Act 5233, §§ 806, 882. Section 1466 of the Penal Code has been substantially to the same effect ever since 1880, although it was amended in 1925 (St. 1925, p. 950, § 1) in such manner as to include a reference to municipal courts and to the District Court of Appeal. The enactment now reads:

> "Either party may appeal to the superior court of the county from a judgment of a municipal court or from a judgment of a justice's or police court, in like cases and for like causes as appeals may be taken to the Supreme Court or to a Court of Appeal."

Section 1467 of the Penal Code was also amended in 1925 (St. 1925, p. 950, § 2), but the amendments then incorporated in it make no substantial change in its import, in so far as it bears upon any question involved in the present proceeding. The section now reads:

> "The appeal may be taken, heard and determined as provided in title nine, part two of this Code, except that such appeal must be taken within fifteen days after the judgment is rendered in a justice's or police court, or entered in a municipal court, or within ten days after the order is made from which the appeal is taken, by filing a written notice of appeal."

From 1880 to 1925 section 1468 of the same Code read as follows:

> "The appeal to the superior court from the judgment of a justice's or police court is heard upon a statement of the case settled by the justice or police judge, embodying such rulings of the court as are excepted to, which statement must be filed with and settled by the court within ten days after filing notice of appeal."

Section 1468 was deprived of its former semblance by amendment adopted in 1925 (St. 1925, p. 950, § 3). It now reads:

> "The appeal to the superior court from a judgment of a municipal court, or from the judgment of a justice's or police court, shall be heard upon a statement of the case settled by the judge of the municipal court or by the justice or police judge. The statement must contain the grounds upon which the party intends to rely upon the appeal, and so much of the evidence as may be necessary to explain the grounds. The statement must be prepared by the appellant and filed with the court, and a copy served upon the opposite party, within five days after the filing of the notice of appeal. The respondent may, within five days after the service of the copy and the filing of the proposed statement, file amendments thereto, a copy of which must be served upon the appellant. Within five days from the time of the filing and serving of the amendments or if no amendments be filed then within ten days from the time of the filing of the statement, as herein provided, the court must settle the same, and if in the opinion of the court the statement is incorrect or insufficient he shall correct it. If no statement is filed and served as herein provided, the appeal is ineffectual for any purpose, and shall be deemed dismissed, and the judgment or order appealed from shall be enforced as if no appeal had been taken."

In dealing with a case in which there had been an appeal from the police court the Supreme Court said:

> "There is nothing in the point that the county court could not entertain the appeal except upon a statement prepared as provided in section 3, page 218, of the Statutes of 1858. * * * The section in question does not apply to cases where the rulings of the court, alleged to be erroneous, appear upon the face of the judgment roll. Where the errors do not appear upon the face of the judgment roll a statement is made necessary because the errors can in no other way, except by a trial de novo, be brought to the notice of the appellate court." People v. Maguire, 26 Cal. 635.

In a later case an individual appealed from a judgment of conviction entered against him in a justice's court. The case came before the Supreme Court and the following appears in the statement of facts contained in the opinion of that tribunal:

> "For the purposes of the appeal [from the justice's court], however, [the appellant] prepared no statement embodying the evidence and such rulings of the court as had been excepted to by him; on the contrary, he furnished no papers, except the docket of the justice."

The following appears later in the opinion:

> "If the county court, as it seems to have done, considered that no appeal can be heard unless accompanied by the statement for which the statute provides, it was in error. The statute must receive a sensible construction. There may be cases in which no statement is needed for the purposes of the appeal. Suppose a justice of the peace should sentence a defendant to the state prison for petit larceny or assault and battery, or should try him without a jury, notwithstanding one was demanded, and it so appeared by his docket, what need would there be for a statement in order to get these questions before the county court? Or suppose the defendant should demur to the complaint upon the ground that the facts stated do not constitute a public offense, and * * * should appeal, what occasion would there be for a statement? The statute must be understood as requiring a statement only where the record fails to disclose the error upon which the appellant relies. We have so held expressly in People v. Maguire, 26 Cal. 640." Morley v. Elkins, 37 Cal. 454.

These two cases, taken together, plainly seem to have established the rule, under the statute of 1858, that on an appeal from a justice's court in a criminal case the docket of the justice was a part of the record—that it was, in fact, a part of the "judgment roll." We cannot discover that either of these decisions has ever been cited to the point here under consideration. Nor has the question ever arisen in later cases, although the office of the statement of the case referred to in section 1468, as it stood prior to the amendment of 1925, has been considered in Matter of Howell, 29 Cal. App. 668, 157 P. 553; in Matter of Gottschalk, 47 Cal. App. 260, 190 P. 649; and in Roberts v. Police Court, supra.

The amendments of 1925 to sections 1466, 1467, and 1468 of the Penal Code, although probably framed with an eye principally to the erection of the new municipal court created in that year (Stats. 1925, p. 648), have also worked a change in the law concerning appeals from justice's courts, and therefore from recorder's courts, for sections 806 and 882 of Act 5233, cited above, were not amended in the year named.

The appeal of petitioner from the recorder's court to the superior court, which is the subject of scrutiny in the present proceeding, was perfected long after the above-mentioned amendments of 1925 became effective, and the procedure governing it must be found in the language of those amendments. Under the change in the law then effected, was the docket of the recorder a part of the record on appeal? Can we consider the docket here? To what extent, if any, is the rule of People v. Maguire, supra, and Morley v. Elkins, supra, abrogated by the amendments?

It may be argued in support of the position of respondent that under section 1468 of the Penal Code it seems impossible to consider the statement of the case as the equivalent of the bill of exceptions provided for in section 650 of the Code of Civil Procedure, although parts of the language of section 1468 seem to tend toward such a possibility. If a defendant who appeals from a judgment of the superior court desires to contend for a reversal on the ground that the complaint fails to state a public offense, he is not required to prepare a bill of exceptions. He may present his contention under an appeal upon the judgment roll, in which no bill of exceptions is incorporated. So, under the language of the opinion in Morley v. Elkins, supra, he may have done on an appeal from a justice's court, under the act of 1858, which, so far as the question here involved is concerned, was in legal effect the same as section 1468 of the Penal Code before the amendment of 1925. Under the practice regulating appeals from the superior court, a bill of exceptions is but part of the record on appeal; that is, it is so in those cases in which a bill of exceptions is employed, for a complete record, so far as the sanctity of the appeal is concerned, may be made without a bill of exceptions. Where no bill of exceptions is employed on the appeal, the only result is that the appellate tribunal is limited in the range which its investigations may cover. It may be argued, further, that in the practice inaugurated by section 1468 of the Penal Code the statement of the case seems to have been designed as the complete and only record on appeal.

According to the strict letter of section 1468, an appeal is futile without a statement of the case:

> "If no statement is filed and served as herein provided, the appeal is ineffectual for any purpose, and shall be deemed dismissed, and the judgment or order appealed from shall be enforced as if no appeal had been taken."

It may be argued that this language admits of no such thing as an appeal "on the judgment roll alone," to adopt the parlance of the cases relating to appeals from the superior court. This is equivalent to the assertion that under the procedure prescribed by section 1468 there is no such thing as a "judgment roll," as that term is understood when we have in contemplation the question of an appeal from the superior court. As one who appeals from the judgment of a recorder's court cannot contend that a complaint fails to state a public offense without filing a statement of the case, even though he causes a copy of the complaint and a copy of the recorder's docket to be filed with the appellate tribunal; as, in fact, he can present no question whatever unless he files a statement of the case, even if he does file the copies of complaint and docket—can it be said that those copies are a part of the record on appeal when he fails to file the statement? And if they are not a record on appeal, when filed without a statement, did the Legislature intend them to be a part of the record when they are filed with a statement, but not incorporated in it? Can it be argued that section 1468 intends that all matter which is to be inspected by the appellate tribunal shall be included in the statement of the case and that such is the method provided for the certification of the entire record? Can it be said that the statement of the case is intended to include what the courts term "the judgment roll alone," when dealing with appeals from the superior court, as well as the matter incorporated in a bill of exceptions used on such appeals?

Section 975 of the Code of Civil Procedure, which relates to appeals to the superior court in civil cases, provides for a statement of the case and requires:

> "The statement must contain the grounds upon which the party intends to rely upon the appeal, and so much of the evidence, as may be necessary to explain the grounds, and no more."

The section provides further:

> "The statement * * * with a copy of the docket of the justice or judge, and all motions filed with him by the parties, during the trial and the notice of appeal, may be used on the hearing of the appeal before the superior court."

Section 975 was not amended in 1925, but section 984 of the same Code, a new section adopted in that year (St. 1925, p. 942), provides that section 975, along with others, "are hereby made applicable to appeals from municipal courts." Why was section 975 permitted to stand, in its reference to the docket and to motions filed with the justice, while such a reference was omitted from the amended section 1468 of the Penal Code? It may be argued that it was only because the Legislature intended to provide in criminal cases a method of certifying the record on appeal which should be different from that provided in civil cases.

We have arrived at a conclusion opposed to that for which respondent contends, and we now proceed to state the arguments which in our opinion support it. It will be remembered that section 1467 of the Penal Code provides:

> "The appeal may be taken, heard and determined as provided in title nine, part two of this Code," with certain exceptions which are not material here.

Section 1246 of the same Code, which is comprised within the title thus referred to, and which relates to appeals to the Supreme court, reads:

> "Upon the appeal being taken, the clerk of the court from which the appeal is taken must, without charge, within twenty days thereafter transmit to the clerk of the appellate court a typewritten copy of the following papers: (1) The indictment, information or accusation; (2) a copy of the minutes of the plea; (3) a copy of the minutes of the demurrer; (4) a copy of the demurrer; (5) a copy of the minutes of the trial; (6) a copy of the minutes of the action, including the proceedings on motion for arrest of judgment on new trial; (7) a copy of the written charges given by the court to the jury, or refused, or modified and given; also a transcript of any oral charge; (8) a copy of the judgment; (9) any written or printed exhibits offered in evidence at the trial of the cause. The clerk of the court from which the appeal is taken must also, within the time above

specified, deliver, without charge, to the defendant or his attorney, upon application therefor, a carbon copy of the original transmitted to the clerk of the appellate court; and must also deliver, without charge, a carbon copy to the district attorney upon his application therefor."

Whether the provisions of section 1246 have been imported by section 1467 into the appellate practice affecting municipal, justice's and recorder's courts in a question of some nicety. The latter section imports those parts of title 9 only which prescribe the methods whereby an appeal may be "taken, heard and [or] determined." It is so manifest as not to require argument that the interpolation here of the word "or" is properly made, and we dismiss the point as concluded. Viewing separately, then, the words just quoted from the section, it is apparent that section 1246 has no concern with the "taking" of appeals. So much appears from the context of the enactment. Not only is its essence untinctured by any matter affecting the taking of appeals, but its opening words, "Upon the appeal being taken," show that its provisions are ineffective until after an appeal is perfected.

Does the section provide methods whereby appeals may be "heard"? Unquestionably, taking strictly its letter, it does not. The enactment prescribes nothing as to hearing, unless we look to its spirit. By direct provision it specifies only a duty of the clerk of the court from which an appeal is taken—the duty to transmit certain documents to the appellate tribunal. But what is to be the purpose of this transmission? It is to occur after an appeal is perfected—after the appealed cause has fallen into the jurisdiction of the appellate tribunal—and its only imaginable purpose is to enable that tribunal to proceed with the exercise of its jurisdiction in disposing of the appeal. The exercise of that jurisdiction is made manifest through a hearing, and it therefore appears as a result of this course of reasoning that section 1246, in its spirit and essence, provides methods whereby appeals may be heard. Having reached this conclusion, it becomes immaterial to inquire whether the enactment provides a means whereby appeals may be "determined."

So much seems reasonably deducible from a survey of section 1467. Is there anything in section 1246 which forbids its importation by means of section 1467? The language of section 1246 inspires several questions which are worthy of at least some consideration.

[4] As we have already remarked, the duty which the enactment imposes is fastened upon "the clerk of the court from which the appeal is taken." But neither a justice's court nor a recorder's court has a clerk. This fact, we think, does not interfere with the importation of the section. The Legislature doubtless intended to make so much of title 9 applicable to the practice on appeals from municipal courts, justice's courts and recorder's courts as is in its nature applicable to such a practice, without too fine a regard for such differences in terminology as that now under discussion. The fact that, after an appeal from these courts, the papers to be used upon the appeal must be transmitted by the justice or by the recorder does not affect the practical applicability of section 1246 merely because that enactment requires that the transmission shall be made by a clerk. Leaving now this particular branch of the discussion, there is another point which seems to conclude the question under consideration. The municipal court has a clerk (Stats. 1925, p. 651, § 6, subd. [b]), and it is, moreover, a court of record (Const. art. 6, § 12, as amended by Stats. 1923, p. 1681). That court, then, comes directly within the requirement of section 1246 of the Penal Code, to the effect that the papers therein designated shall be transmitted by the clerk.

But section 1467 of the Penal Code in effect groups justice's courts, and therefore recorder's courts, with municipal courts. As, therefore, so far as the point now under discussion is concerned, section 1246 applies exactly to municipal courts, the argument is inescapable that the Legislature did not intend that it should not apply to justice's and recorder's courts because those courts have no clerks, especially as it cannot apply to municipal courts unless it applies to the other two, or at least to the justice's court, for the municipal courts and justice's courts are put in the same category by the Legislature in its enactments prescribing practice on appeal. We conclude, finally, that the fact that section 1246 imposes a duty upon "the clerk" does not interfere with the importation of the enactment by means of section 1467.

We continue our analysis of section 1246. The enactment provides that the clerk must transmit to the appellate court the "indictment, information or accusation," while it is provided in another section that criminal proceedings in a justice's court "must be commenced by complaint." Pen. Code, § 1426. This difference in terminology could not, we think, prevent the importation of section 1246 by means of section 1467, especially as the difference is more apparent than real. A criminal complaint is defined to be the "allegation in writing made to a court or magistrate that a person has been guilty of some designated offense" (Pen. Code, § 806); but the definition is embodied in a chapter of the Code which is entitled "The Information," and other sections in it employ the word "information" apparently interchangeably with the word "complaint."

Section 1246 provides for the transmission of certain "minutes" to the appellate tribunal. Although minutes are not kept by a justice's court, everything prescribed in connection with the use of that word in section 1246 is recorded by a justice in his docket. The matter required to be transmitted by the section can therefore be furnished by a justice through the transmission of a copy of the docket, and thus the section can be substantially complied with. Moreover, a municipal court, being a court of record, as already noted, does keep minutes, and can comply with the strict letter of section 1246. This being so, and as municipal and justice's courts are placed in the same category by the statutes concerning appellate procedure, the section must be so construed, if possible, as to make it apply to justice's courts. We can see nothing to interfere with such a construction.

From all these reflections it appears to us that section 1246 of the Penal Code must be looked to as prescribing a part of the procedure on appeal from municipal and justice's courts, and therefore from recorder's courts, although it was said in Matter of Howell, supra, that all of title 9 of part 2 of the Penal Code is not so to be regarded. Section 1467 of that Code, in the respect in which it has been under examination here, has never been construed by the courts of review of the state, although it has been in its present form, in its provision that appeals to the superior court are "taken, heard and determined as provided in title 9, part 2" of the Code, ever since its enactment in 1872. The question is here directly presented and, in view of the amendments of 1925 to sections 1466–1468 of the Code, formulated principally because of the creation of the new municipal courts, we have thought it advisable to treat it with great minuteness.

[5, 6] It becomes material now to re-examine section 1468, and to construe it in connection with the section—section 1246—which accompanies it as a prescription of the practice upon appeals to the superior court. It is plain now, we think, that under section 1468 the statement of the case is the equivalent of a bill of exceptions, with the difference, at least, that the statement must contain "the grounds upon which the party [appealing] intends to rely upon the appeal." And we are satisfied that in setting forth these grounds it is not necessary to state them so fully as to include any of the papers or "minutes" which are mentioned in section 1246. The two sections—1246 and 1468—operate together to this effect:

The former covers the transmission of papers which are the equivalent of the "judgment roll alone," while under section 1468 so much of the evidence "as may be necessary to explain the grounds" upon which the appellant proposes to rely must be reproduced, and, in addition, the grounds must be stated. It is evident from the concluding sentence of section 1468 that a statement of the case must be filed even if no evidence is necessary to "explain the grounds." The statement, however, will in such a contingency consist merely of a recital of the grounds which the appellant expects to argue from the face of the papers transmitted under the mandate of section 1246.

[7, 8] We conclude that, in the present instance, the docket of the recorder's court is before us. As the docket shows no action of the recorder—no judgment—following upon the verdict of the jury, it seems that the appeal attempted to be perfected by petitioner was premature, and that the cause never was subjected legally to the jurisdiction of respondent court. We do not see how we can presume, in aid of the docket of the recorder, that a judgment was entered by him, merely because petitioner attempted to appeal from a judgment; nor do we see how petitioner can be estopped by the form of her notice of appeal to assert that no judgment was entered. None of the elements of an estoppel seem to be presented by the record. It seems that the cause in which petitioner is defendant is still within the jurisdiction of the recorder, and that an appropriate means must be found, even at this late day, whereby to pronounce judgment upon the verdict rendered in his court.

Judgment annulled.

We concur: FINLAYSON, P. J.; CRAIG, J.

79 Cal. App. 433

HALL v. JAMES et al. (Civ. 5326.)

(District Court of Appeal, First District, Division 1, California. Oct. 4, 1926.)

Pleading ⚷68.

Where allegations as to amount of damages occasioned by defendant's breach of contract to play part in motion picture production were made on information and belief, complaint is demurrable, since such matter was within knowledge of plaintiff.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Charles J. Hall against Alice James and another. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant.

Albert E. Dunning, of Los Angeles, and Alfred W. Hare, of Santa Cruz, for respondents.

CAMPBELL, Justice pro tem. The record shows that the demurrer to plaintiff's third amended complaint was sustained, and plaintiff was granted ten days in which to amend his pleading and file a fourth amended complaint, that he declined to amend, and judgment was therefore entered that plaintiff do have and recover nothing from defendants, and that defendants recover from plaintiff their costs. From this judgment in favor of defendants plaintiff appeals.

The demurrer sets forth several grounds upon which the complaint is defective, but, if the demurrer is well taken as to any one ground, the appeal must fail, and a discussion of the remaining points urged becomes unnecessary.

The action is one for breach of contract, in which it is alleged that defendant Alice James failed to perform certain services in playing a part in a motion picture production. The third amended complaint of plaintiff, paragraph V, after alleging the contract, and that defendant Alice James quit her employment, and would not complete her agreement with plaintiff, alleges:

> "That ever since said 26th day of June, 1922, she had refused, and still does refuse, to perform and comply with the terms of her said written contract and agreement with the plaintiff as herein set forth, to the great damage of the plaintiff herein in the sum of $1,942.50, as plaintiff is informed and believes, and thus alleges."

In paragraph VI plaintiff alleges sums of money he was compelled to pay out for substitutes and extra people and the purchase of 1,500 feet of film in reproducing and duplicating scenes and extra cost of rental for sets by reason of the failure of Alice James to perform her duties under such contract and agreement, "thus causing delay to the whole cast and staff in the sum of $1,000, and in all amounting to the sum of $1,942.50, as plaintiff is informed and believes, and thus alleges."

In paragraph VII plaintiff alleges that he paid defendant Alice James $150 for two weeks' wages, and that such services were worthless because of the breach by her of her contract, "and that said sum of $150 paid to said defendant Alice James as herein set forth had not been repaid to the plaintiff or to any other person or persons or at all, and that the same is now due and payable from said defendant Alice James to the plaintiff, as the plaintiff is informed and believes and thus alleges."

In paragraph VIII plaintiff alleges that by reason of the breach of said contract by defendant Alice James plaintiff has been damaged in the sum of $2,092.50, "and that no portion of the same has been refunded or paid by said defendant Alice James to the plaintiff or to any other person or persons or at all, and that the same and all of said amount is now due and payable from said defendant Alice James to the plaintiff, as plaintiff is informed and believes and thus alleges."

In paragraph IX plaintiff alleges that the failure of defendant Alice James to perform the terms of her contract has caused great delay in completing the picture, "and thereby the plaintiff suffered irreparable damage caused by said defendant in violating and failing to keep and perform the terms of said written contract and agreement as herein set forth, as plaintiff is informed and believes and thus alleges."

In paragraph X plaintiff alleges that the breach of the contract by defendant Alice James and her failure to perform it "is malicious, and should subject the defendant Alice James to punitive damages in the further sum of $5,000, as plaintiff is informed and believes and thus alleges."

The defendants in their demurrer, among other grounds, demur on the ground "that no specific damages are specifically alleged, but that all allegations upon which damages are based are alleged upon information and belief of plaintiff." Allegations as to matters which are peculiarly within the knowledge of the opposite party, and which the pleader can learn only from statements made by him to others, may properly be based upon "information and belief." One may not, however, allege in this manner facts presumably within his knowledge. 1 Bancroft's Code Pleading, 79. A defendant cannot base a denial upon "information and belief" where the facts are presumably within his personal knowledge (Loveland v. Garner, 74 Cal. 298, 15 P. 844; Gribble v. Columbus, etc., 100 Cal. 67, 34 P. 527; Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; Weill v. Crittenden, 139 Cal. 488, 73 P. 238), and it is equally true of a plaintiff, and particularly so in the instant case, where the facts alleged are peculiarly within the knowledge of the plaintiff, and presumably unknown to the defendants. The plaintiff is certainly in a position to know better than any informant the financial loss he sustained by reason of the breach of the contract.

The demurrer to the third amended complaint was properly sustained, and, appellant having declined to amend, the judgment was properly entered.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 456

PEOPLE v. SHORT. (Cr. 1359.) *

(District Court of Appeal, Second District, Division 1, California. Oct. 7, 1926.)

Criminal law ⚷511(1).

Evidence *held* insufficient to corroborate testimony of accomplice so as to justify conviction for forgery under Pen. Code, § 1111.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Edna M. Short was convicted of forgery, and she appeals from the judgment and from an order denying a motion for new trial. Reversed.

S. S. Hahn, Nathan Goldberg and Max Schleimer, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

YORK, J. Defendant was convicted on the first count of an indictment, charging the crime of "forgery of contract and writing obligatory" hereinafter called the Shannon contract. On all of the other eleven counts the jury found defendant not guilty. The conviction of defendant was founded upon the evidence of her codefendant, Rosie Adamson, after said codefendant's plea of guilty. In addition, respondent relies upon other evidence hereinafter mentioned, including testimony of a deputy district attorney concerning facts admitted to him by the defendant after her indictment. The codefendant's testimony, if true, proved that she was an accomplice of this defendant in committing the crime for the commission of which they were jointly indicted. There was no corroborating evidence in support of the testimony of the accomplice as required by section 1111, Penal Code, which provides that "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The only evidence which any one could possibly contend was corroborative evidence tending "to connect the defendant with the commission of the offense" of which she was convicted was evidence relating to the commission of other similar crimes, which in other counts of the indictment were alleged to have been committed by defendant, and of which the jury found that she was not guilty.

More specifically, the evidence on which respondent relies as corroboration of the testimony of the accomplice in relation to the forging or utterance of the Shannon contract by defendant Short is found in the testimony of the deputy district attorney, Hill, and of the witness Helen Wartembe. It is claimed that Miss Wartembe "identified the handwriting used in the forged contract." The defendant was on trial on the several separate charges, each count referring to the alleged forgery of a separate contract. The testimony of Miss Wartembe, as it appears in the transcript, shows that she identified handwriting in some of the contracts as that of the defendant, but that when asked about the signature in the Shannon contract, she replied, "I couldn't tell that one." In the testimony of Mr. Hill, he gave an account of some interviews between himself and the defendant at the office of the district attorney, in which he questioned her concerning "the contracts which were then before me on my desk—that is, some of them were, a few of them." No list of those contracts or identification of them is found in the testimony of this witness, and, if it is anywhere in the voluminous record, that fact has not been brought to our attention. In the course of these interviews of Hill with the defendant, some contracts were identified by the name of the purchasers named therein, or by the exhibit numbers. We have been unable to find anywhere in Hill's testimony any identification by name or number, or at all, of the Shannon contract (the contract described in the count on which defendant was convicted). So far as appears, the Shannon contract may not have been one of those which Mr. Hill had before him and to which reference was made in those interviews with the defendant.

Since the jury found the defendant guilty on a charge which is supported only by the testimony of an accomplice, without the corroboration which the law requires (Pen. Code, § 1111), it is clear that the judgment of conviction cannot be sustained.

The judgment and order are reversed.

I concur: CONREY, P. J.

---

79 Cal. App. 428

STATON v. BUSTER. (Civ. 3044.)

(District Court of Appeal, Third District, California. Oct. 1, 1926.)

1. Husband and wife ⚷267(1).

Husband may convey community real property, acquired prior to enactment of Civ. Code, § 172a, in 1917, without signature of wife.

2. Vendor and purchaser ⚷130(2)—Deed to community real property, acquired prior to enactment of 1917 statute, signed by husband only, held to convey good and marketable title; "marketable title" (Civ. Code, § 172a).

Deed to community real property, acquired prior to enactment of Civ. Code, § 172a, in 1917, signed by husband only, *held* to convey good and marketable title, and such as vendee should have accepted, "marketable title" being one which reasonable purchaser, well informed as to facts and their legal bearings, willing and anxious to perform contract, would, in exercise of prudence

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 2, 1926.

ordinarily exercised by business men, be willing and ought to accept.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Marketable Title.]

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Harold Staton against W. F. Buster. Judgment for plaintiff, and defendant appeals. Reversed.

Ware & Ware, of Chico, for appellant.

Duard F. Geis and Carroll F. Byrd, both of Willows, for respondent.

PLUMMER, J. On or about the 22d day of August, 1925, the plaintiff was awarded judgment against the defendant in the sum of $750, from which judgment the defendant appeals.

The complaint upon which this action is based alleges, in substance, that the defendant agreed to convey to plaintiff a certain piece of real property situate in the town of Hamilton city, Glenn county, Cal., and was to receive in exchange therefor a certain Oakland touring car, $50 in cash, and a policy of insurance upon the car; that, in pursuance of said agreement, the plaintiff delivered to the defendant the car in question, $10 in cash, and offered to pay the remainder of said cash, and to furnish the policy of insurance upon receiving a deed to the real property agreed to be conveyed by the defendant to the plaintiff. The complaint alleges further that the defendant failed to deliver to the plaintiff a deed sufficient to convey a good title to said property; that thereafter the defendant abandoned the automobile which had been delivered to him by the plaintiff; that the plaintiff repossessed said car and sold the same at public auction; that the sum received for said car was $575; that the reasonable market value of the real property agreed to be conveyed was the sum of $1,500; that the failure of the defendant to convey to the plaintiff the real property before referred to caused the plaintiff damage in the sum of $885.

Three questions are tendered to us for solution upon this appeal: (1) That the defendant tendered to the plaintiff a good and sufficient deed of conveyance, and that the plaintiff refused to accept the same; (2) that there was no sufficient memorandum in writing signed by the defendant to convey to the plaintiff the real property mentioned in plaintiff's complaint; (3) that the court adopted the wrong measure of damages in computing the injury, if any, that had been caused the plaintiff by reason of any action of the defendant in the premises.

As a decision upon the first ground for appeal assigned by the appellant is determinative of this case, all that we might say upon the second and third grounds of error assigned would necessarily be superfluous. We will confine ourselves to a discussion of the first alleged error on the part of the trial court, to wit, the finding that the defendant had not tendered to the plaintiff a good and sufficient deed of conveyance.

The record shows that the defendant was a married man; that his marriage took place in the year 1901; that the real property involved in this case was acquired by him in 1911; that the property was acquired as community property, and the court found as follows:

> "That the real property which the defendant agreed to convey, pursuant to contract and agreement above mentioned, was acquired by the defendant during coverture, and was community property of the defendant and his wife at all times in these findings mentioned."

The record further shows that the defendant, after the execution of the agreement to convey to the plaintiff, did execute and tender to the plaintiff a grant, bargain, and sale deed, sufficient in form to convey a good title to said premises, executed by himself; that the plaintiff refused to accept the deed of conveyance to the property involved signed only by the defendant and insisted upon the delivery to him of a deed of conveyance signed by both the defendant and his wife; that the wife of the defendant refused to sign or execute or join in the execution with her husband of a deed of conveyance of the premises to the plaintiff.

[1] Upon this record showing that the defendant and his wife were married in 1901, that the real property involved was acquired by the defendant in 1911, the court found that the property was community property, and, also, that the deed theretofore executed by the defendant without the signature of his wife, and the execution thereof by her, was insufficient to convey a good and merchantable title.

The basis of the plaintiff's claim that the deed tendered to him by the defendant was insufficient rests upon the provisions of section 172a of the Civil Code, which specifies that a wife must join in executing any instrument by which community property, or any interest therein, is leased for a longer period than one year, or is sold, conveyed, or incumbered, etc.

The record shows, however, that the property in question was acquired by the defendant several years preceding the enactment of said section, which took place in 1917, and therefore whatever rights the defendant had in and to the premises in question and the power to convey the same were unaffected by the adding of section 172a to the Civil Code.

In Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22, the Supreme Court has held that section 172a of the Civil Code has no application to a transfer by a husband of community real property acquired before that section was enacted in 1917. In that case the facts show that the real estate involved was community property, and was purchased with community funds arising from the sale of community property owned by the defendant prior to the year 1917. It was further held that the deed of the wife was unnecessary to a conveyance of said property, and that the wife had no vested interest in such property which could be conveyed by her. In Schubert v. Lowe, 193 Cal. 291, 223 P. 550, where the question was that of leasing community property, the court held that section 172a of the Civil Code requiring a wife to join with her husband in a lease of community property applies only to community property acquired subsequent to the adoption of that Code section. To the same effect as the foregoing cases is the earlier case of Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. All of these cases are referred to and the principles involved herein enunciated and set forth at length, in the recent case of Stewart v. Stewart, 249 P. 197, and anything we might here say would add nothing to what is there set forth. We may state that the decisions which we have cited are absolutely conclusive upon the principal question involved in this appeal, to wit, the power of the husband to convey community real property acquired prior to the enactment of section 172a of the Civil Code in 1917, without the signature of his wife. That such power is vested in him may now be said to be beyond dispute.

[2] It is further contended on the part of the respondent that the plaintiff was notwithstanding entitled to a deed signed by the wife as well as by the defendant, in order that his title might be considered good and marketable. As has been said in the cases referred to, the wife has nothing to convey under such circumstances, and her deed would therefore convey nothing; we cannot very well perceive how her signature can, in law, be considered necessary to render a conveyance to such community premises good and marketable. Much learning has been expended in giving definitions as to good and marketable titles. The following appears to be one supported by the weight of authority, to wit:

> " 'A marketable title,' to which the vendee in a contract for the sale of land is entitled, means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept." Todd v. Union Dime Sav. Inst., 128 N. Y. 636, 28 N. E. 504; Cummings v. Dolan, 52 Wash. 496, 100 P. 989, 132 Am. St. Rep. 986.

A great many definitions are given in the note appended to the case of Cummings v. Dolan, supra, as reported in the American State Reports, but they do not differ in substance and general effect from the language which we have quoted.

The record in this case showing that the defendant tendered to the plaintiff a good and sufficient deed of conveyance of the real property involved, and that the plaintiff declined to accept the same, it necessarily follows that the plaintiff has no action for damages by reason of the failure of the defendant to secure the signature of his wife and then tender a deed executed by both himself and his wife. It also follows that whether the rulings of the trial court as to the other assignments of error were correct or incorrect are wholly immaterial.

The judgment of the trial court is reversed.

We concur: FINCH, P. J.; PULLEN, Justice pro tem.

79 Cal. App. 426

LINDEMAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5681.)

(District Court of Appeal, First District, Division 2, California. Sept. 30, 1926.)

Justices of the peace ⚷160(3)—Erroneous recital in plaintiff's notice of appeal to superior court that appeal was from judgment for plaintiff can be ignored as surplusage (Code Civ. Proc. § 974; Civ. Code, § 3537).

Erroneous recital in plaintiff's notice of appeal to superior court that appeal was from judgment for plaintiff in justice court can be ignored as surplusage, in view of Code Civ. Proc. § 974, and Civ. Code, § 3537, where justice court rendered only one judgment.

Application for writ of mandate by Mrs. Charles Lindeman, prayed to be directed to the Superior Court, City and County of San Francisco, and another, to require the reinstatement of a cause on the calendar. Writ granted.

Theodore M. Monell, of San Francisco, for petitioner.

Wm. M. Abbott, K. W. Cannon, and W. Lindley Abbott, all of San Francisco, for respondents.

STURTEVANT, J. This is an application for a writ of mandate and is based on the following facts: The petitioner commenced an action against J. H. Handlon in the justice court of San Francisco. After issue was joined a trial was had and a judgment was entered in favor of the defendant. In due time the plaintiff served on the defendant and filed a notice of appeal, which notice was in words and figures as follows:

"You will please take notice that the plaintiff in this action above named hereby appeals to the superior court of the city and county of San Francisco, from the judgment therein made and entered in the justice court, on the 19th day of October, A. D. 1925, *in favor of said plaintiff against said defendant* and from the whole thereof. The appeal is taken on questions of law and fact. Dated San Francisco, this 18th day of November, A. D. 1925." (Italics ours.)

Later the hearing of the appeal was duly set for May 5, 1926. Before that hearing was had the defendant Handlon duly served a notice thereof and later made a motion to dismiss the appeal and based the motion on the ground that the notice of appeal recited that the judgment appealed from was a judgment "in favor of said plaintiff against said defendant," whereas the only judgment in the case was in favor of the defendant. Thereafter, on April 9, 1926, the respondent court granted the motion to dismiss, and the petitioner now asks for a writ directing the respondent court to reinstate said cause on its calendar and to proceed to hear said cause. The respondent has filed an answer which he stipulates is to be considered merely as a demurrer to raise only the question of the sufficiency of the petitioner's petition. In making the application the petitioner concedes that there was an error made in the wording of the notice of appeal, but contends that the error was as to a matter that was surplusage, and that the erroneous recital can and should be ignored, and that there still remains a full and complete notice of appeal which meets every call of the statute. Code Civ. Proc. § 974.

We think the contention is well made. A comparison of the language, used in the notice as written, with the provisions of the statute, shows that the erroneous recital was surplusage. It is statutory that superfluity does not vitiate. Civ. Code, § 3537. It is not contended that the justice court rendered more than one judgment, and therefore the respondent Handlon was in no manner misled.

The writ should issue as prayed.

I concur: NOURSE, J.

PEOPLE v. ALLISON. (Cr. 934.)*

(District Court of Appeal, Third District, California. Sept. 23, 1926. Rehearing Denied Oct. 23, 1926.)

1. Criminal law ⟹507(1)—Statutory definition imparts to the word "accomplice" much more restricted signification than it naturally imports or than it bore at common law or under the Code prior to such definition (Pen. Code, § 1111).

Pen. Code, § 1111, defining an "accomplice" as one who is liable to prosecution for identical offense charged against defendant, imparts to the word "accomplice" a much more restricted signification than it naturally or intrinsically imports or than it bore at common law or under the Code prior to such definition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. Criminal law ⟹507(1)—"Accomplice" at common law includes principals in first or second degree and accessories before or after the fact.

At common law an "accomplice" includes all particeps criminis, whether they are principals in the first or second degree or merely accessories before or after the fact.

3. Criminal law ⟹507(1)—Legislature might constitutionally give its own definition of an accomplice (Pen. Code, § 1111).

Legislature might constitutionally give its own definition of an accomplice as was done in Pen. Code, § 1111, and fix the status of one participating in offense, in a manner different from another.

4. Criminal law ⟹742(2).

In prosecution for burglary, whether witness testifying for state was also guilty of committing burglary so as to be an accomplice within Pen. Code, § 1111, *held* for jury.

5. Criminal law ⟹1158(4).

Whenever question is whether witness did or did not do certain things which, admittedly, if he did do them, make him an accomplice, jury's finding is not disturbed.

6. Burglary ⟹3—Gist of crime of burglary is criminal intent in entry of buildings enumerated in statute (Pen. Code, § 459).

Under Pen. Code, § 459, defining burglary, gist of the crime is the entry of any building enumerated therein with intent to commit crime and whether a crime actually be committed is wholly immaterial.

7. Criminal law ⟹507½—Proof of plea of guilty by witness for state would only be competent to impeach his testimony and was not conclusive that he was an accomplice (Pen. Code, § 1111).

Evidence that witness for state entered plea of guilty to information jointly charging him and defendant and another with crime of burglary would only be competent to impeach his testimony that he knew nothing of intention of others to commit burglary until after act had been committed, and even if competent to show he was in fact an accomplice within Pen. Code, § 1111, it was not conclusive.

8. Criminal law ⟹1168(2)—Declarations of witness prior to time he was called to testify that defendant committed burglary, though admitted out of order, held not prejudicial where adding nothing to his positive testimony.

In prosecution for burglary, admission of evidence that witness for state gave to detective a description of defendant as one of the parties to the crime *held* not prejudicial, though such declarations were permitted to be proved out of due order of proof, and though circumstances authorizing their proof were not shown, where they added nothing to probative force of positive testimony of state witness that defendant was one of the parties committing burglary.

---

*Rehearing denied 250 P. 408. Superseded by opinion of Supreme Court 253 P. 318.

9. Witnesses ⚷414(2)—Witness' declarations prior to time called to testify tending to support trial testimony, and made when accused was not present, are inadmissible as self-serving and hearsay.

Ordinarily declarations of a witness prior to time he has been called to testify tending to support his own testimony given at trial and made when accused was not present are not admissible in evidence, since they are self-serving and hearsay.

10. Criminal law ⚷808½.

In prosecution for burglary instruction on necessity of corroboration of testimony of an accomplice in precise language of Pen. Code, § 1111, *held* sufficient.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Bernard P. Allison was convicted of burglary, and he appeals. Affirmed.

Donald McKisick and J. S. Daly, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted by a jury in the superior court of Sacramento county of the crime of burglary, and he appeals from the judgment of conviction and the order denying his motion for a new trial.

The points raised here are that the evidence is insufficient to support the verdict of conviction, that there were errors in rulings by the trial court upon the question of the admissibility of certain testimony, and that certain parts of the court's charge to the jury embraced erroneous statements of the law. The point first stated involves the claim that there was no testimony introduced by the people to support conviction but that of an accomplice uncorroborated by other testimony or evidence tending to connect the accused with the commission of the crime.

The facts as they will here be stated are taken from the testimony of the witnesses introduced by the people. On the 1st day of February, 1926, about 5 o'clock p. m., box car No. 2100 of the Northern Electric Railway Company was loaded with freight, including a crate of hams, at the freight sheds of said company, at Second and M streets, in the city of Sacramento. After being loaded the doors of the car were sealed by an employee of said company and the car thereupon switched to the company's yards near Twentieth and B streets in said city, there to remain until attached to a freight train scheduled to leave the yards for its destination about 10:30 o'clock p. m. Upon its arrival at the yards (called Haggins yards), an inspector of the company examined the car and found that "it had been and was sealed on both sides." This inspection was made near the hour of 8 o'clock p. m. Between that hour and the hour (10:30 p. m.) scheduled for the departure of the freight train, with car No. 2100 attached thereto, from the Haggins yards, the said car was broken open and about one-half of the hams contained in the crate in the car were removed therefrom. The theft was discovered just prior to the time at which the freight train was to be started on its way. Immediately thereafter the crime was reported to the police office in Sacramento, and subsequently one Daniel E. Speascock and later the defendant and one Hudson were arrested and charged with the commission of the offense. These parties having later been given a preliminary examination before a magistrate on a charge of burglary in that they entered said car with the intent to steal personal property situated therein, and held to trial in the superior court of Sacramento county, were in due time informed against by the district attorney of said county for said crime. Upon his arraignment on that information, Speascock pleaded guilty, but made an application to be admitted to probation. The defendant entered a plea of not guilty and stood trial, with the result as above indicated. What disposition was made of the case against Hudson this record does not disclose, but this is a matter of no consequence here. The application of Speascock for probation had not been acted upon at the time of the trial of this case. However, Speascock testified for the people, and his was the only testimony directly connecting the defendant with the commission of the crime. His story, as given from the witness stand, in substance, was: That he and Hudson met the defendant early in the evening of February 1, 1926, in a pool hall, in the city of Sacramento; that the three together went to the Haggins yards of the Northern Electric Railway Company and there entered an empty box car with the intention of sleeping during the night; that after they had been in the car for a short period of time, the defendant left the car, and later called for Hudson, who thereupon also left the car and joined defendant; that, within a short time thereafter, either Allison or Hudson called for him (Speascock), and that he thereupon left the car. Speascock, continuing, stated that, on getting out of the car, he saw defendant and Hudson in car No. 2100, and that, while he (Speascock) remained on the ground, "one of the boys" (referring to defendant and Hudson) asked him (witness) to take the hams as they were handed to him from said car by defendant and Hudson; that he did so and piled the hams on the ground; that, after a large number of hams were so taken, defendant and Hudson left the car and the three thereupon wrapped the hams in defendant's overcoat and thus took them to a point about 150 feet from the yards and there secreted them. Speascock testified that, prior to being called from the car which had been entered by the three for the purpose of taking a sleep, nothing was said or suggested about breaking open any car or entering any car for the purpose of taking therefrom any articles or goods therein contained; that he knew nothing of the purpose of defendant in leaving the car which they had entered to rest or his purpose in calling Hudson and later himself from said car until after he had left the car and found defendant and Hudson in car No. 2100, and after either Hudson or defendant had asked him to take the hams as they delivered them from the last-mentioned car. After the arrest of the trio, Speascock accompanied a police officer to the spot where the hams had been hidden by the thieves, and there they were recovered.

The defendant claimed and undertook to establish an alibi, and, to that end, testified that he was not with Speascock and Hudson at the Haggins yards of the Northern Electric Railway Company on the night of February 1, 1926, or at any other time; that he did not at any time enter the car in which the stolen hams had been placed for shipment and had no part in stealing the hams, if they were stolen. The record of Speascock's arraignment on the charge of burglarizing the car in question of which he, Hudson, and the defendant were by information jointly accused, and his plea of guilty to said charge prior to the trial of this case, was introduced in evidence by the defendant.

Section 1111 of the Penal Code reads as follows:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. *An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.*"

[1-6] It will be noted that the Legislature has seen fit, as is evidenced by the last clause of said section (and which, as above quoted herein, has been put in italics), to impart to the word "accomplice" a much more restricted signification than it naturally or intrinsically imports, or than it bore at common law and under our Code prior to the amendment of said section by adding thereto said clause by the Legislature of 1915. At common law the word "accomplice" "was interpreted broadly to include principals in every degree and accessories before and after the fact. Those who 'receive, relieve, comfort or assist' the felon were regarded as having participated in his crime, and as meriting much the same punishment that he had earned." People v. Coffey, 161 Cal. 433, 439, 119 P. 901, 903 (39 L. R. A. [N. S.] 704). In other words, both at common law and in the jurisdiction of the federal courts the settled and accepted definition of an accomplice includes "all particeps criminis, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." In re Rowe, 77 F. 161, 23 C. C. A. 103. See, also, People v. Ah Gee, 37 Cal. App. 1, 5, 6, 174 P. 371. But clearly it was and is within the constitutional competence of the Legislature to give its own definition of an accomplice, or to describe and fix the status, technically, of an individual with respect to any crime in the commission of which he has participated in a manner different in any essential particular from the manner in which another has participated in the commission of such crime. People v. Coffey, 161 Cal. 433, 438, 119 P. 901, 39 L. R. A. (N. S.) 704. Under our Code, as it now reads, to be an accomplice, a person taking part with another in the commission of a crime must, in act and intent, have committed precisely the same crime as that of which the facts disclose that the latter is guilty. In the instant case, if, as the jury found to be so, the defendant was guilty of burglary, then, to constitute the witness Speascock an accomplice, within the meaning and purpose of section 1111 of the Penal Code, he, too, must have been guilty of burglary growing out of the same criminal transaction, and whether Speascock was an accomplice of the defendant, or, in other words, was also guilty of committing the burglary, is the first question which defendant presents for consideration and decision on this appeal. It is plain to us, however, that, as to that question, the evidence is such as clearly to make the question one of fact for the jury to determine, and that the verdict occludes further consideration thereof by this court. The settled rule is that where, as here, "the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed." People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 902 (39 L. R. A. [N. S.] 704). As defined by section 459 of the Penal Code, the gist of the crime of burglary is founded on or consists of intent, or is in the entry of any of the buildings or structures enumerated in said section with the intent to commit a crime. Whether a crime actually be committed by the person after thus entering the building or structure or while therein is wholly immaterial, in so far as the constitution of the crime of burglary itself

is concerned. The fact of the actual commission of a crime in the building after the felonious entry thereof is merely evidentiary, or, in other words, would be evidence only that the intent with which the entry was made was felonious or was made with the intent to commit a crime in the building or structure entered.

[7] There is no evidence in the record, other than the record disclosing that Speascock, prior to the present trial, entered a plea of guilty to the information charging him jointly with defendant and Hudson with the crime of burglary in that they entered the car in question with a burglarious intent, and the further fact that the three were companions and entered the yards of the railroad company together, ever at any time entered the car in which the larceny was committed. There is no evidence, other than the circumstances just referred to, that Speascock, prior to the time at which the car was entered by the defendant and Hudson, had or was a party to any agreement, either express or tacit, with the latter or either of them, to break open and enter the car in question for any purpose, of had any understanding with both or either to that effect. To the contrary, the only direct testimony regarding Speascock's part in the criminal transaction was that of Speascock himself, and, as seen, he testified that he did not at any time enter the car and did not at any time know that the intention of defendant and Hudson was to enter the car for any purpose until called either by defendant or Hudson from the car into which the trio had previously entered to take a sleep, after defendant and Hudson had left the last-mentioned car, when, upon leaving said car, he found his two companions in the burglarized car and was asked by them to take the hams as they passed them out. If Speascock's testimony is true, then, while perhaps guilty of larceny, he obviously was not guilty of burglary. The fact, however, that Speascock, for some hours prior and down to the time of the commission of the burglary, had been and was in the company of defendant and Hudson, and the further fact that he participated in the larceny of the hams, constituted circumstances of such worth only as the jury, in the exercise of a legally measured discretion, might ascribe to them, tending in some degree to show that he, by previous agreement or understanding, joined in the commission of the burglary. Therefore a conflict may well be said thus to have arisen in the evidence upon the question of Speascock's guilt of the crime of burglary, and hence the question whether he was an accomplice of the defendant in the commission of the crime of burglary became, as before stated, peculiarly one for solution by the jury Evidence of the fact that Speascock entered a plea of guilty to the information jointly charging him, defendant, and Hudson with the crime of burglarizing the car would undoubtedly be competent and proper as in impeachment of Speascock's testimony that he knew nothing of the intention or purpose of defendant and Hudson to break open and enter the car until after that act had been committed by the latter, but that would be as far as its probative purpose would extend. It has properly been held that where two persons, jointly charged with the same offense, have been separately tried, the verdict in the case first tried, whether of conviction or acquittal, would not constitute competent evidence of the guilt or innocence of the other, subsequently tried for the same offense. See People v. Creegan and Becker, 121 Cal. 554, 53 P. 1082; People v. Lichtenstein, 22 Cal. App. 592, 614, 135 P. 692, 702. One sufficient reason for this rule is that the evidence in the case already tried might be entirely different from that in the other—either more or less persuasive of guilt. In People v. Lichtenstein, supra, it is further suggested, among other things, upon this proposition:

> "The judgment of one jury or that of a judge upon the same facts would amount to a mere conclusion or opinion of a set of individuals or of one individual from the evidence produced, and a conclusion or an opinin of that sort is never permissible in the proof of a disputed fact. It possesses no probative value."

So, it is in principle the same where a plea of guilty to an information or an indictment is entered by the accused. Such plea represents merely the conclusion of the accused from the facts pleaded. It might transpire that a particular crime charged against a person in an indictment or information is in fact not the crime which the facts, when fully known and clearly understood, disclose was the crime actually committed. Such instances are not wanting in the history of our own state system of jurisprudence. Indeed, it is ofttimes found to be with no little difficulty that the particular crime may definitely or clearly be determined because of the uncertainty characterizing the evidence bearing upon the criminal transaction. It is for this reason that the Legislature of 1905 deemed it not only proper but necessary, to prevent possible miscarriages of justice in certain instances, to amend section 954 of the Penal Code so as to permit the charging of different offenses in an indictment or information where such offenses relate to the same act, transaction, or event. See People v. Piner, 11 Cal. App. 542, 105 P. 780; People v. Miles, 19 Cal. App. 223, 228, 125 P. 250; People v. Plath, 166 Cal. 227, 235, 135 P. 954. Lastly, upon the point in hand, it is to be remarked that, even if it were necessary to concede that proof of the plea of guilty to burglary by Speascock was competent as tending to show that he was a party to the perpetration of said crime and therefore an accomplice of the defendant, within the intent or contemplation of section 1111 of the Penal Code, it would still be true that such proof would amount to no more than the usual character of evidence offered to prove an ultimate fact, subject to be negatived or explained by other evidence, and its verity, like that of any other evidentiary fact, subject either to acceptance or rejection by the jury, in the exercise of a proper legal discretion. Upon this theory of the evidentiary scope of the fact of Speascock's plea of guilty, the necessary implication from the verdict would be that the jury found that the testimony of Speascock as to his connection with the criminal transaction of which the charge against the defendant is the outgrowth was true, and so found that he (Speascock) was not an accomplice of the defendant in the commission of the burglary. Thus it is clear that from whatever angle the fact of Speascock's plea of guilty may be viewed, the conclusion of the jury, as implied from their verdict, that Speascock was not an accomplice of defendant in the commission of the crime of burglary, is binding upon this court.

[8, 9] The next assignment involves an attack upon the action of the court in permitting Detective Brown, over objection by defendant, to testify that after the crime had been committed and subsequent to the arrest of Speascock on the charge of burglarizing the car, the last named, when the defendant was not present, gave to Detective Fisher a description of the defendant as one of the parties to the crime and that upon the description so given the accused was later identified by the officers and placed under arrest. Ordinarily the declarations of a witness prior to the time he has been called to testify tending to support his own testimony given at the trial, and made when the accused was not present, are not admissible in evidence for the reason that they are self-serving in character and belong to the hearsay species of evidence. An exception to this general rule, however, is recognized in those instances where evidence is introduced tending to show that the story told by the witness on the witness stand is a fabrication, in which case "it may be shown that the same account [as that given by the witness in his testimony] was given [by the witness] before its ultimate effect and operation (arising from a change of circumstances), could have been foreseen, and also, perhaps, in other peculiar cases." People v. Doyell, 48 Cal. 85, 91, and authorities therein cited; Hotaling v. Hotaling, 187 Cal. 695, 714, 203 P. 745. See, also, People v. Rodley, 131 Cal. 240, 63 P. 351; Cal. Elec. L. Co. v. Safe Deposit & Trust Co., 145 Cal. 124, 78 P. 372; Commonwealth v. Jenkins, 10 Gray (Mass.) 485; 40 Cyc. 2789. In the present case, as we have seen, the defendant claimed an alibi, and the theory upon which the cross-examination of Speascock was prosecuted by defendant's counsel was that, he himself having committed the burglary, his story was a fabrication concocted and told at the trial upon the promise or in the hope that he would be accorded leniency in the matter of punishment by the officers. If, therefore, the testimony by the police officers that Speascock, immediately after his arrest, and before he had time or motive for manufacturing a false story of how and by whom the crime was committed, had given a detective a description of defendant as one of the parties to the commission of the burglary had been offered as in rebuttal of defendant's case, we think it is clear that said testimony would have been competent under the exception to the general rule against the admissibility of self-serving declarations by a witness or a party to the action. If the declarations could properly be shown in rebuttal, the fact that they were permitted to be proved out of the due order of proof could not have prejudiced the defendant or any of his substantial rights in the trial of his case. In fact, we are willing to go so far as to hold that, even if the circumstances which authorize the proof of such declarations were not clearly shown to have existed when such proof was tendered, the result of the allowance of the proof was not to prejudice the defendant, since testimony of the declarations could have added nothing to the probative force of the positive testimony of Speascock that the defendant was one of the parties who broke into and entered the car and stole certain of the hams which had been placed therein for shipment. At any rate, we cannot justly hold, upon a consideration of the whole record, that even if the rulings allowing the declarations to be shown were erroneous, a miscarriage of justice has resulted therefrom.

[10] The instructions of which the defendant complains are free from just criticism. On the question of the necessity of corroboration of the testimony of an accomplice, the court instructed the jury in the precise language of section 1111 of the Penal Code. This was sufficient upon that subject. There is no substantial merit in the criticisms of certain other parts of the court's charge. It is not necessary to consider herein the assignments under this head. It is enough to say that the court's charge, as a whole, fully, fairly, and correctly embraced and set forth, in language of singular clearness, every principle of law essential to a just and enlightened consideration of the evidence by the jury.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

79 Cal. App. 443

RETSLOFF v. SMITH et al. (Civ. 5304.)

(District Court of Appeal, First District, Division 1. California. Oct. 7, 1926.)

1. Vendor and purchaser 🔑54, 214(2).

Purchaser under contract of sale of real estate becomes owner of whole equitable estate, which he can transfer or convey.

2. Bankruptcy 🔑172—Purchaser's "transfer" of equitable interest under contract of sale three days before filing petition in bankruptcy held void (Civ. Code Cal. § 3442; Bankruptcy Act, § 67e [U. S. Comp. St. § 9651]).

Transfer by purchaser of equitable interest under contract of sale before all payments had been made, and three days before filing petition in bankruptcy, *held* void under Bankruptcy Act, § 67e (U. S. Comp. St. § 9651), where he was not in default in payments, in view of Civ. Code Cal. § 3442; "transfer" including every different mode of disposing of property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transfer.]

3. Vendor and purchaser 🔑185—Purchaser under contract providing for payment on July 15th, and to be void if payments were not made as "herein provided," but permitting vendor to take papers from escrow when payment was delinquent 60 days, held not in default on August 1st, after failure to make July 15th payment.

Purchaser under contract providing for payments on July 15th and January 15th, and stipulating that contract should be void if payments were not made as "herein provided," time being of essence, but permitting vendor to take papers from escrow after any payment was delinquent 60 days, *held*, not in default on August 1st, though he had not made July 15th payment and was insolvent, where vendor had previously accepted payments after time specified, in view of apparent intent of parties.

4. Vendor and purchaser 🔑95(2), 101.

Vendor by accepting payments after time specified waives provision that time is of essence of contract as to such payments, and cannot thereafter declare forfeiture without notice that in future strict performance will be required.

5. Contracts 🔑162.

Various terms of contracts will be harmonized if possible, in view of Civ. Code, § 1641.

6. Contracts 🔑169, 170(1).

In case of apparent conflict between provisions of contract, circumstances surrounding its execution and acts done under it should be considered to ascertain intent of parties.

7. Contracts 🔑147(1).

Ascertained intent of parties must take precedence over literal sense of terms of contract.

8. Contracts 🔑318.

Where meaning of contract is doubtful, construction entailing forfeiture will be avoided, if possible.

9. Contracts 🔑163.

Typewritten clause in contract will prevail over printed clause in case of conflict, in view of Civ. Code, § 1651.

10. Vendor and purchaser 🔑170.

Where vendor would not have accepted payment under contract of sale, tender by purchaser's trustee in bankruptcy *held* unnecessary to preserve rights thereunder, in view of Civ. Code, § 3532.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Action by Carl O. Retsloff, trustee of the estate of John A. Bryant, a bankrupt, against F. W. Smith and others, to recover real property claimed to have been fraudulently transferred. Judgment for defendants, and plaintiff appeals. Reversed with instructions.

Jas. G. Pfanstiel and Laurence H. Smith, both of San Diego, for appellant.

F. F. Grant, of San Diego, for respondents.

CAMPBELL, Justice pro tem. This is an action brought by the plaintiff, as trustee in bankruptcy to recover certain real property, or the vendee's interest therein, which plaintiff claims was fraudulently transferred by the vendee to the defendants within three days before he filed a voluntary petition in bankruptcy, and that the transfer is void under the Bankruptcy Act (U. S. Comp. St. § 9585 et seq.). The case depends upon a written contract for the purchase and sale of real estate. The trial court interpreted this contract adverse to the theory of appellant, and this interpretation presents the main question for review by this court.

On July 16, 1920, John A. Bryant, now adjudged a bankrupt, entered into the contract in question for the purchase from respondents of the real estate described therein. The contract is the usual printed form of "agreement for sale of real estate." The original instrument has been sent up on appeal, and is before the court. The contract, after stating the purchase price of $2,500, the fact that $500 had been paid and the receipt acknowledged, that the balance of $2,000 was to be paid at the rate of $500 per year beginning July, 1921, together with interest at 6 per cent. per annum, payable semiannually, July 15th, and January 15th, on deferred payments and the payment of taxes, provides as follows:

"Time is hereby declared to be the essence of this contract, and should purchaser fail or neglect to make said deferred payments, or any of them, at the time and in the manner herein provided, then and in that event this receipt and contract shall at once become null and void, and the said parties of the first part shall be at once released from any and all obligation to make any conveyance hereunder, or to convey the property herein described to said purchaser. It being agreed that it is impossible to fix and determine the actual damages arising out of the failure of said purchaser to make said deferred payments, it is hereby agreed that all moneys paid upon the purchase price of said property shall be by the said parties of the first part retained and held as and for liquidated damages arising and caused by the failure of said purchaser to comply with the terms hereof.

"And the parties of the first part, on receiving such payments, at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, or to his heirs, executors or assigns, a good and sufficient deed, and to furnish a certificate of title showing clear in the then grantor except as to obligations required herein or assumed by the party of the second part.

"*It is further understood that all payments on this contract be made at the East San Diego State Bank, and if any payment become delinquent sixty days the parties of the first part shall have the right and power to take from escrow all papers pertaining to this sale.*"

The last paragraph, italicized, is typewritten, and the remainder of the contract above quoted is the printed form of contract.

Payments aggregating $1,000 were made on the principal of the contract, leaving unpaid a balance of $1,500. During the month of July, 1922, a further payment of $500 on the principal and a payment of accrued interest became due and were not paid. On August 1, 1922, John A. Bryant delivered a written instrument in the form of a letter to respondents F. W. Smith and J. B. Azdell, addressed to them and signed by him, advising them of his inability to make his payments on the contract, as follows:

"Owing to financial stress, I find that I am unable to carry on the agreement for the sale of the east 20 ft. of lot 25 and 26 in block 45 of City Heights addition, and I hereby notify you that I am unable to continue the same. I hereby release you from all agreements made to me, and declare that I hereby forfeit all my rights in the agreement on the above-described property."

This release or transfer of the interest of Bryant in the property to respondents was made voluntarily and without any consideration whatever.

Three days later, to wit, on August 4, 1922, John A. Bryant filed his voluntary petition in bankruptcy, and was thereupon adjudged a bankrupt, and plaintiff was thereafter appointed the trustee of his estate.

The trial court found that on August 1, 1922, and for a long time prior thereto, the said John A. Bryant was insolvent, but further found that defendant did not know or have reason to believe that he was insolvent on the 1st day of August, 1922, and that said defendants did not know or have reason to believe, and did not intend, that the termination of said contract would hinder, delay, and defraud creditors of said Bryant, and that said defendants did not re-enter possession of said premises, and said agreement was not terminated for the purpose of hindering, delaying, and defrauding creditors. The court further found that plaintiff, as trustee in bankruptcy, did not learn of the existence of the contract until on or about the 14th or 15th day of September, 1922, and did not learn of its terms until after that date. After the trustee in bankruptcy learned of the terms of the contract, he instituted this action for the purpose of recovering the property or the equity of the bankrupt therein; it being admitted that only $1,500 remained unpaid on the principal sum, and that the property was worth $5,000 at the time of the commencement of the action, and that there were not sufficient assets in the bankrupt's estate to pay the claims filed against his estate.

Two questions are presented on this appeal, the decision of which is determinative of the action, viz. Was the bankrupt Bryant in default in his payments on the contract on August 1, 1922? and Was he possessed of a property interest in the land which he transferred back, or released to respondents, within a few days of filing his voluntary petition in bankruptcy?

[1] A contract for the purchase and sale of real property passes to the purchaser the equitable ownership thereof, leaving the naked legal title in the seller for the purpose of securing the payments due from the purchaser and the performance of the contract by the purchaser. If the purchaser dies while the contract is in force and effect, his interest passes to his heirs as real property. If the seller dies while the contract is in force and effect, his interest passes to his heirs as personal property. The effect of such contracts is well fixed and defined by law. Therefore Bryant, as the purchaser of the real property under the contract of sale, became the owner of the whole equitable estate therein, which he could transfer or convey. Jackson & Thomas v. Torrence, 83 Cal. 521, 537, 23 P. 695; Bowen v. Lansing, 129 Mich. 117, 88 N. W. 384, 57 L. R. A. 643, 95 Am. St. Rep. 427.

[2, 3] The main question presented is as to whether the bankrupt, Bryant, was in default in his payments under his contract on August 1, 1922. If not, he was on that date the owner of the whole equitable interest in the property in question, and his transfer of such interest voluntarily and without consideration was in violation of the Bankruptcy Act and the laws of this state, as the termination of Bryant's interest and his passing it back to respondents constituted a mode of disposing of or parting with property. Scholle v. Finnell, 173 Cal. 372, 159 P. 1179; In re Peabody, 154 Cal. 173, 97 P. 184; Pirie v. Chicago Title & Trust Co., 182 U. S. 444, 21

S. Ct. 906, 45 L. Ed. 1171. Section 67e of the Bankruptcy Act (U. S. Comp. St. § 9651) provides:

> "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor," etc.

Section 3442 of the Civil Code provides:

> "That any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

In Pirie v. Chicago Title & Trust Co., supra, the Supreme Court of the United States, in commenting on the meaning of the word "transfer" by the Bankruptcy Act, says:

> " 'Transfer' is defined to be not only the sale of property, but 'every other different mode of disposing or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished."

Under the meaning thus given to the word "transfer," it follows that, if the bankrupt, Bryant, was the owner of the equitable interest in the property in question on August 1, 1922, then the transfer or conveyance by him to respondents voluntarily and without consideration constituted a transfer or conveyance within the spirit and meaning of the Bankruptcy Act.

The trial court, as conclusions of law from the facts found, concludes "that by reason of the failure of the said John A. Bryant, or any one in his behalf or stead, or at all, to pay the annual installment due on the purchase price on July 15, 1922, the contract of purchase by its terms became at once null and void, and from and after the 15th of July, 1922, the said John A. Bryant had no right, title, and interest in or to the said property, and the defendants became the sole owners and entitled to the possession of the same," and "that the clause 'if any payment become delinquent sixty days the parties of the first part shall have the right and power to take from escrow all papers pertaining to this sale' in said contract of purchase, has reference to the time in which the escrow papers shall lay in escrow, and has no bearing and does not change or modify the times when the payments shall become due and payable as set out specifically in said contract in prior paragraphs and clauses."

Appellant urges that the trial court erred in this conclusion; that as a matter of law the clause in the contract "if any payment become delinquent sixty days" is a 60 days' grace period allowed the purchaser in which to make the payments after they become due, and further that, having accepted payments on prior occasions after they were due, waived strict performance, and the "time is of the essence" provision of the contract.

[4] The court found as facts that the installment of interest due January 15, 1921, was not paid until January 18, 1921; that the installment on the principal and the interest due July 15, 1921, were not paid until July 19, 1921; and that the interest due January 15, 1922, was not paid until January 23, 1922. The evidence is undisputed as to these payments and as to the fact that no notice to reinstate the "time is of the essence" clause of the contract was ever given, but to the contrary that the forfeiture did not take place until August 1, 1922. A vendor by accepting payments after the times specified in the agreement for sale of real property waives the provision with reference to time being of the essence of the contract as to those payments, and cannot thereafter effectually declare a forfeiture of vendee's right to purchase and of payments already made without notice that in the future a strict performance will be required. Newell v. E. B. & A. L. Stone Co., 181 Cal. 388, 184 P. 659, 9 A. L. R. 993; Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 279, 128 P. 751; Butte Creek Cons. Dredging Co. v. Olney, 173 Cal. 697, 161 P. 260; Pearson v. Brown, 27 Cal. App. 125, 148 P. 956; Burmester v. Horn, 35 Cal. App. 549, 170 P. 674; Myers v. Williams, 173 Cal. 301, 159 P. 982; In re Palatable Distilled Water Co. (D. C.) 154 F. 531.

We cannot but conclude that the construction urged by appellant is correct, that is, that a forfeiture of the contract could not be invoked until the expiration of 60 days after the payment became due—that the 60 day period which must elapse before the vendor would have the right to remove the papers from escrow was in effect 60 days' grace allowed after the payment became due in which to make the payment.

The printed portion of the contract provides, in substance, that, in case the purchaser fails to make any deferred payment in the manner and at the time therein provided, the contract "shall at once become null and void." The typewritten portion provides three things: First, that all payments shall be made at the East San Diego State Bank; second, a reference to or presupposes an escrow of all papers "pertaining to this sale" at such bank; third, a 60-day period during which time payments may become delinquent. In other words, the typewritten clause provides that the vendee "shall have the right and power to take from escrow all papers pertaining to this sale." But when? Sixty days after any deferred payment becomes delinquent. By reason of this provision, the vendors could not take from escrow these papers until 60 days had transpired after a payment became delinquent, except only by a new agreement with the vendee. This new agreement was what actually took place August 1st, and constitutes the transaction out of which this action arose.

If the latter provision of the contract is to be given any rational meaning at all, it must be held to mean that, after a payment becomes due, and is not paid—becomes delinquent—there is a period of 60 days thereafter during which time no forfeiture will occur or can be declared. This construction does not nullify the former provision, but harmonizes the two, and gives both provisions life and meaning. The former clause provides that the contract shall become null and void in the event the payments are not made at the times and in the manner herein provided. The manner and times herein provided mean at the East San Diego State Bank upon the dates specified with a 60-day grace period before the "null and void" clause shall automatically operate.

[5-7] It is fundamental in the interpretation of contracts that the various terms will be harmonized, if possible. Mickle v. Sanchez, 1 Cal. 200; Cohen v. Cohen, 141 Cal. 534, 75 P. 100; Jones v. Van Nuys, 161 Cal. 158, 118 P. 541; Griffin v. Long, 21 Cal. App. 308, 131 P. 760. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. If there is any ambiguity in the language of a contract or any apparent conflict between its different clauses or provisions, the circumstances surrounding its execution and the conditions and motives of the parties as shown by recitals in the contract or matters in evidence should be taken into consideration in order that the true intent of the parties may be ascertained. The purpose of all construction is to ascertain the intent of the parties. When the intent of the parties is ascertained, it must always take precedence over the literal sense of terms. Saunders v. Clark, 29 Cal. 304; Sprague v. Edwards, 48 Cal. 249.

[8] Lord Chancellor Sugden once said: "Tell me what you have done under a deed, and I will tell you what that deed means." If the meaning of the language of an instrument can be considered doubtful, the court will call in the aid of the acts done under it as a clue to the intention of the parties. Hill v. McKay, 94 Cal. 5, 29 P. 406; Rockwell v. Light, 6 Cal. App. 563, 92 P. 649; Dollar v. International Banking Corporation, 10 Cal. App. 83, 101 P. 34; Vulcan Iron Works v. Cook, 15 Cal. App. 410, 114 P. 995; Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P. 598; Kennedy v. Lee, 147 Cal. 596, 82 P. 257; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275; Woodard v. Lumber Co., 171 Cal. 513, 153 P. 951. When this rule is applied in the instant case, it is obvious that, if Bryant had tendered the principal and interest due July 15, 1922, to the bank at any time between that date and August 1st, the bank would have accepted it, credited it to respondent Smith's account just as it had at previous times, and his equity would have passed into his bankrupt estate. To hold otherwise, a construction would have to be placed upon the contract that would be extremely technical and literal and without reference to what the parties intended and would entail a forfeiture. If the meaning of a contract is doubtful, any construction that will entail a forfeiture will be avoided if it is reasonably possible. Behlow v. S. P. R. Co., 130 Cal. 16, 62 P. 295; Madison v. Northwestern Ins. Co., 141 Cal. 484, 75 P. 113; New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 485, 91 P. 152.

If the contract became "null and void" immediately on delinquency, there would be no reason for the papers to remain in escrow thereafter for 60 days. The typewritten clause does not change "the times when the payments shall become due and payable," but is a part and parcel of the "null and void" clause, and must be read with it. In other words, it has to do with the forfeiture provision of the contract by continuing the life of the contract for 60 days after payment becomes due and payable.

In Jones v. Van Nuys, supra, the Supreme Court, through Mr. Justice Lorigan, succintly states the rule of interpretation of contracts as follows:

> "In construing a contract the basic rule is to be adopted that each clause is to be considered with reference to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached, and this rule is to be applied here."

If both of the provisions in question in the instant case are to be construed together along with all other provisions of the instrument as the "unified medium" of intent of the parties, the conclusion is impelling that the parties intended that a forfeiture would not occur by the terms of the contract until 60 days after a payment became due and payable. Again, if the contract became null and void automatically immediately a payment became due and was not paid, all obligations thereunder to pay would terminate with the contract, and no payment could be delinquent for 60 days thereafter. Such a construction not only does violence to the literal words of the contract, but wholly ignores the rule of interpretation announced in the authority cited "that the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other," and that "all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached."

[9] While the two clauses in the contract can be harmonized without a forced or strained construction, yet, if there is any apparent conflict greater weight is to be given to the written clause than to the printed clause (Civ. Code, § 1651; Vorwerk v. Nolte, 87 Cal. 236, 25 P. 412), and likewise where there is a conflict in a printed clause with a typewritten clause, the typewritten clause will prevail. Bennett v. Giles, 111 Ill. App. 433; Soucy v. Louis Obert Brewing Co., 180 Ill. App. 69; Heyn v. N. Y. Life Ins. Co., 192 N. Y. 1, 84 N. E. 725; Producers Oil Co. v. Snyder (Tex. Civ. App.) 190 S. W. 514.

Respondent contends that the fact that John A. Bryant became insolvent automatically terminated the contract, and cites Central Trust Co. v. Chicago Auditorium Ass'n, 240 U. S. 581, 591, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580; In re Neff, 157 F. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, and Rogers Lamb Co. v. Coast Securities Co., 58 Cal. App. 744, 209 P. 246, in support of his contention. These authorities in our view do not sustain the position taken. The first case holds that the filing of an involuntary petition followed by an adjudication in bankruptcy is the equivalent of an anticipatory breach of an executory contract to carry baggage and passengers for a cash consideration, where the trustee in bankruptcy does not elect to assume performance, and gives rise to a provable claim in the bankrupt estate, and sustains a claim for damages growing out of a breach of contract. In Re Neff the court holds that bankruptcy, before the time arrives, of one who has promised to return the amount paid for stock of a corporation if it is surrendered within a certain time does not prevent the claim from being a fixed liability, absolutely owing at the time of the bankruptcy, so as to be provable under the Bankruptcy Act, since the promisee may treat the bankruptcy as a repudiation of liability and immediately bring an action for damages.

The Rogers Lamb Co. Case is to the effect that as between the parties themselves under a conditional sales contract of personal property, where the title remains in the vendor, the vendor has the right to take possession of the property when it is abandoned by the vendee.

[10] Counsel urges that insolvency terminates the contract, but the cases cited, while they do not parallel the instant case, hold only that an adjudication in bankruptcy is the equivalent of an anticipatory breach, in which event the measure of damages in an action for damages would be the amount due under the contract. This the trustee in bankruptcy is attempting through this action to pay. It is true that the trial court found "that neither John A. Bryant, nor the plaintiff herein, or any one on their behalf, or at all, made, or offered to make, any other payments or payment to these defendants on account of said written executory contract," but the court also found "that at no time after the 1st day of August, 1922, would said defendants, or any of them, have accepted any sum or sums on account of said contract from plaintiff or from any one." A tender of payment would therefore have been fruitless, and "the law neither does nor requires idle acts." Civ. Code, § 3532.

It follows that the transfer from John A. Bryant to respondents, made on August 1, 1922, is void, and that Carl O. Retsloff, as trustee of the estate of John A. Bryant, bankrupt, is entitled to all the right, title, and interest in and to the property which John A. Bryant had at the time and prior to the transfer of his equitable ownership to respondents, and that upon payment to respondents, within a reasonable time, all sums which the court may adjudge to be due under the contract, Carl O. Retsloff, as trustee, be substituted to all the rights of John A. Bryant, bankrupt, in and to such contract.

The judgment is reversed, with instructions to the trial court to enter judgment in accordance herewith.

We concur: TYLER, P. J.; KNIGHT, J.

199 Cal. 408

CITY OF VALLEJO v. SUPERIOR COURT OF NAPA COUNTY et al. (S. F. 12061.)

(Supreme Court of California. Sept. 29, 1926. Rehearing Denied and Opinion Modified Oct. 28, 1926.)

1. Judges ⚷43—Plaintiff's knowledge that presiding judge was stockholder in bank holding deed of trust on land sought to be condemned would have no bearing on question of judge's disqualification to hear and determine proceeding (Code Civ. Proc. § 170, subd. 1).

In condemnation proceedings, that plaintiff knew of existence of deed of trust owned and held by bank prior to inception of proceeding and knew that presiding judge was stockholder of such bank would have no bearing, in view of Code Civ. Proc. § 170, subd. 1, on question of disqualification of judge to hear and determine such proceeding.

2. Judges ⚷51(1)—That bank holding deed of trust on property sought to be condemned was not made a party to action held immaterial, as regarding right of plaintiff to raise question of disqualification of presiding judge as being stockholder in bank (Code Civ. Proc. §§ 1246, 1248).

That plaintiff did not at inception of condemnation proceedings make bank, holding deed of trust on property securing note which was then overdue, a party to proceeding, *held* immaterial, as regarded right of plaintiff to raise question of disqualification of presiding judge because interested as stockholder in bank, as in view of Code Civ. Proc. §§ 1246, 1248, bank might appear and defend, and would be entitled to have money awarded to debtor applied to payment of its claim.

3. Judges ⚷43—Interest of presiding judge as stockholder in bank holding deed of trust on property sought to be condemned held to disqualify him from presiding in action (Code Civ. Proc. §§ 170, subd. 1, 398).

Interest of presiding judge in condemnation proceedings, as stockholder in bank holding deed of trust securing overdue note on property sought to be condemned *held* to disqualify him to sit therein, in view of Code Civ. Proc. § 170, subd. 1, and hence his judgments and orders therein during existence of such disqualification were void; he retaining jurisdiction only under section 398 to transfer cause to another court.

4. Mandamus ⚷44—Right to writ of mandate to compel disqualified judge to transfer proceedings on motion for new trial held not affected because plaintiff had perfected appeal from judgment.

Right to writ of mandate to compel disqualified judge to transfer proceedings on motion for new trial *held* not affected because plaintiff had perfected an appeal from judgment rendered in proceeding, since court retained jurisdiction to hear and determine motions for new trial and all questions arising in proceedings independent of and collateral to proceedings wherein such judgment was made.

5. Judges ⚷51(2).

Motion for transfer of condemnation proceedings because of disqualification of presiding judge, under Code Civ. Proc. § 398, *held* not to come too late, though plaintiff had perfected an appeal from judgment rendered therein.

In Bank.

Application for writ of mandate by the City of Vallejo, prayed to be directed to the Superior Court of Napa County and Hon. Percy S. King, Judge thereof. Writ granted.

Preston & Duncan, of San Francisco, for petitioner.

Frank L. Coombs, of Napa, and Nathan C. Coghlan, of San Francisco, for respondents.

RICHARDS, J. The petitioner herein applies to this court for the issuance of a writ of mandate directed to the superior court of the county of Napa and to Hon. Percy S. King, as judge thereof, respondents herein, commanding said respondents to transfer the cause referred to in said application to another court, the judge whereof is qualified to act in said cause, and for an order of this court restraining said superior court and the judge thereof from taking any other action or proceeding in said cause except the action of transferring the same, as above prayed for; and for such other and further relief as may be meet in the premises. The facts upon which said application is predicated, and which are admitted, except as otherwise herein noted in the answer of the respondents herein, are as follows: On the 26th day of May, 1925, the said city of Vallejo commenced an action against Eva Coghlan and John T. Vest to condemn for the uses and purposes of said city and the inhabitants thereof a tract of land consisting of 164.04 acres, of which the said Eva Coghlan was alleged to be the owner and the said John T. Vest the lessee; and also and on the same date commenced another action against the same defendants to condemn a right of way upon and across a certain larger tract of land owned and leased by the same defendants, respectively, and of which the above smaller tract was a portion, both of said actions having for their purpose the establishment and maintenance of a reservoir for the impounding of waters for the public use of the city of Vallejo and its inhabitants. The summons in each of said actions was thereupon issued and served upon the defendants, who appeared and answered in each of said actions, which were thereafter consolidated and came on for trial before the said superior court, the said judge thereof, and a jury on the 9th day of March, 1926.

Upon the trial and submission thereof to the jury that body returned their verdict in each of said cases, by the terms of which they awarded to Eva Coghlan the sum of $45,000 as the value of the 164.04 acreage proposed to be taken, and the further sum of $20,000 damages for the severance of the same from the larger tract of land, and further awarded to the same defendant the sum of $10,000 as the value of the right of way sought to be condemned, and $15,000 as damages for the severance. The jury also awarded to her codefendant, John T. Vest, the sum of $2,000, as compensation for the loss of his leasehold interest in the said smaller tract and in the right of way over the larger tract. On April 5, 1926, the clerk of said court, in supposed response to said verdicts, entered a money judgment against said plaintiff and in favor of said Eva Coghlan for the sum of $90,000, and in favor of said John T. Vest for the sum of $2,000, said judgments, however, not having been signed or authorized by the judge of said court. Thereafter and on the 9th day of April, 1926, the judge of said court signed and caused to be filed a document entitled "Interlocutory Decree," wherein there were recited and set forth the verdicts returned by the jury in said consolidated actions and wherein also the judge of said court found and decreed that the plaintiff should take, acquire, and have for the aforesaid uses the said lands and right of way so condemned, and should pay to the said defendants the respective amounts awarded by the terms of said verdicts. The said judge, while adopting said verdicts of the jury in its said decree, filed no other or further findings of fact or conclusions of law in said actions, or either of them, except such as are embraced in said decree.

During the progress of the actual trial of said actions the defendant Eva Coghlan had filed, by leave of the court, an amended answer setting forth the fact that the Bank of Napa, a banking corporation, having its principal place of business in the city of Napa, was the owner and holder of a deed of trust, covering the property sought to be condemned and affected by such condemnation, to secure the payment of a promissory note for the sum of $18,900, which deed of trust and note bore the date of July 15, 1924, as that of their execution, and which note was payable eighteen months after its said date, and was therefore, at the time said amended answer was filed, overdue. The petitioner herein alleges that neither the said plaintiff nor its attorneys or agents had any knowledge or actual notice of the existence of said deed of trust or of the note secured thereby, other than such constructive notice thereof as is imparted to the world by the recordation of said trust deed, prior to the 14th day of April, 1926; and further alleges that on said last-named date said plaintiff, city of Vallejo, through its attorneys, discovered for the first time that Hon. Percy S. King, judge of said court, was a stockholder and director of and in the said Bank of Napa and had been such for a long period of years prior to said April 14th, 1926, and still continued so to be. That on the 15th day of April, 1926, the said plaintiff, city of Vallejo, through its attorneys, duly served and filed its notice of intention to move for a new trial in said actions, specifying that the same would be made upon each and all of the grounds set forth in the Code of Civil Procedure regulating such matters, and stating that the same would be made upon the minutes of the court and also upon affidavits to be thereafter prepared and filed. The said plaintiff also and on the same date served and filed a verified petition in said actions, setting forth the facts as above recited with respect to the ownership and holding of said deed of trust by said Bank of Napa, and also in respect to the relation of the judge of said court to said Bank of Napa as a stockholder and director therein, upon the basis of which averments as embraced in its said verified petition the said plaintiff asserted therein that the said judge of said court was disqualified to sit or act in said cases because of his interest therein, under section 170, subdivision 1 of the Code of Civil Procedure. The said plaintiff further and on the same date served and filed its motion to vacate and set aside the judgment or decree theretofore given, made, and entered in said actions, basing the same upon the foregoing alleged facts as showing the disqualification of the judge of said court to give, make, or enter the said judgments, and making the same upon all the papers, records, and files in said action and upon certain affidavits setting forth the foregoing facts then presented and filed. The date noticed for the hearing of said last-named motion was that of April 20, 1926.

Upon said date said matter came on for hearing before said court, Hon. Percy S. King presiding. At said time the said plaintiff further presented to said court and the judge thereof its formal motion for a change of the place of trial of said actions upon the ground that the said judge of said court was disqualified by reason of his said interest to sit or act in said cases or in any further proceedings therein, which said motion was accompanied with a demand for a change of place of trial of said actions, as provided in the Code of Civil Procedure, and also with an affidavit setting forth the foregoing facts. Upon the hearing of the several matters, the defendants in said actions presented their opposition thereto in the form of affidavits and other evidence, wherein they denied the plaintiff's repeated assertion that it and its attorneys and agents did not have actual knowledge and notice of the fact that the said Bank of Napa was the owner and holder of said deed of trust and promissory note prior to the asserted date; and in that behalf the defendants averred and deposed that the said plaintiff, its counsel, and agents, did in fact have and possess full knowledge and notice thereof prior to the date of its commencement of said actions. The said defendants further denied that the said plaintiff, its counsel, and agents, did not have notice and knowledge of the fact that the judge of said court was a stockholder and director in said Bank of Napa prior to its alleged date of discovery of the same, but, on the contrary, the said defendants averred and deposed that full knowledge of the fact of the said relationship of the judge of said court to said bank was possessed by said plaintiff, its counsel, and agents from a time prior to the commencement of said actions and at all times thereafter. The said defendants did not, however, deny, nor do the respondents herein now deny, the facts regarding the ownership and holding of said deed of trust and promissory note by said bank, nor did the defendants therein nor do the respondents now deny the fact to be that during all of the times mentioned the said judge of said court was and still continues to be a stockholder and director in said bank. The said several motions and matters came on for hearing before said court and the said judge thereof on the date set therefor, and were then heard and evidence taken and were continued for further action until April 26, 1926, at which time the said judge of said court denied the said plaintiff's motion for change of place of trial and announced his readiness to proceed to hear the plaintiff's motion to vacate and set aside said judgment, and also to hear the said plaintiff's motion for a new trial. The plaintiff thereupon duly excepted to the order denying its said motion for change of place of trial, and objected to said judge sitting or acting further in said causes upon the ground of his disqualification. The court overruled said objection, whereupon the plaintiff, after noting its exception thereto, presented its motion to vacate and set aside said judgments upon the aforesaid ground of the interest and disqualification of said judge. The judge denied said motion, whereupon the instant proceeding was commenced alleging that said proceedings on its motion for a new trial are still pending before said court and said judge, and that the latter threatens to proceed to hear and determine the same and will also permit execution to be issued upon said judgments unless the said judge is restrained from so doing by this court and is commanded to transfer said causes to another county and to the court of a qualified judge for further proceedings therein, and for such other and further relief as it may appear to be entitled upon a hearing hereon.

[1] The respondents to the petition herein have filed an answer thereto, containing various denials of the averments thereof other than those above referred to. We do not, however, deem these to be material as presenting any issues of fact which would require a reference herein, since the said denials do not embrace any denial of the fact that the said Bank of Napa was from a date prior to the commencement of these actions, the owner and holder of the trust deed and promissory note above referred to; nor of the fact that the respondent Hon. Percy S. King, as judge of said respondent court, was during all of the times mentioned in said petition, and still continues to be, a stockholder and director in said bank. The questions of law presented in this proceeding arise out of the last above-mentioned facts, the existence of which is not controverted, and out of the plaintiff's alleged knowledge of their existence and action in the light of such knowledge as of a time prior to the inception of these actions and as of a time during the proceedings therein, up to and including the making and entry of the judgments or decrees therein. Dealing with the second of these questions first, in the orderly course of this decision, it may be assumed for the purposes thereof that the plaintiff did sufficiently know of the existence of the deed of trust owned and held by the Bank of Napa and of the promissory note which the same secured prior to the inception of said actions and during the entire course of the proceedings therein; and it may also be assumed to be a fact that the plaintiff sufficiently knew of the relationship sustained by the judge of said court to said Bank of Napa during all of said time. Would such a knowledge of these facts have any bearing upon the question of the disqualification of the judge to hear and determine said action, if, in fact, such disqualification at all times existed by virtue of the foregoing facts? We are constrained to hold that they would not, basing our holding thereon upon the decision of this court in the case of Lindsay-Strathmore Irr. District v. Superior Court, 182 Cal. 315, 187 P. 1056. The basis upon which the reasoning of the court in that case rests for its conclusion that, under the provisions of section 170 of the Code of Civil Procedure, no estoppel can be created at least prior to final judgment in an action to which the judge is a party or in which he is interested, is that set forth in the case of Oakley v. Aspinwall, 3 N. Y. 547, which this court quoted with express approval and which in terms is as follows:

> "But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibitions of a law, which was not designed merely for the protection of the party to a suit, but for the general interests of justice. * * * It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

It will be seen that the foregoing language thus adopted and approved by this court must be given application not only to a case wherein the party seeking to benefit by its application had knowledge of the judge's disqualification as of a time even before the inception of the action, but it must also be given application to a case wherein, during the course of the proceedings therein before such disqualification, such party has obtained some benefit or advantage through the making by such judge of orders, the effect of which was to confer such benefit or advantage, as, in the present case, the making of the order bearing the date of August 7, 1925, permitting the plaintiff to have and take immediate possession of the right of way sought to be condemned in the second of its said actions, and the acts of the plaintiff in taking and since holding possession of said right of way under and by virtue of such order. If this court should in the instant proceeding find itself constrained to hold that, under the facts as presented herein, the judge of said trial court was from a time prior to the inception of said actions, and at all times thereafter, disqualified to set or act in said causes otherwise than for the limited purpose of making an order or orders for the transfer thereof to a court and before a judge wherein such disqualification did not exist, the order which this court would make in the premises would be effective to render nugatory all orders having other than such limited effect made or entered by the action of such disqualified judge, and leave the parties to their remedies as a result thereof. Having thus disposed of the second of the two questions presented upon the face of this proceeding, we shall now address ourselves to the first and main problem advanced herein and which depends for its solution upon the practically undisputed facts embraced in the record herein.

[2] When the city of Vallejo commenced each of the two actions involved in this inquiry against the owner of the premises described therein, it is a conceded fact that the Bank of Napa, a banking corporation, was the owner and holder of the deed of trust above referred to covering the whole of the lands and premises affected by said condemnation suits, and each of them, as security for the payment of a large indebtedness due and overdue from the owner thereof to said bank and evidenced by her promissory note owned and held by said bank. The said plaintiff did not, at the inception of said actions, make said bank a party thereto. We do not, however, regard this fact as material to the present inquiry. Under the provisions of section 1246 of the Code of Civil Procedure, "all persons * * * having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest or that claimed by him, in like manner as if named in the complaint." It thus appears that the Bank of Napa, as the owner and holder of the deed of trust covering the whole of the property affected by said actions, a valuable portion of which was sought to be segregated and taken as a result thereof, had at all times a present proprietary interest in the subject-matter of each of said actions, and which it had, under the aforesaid provisions of the Code, a present right to have considered and determined in said actions and each of them. Under the provisions of section 1248 of the Code of Civil Procedure, when property incumbered by a mortgage or other lien is sought to be taken and the indebtedness thus secured is not due, the court is empowered to deal with such a situation by deducting the amount of the debt from the judgment and continuing the lien upon the property taken until the indebtedness is paid. If, however, as in the instant case, the indebtedness secured by the mortgage or trust deed is due and overdue, the creditor holding such security would be entitled to have the money awarded to his debtor in such condemnation proceedings applied to the payment of his claim. 2 Jones on Mortgages (7th Ed.) § 681a.

The foregoing principle is given apt application in the case of Los Angeles Trust & Savings Bank v. Bortenstein, 47 Cal. App. 421, 190 P. 850, wherein that court says:

> "It is a well-recognized rule of equity based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such land remains, and is to be considered, as land in respect to all rights and interests relating thereto. The money in such cases is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or incumbrancers in respect to such land."

And the court further aptly says:

> "It is a fair inference from the averments of the complaint, the allegations of which are admitted by Bortenstein's default, that the damages awarded by the court in the action against the city were not limited to Bortenstein's interest, which was that of an owner of land subject to a mortgage, but covered all the damage done by the flood to the freehold. Therefore the money so awarded by the court as damages to the realty must be treated, in equity, as the land itself. It takes the place of the reduced value of the land. The mortgaged land in its present damaged condition, together with such portion of all the moneys awarded for the total injury as represents the damage to the mortgaged premises, stand now in the place and stead of the original uninjured mortgaged premises. Bank of Auburn v. Roberts, 45 Barb. [N. Y.] 407; Id., 44 N. Y. 192."

The case of Rose v. Conlin, 52 Cal. App. 225, 198 P. 653, while based upon a different state of facts, contains nothing in opposition to but much in support of the foregoing views. We deem no further citation of authority necessary to show that the interest which the Bank of Napa had at all times in these two actions, both prior to and during the pendency thereof, and still has therein, is as much that of a present and proprietary interest in the premises involved therein and in any judgment or order or other action had or taken by the court in which such actions were pending or by the judge thereof, affecting such premises and the rights of its debtor, and hence of itself therein, as though said Bank of Napa had been at all times during the pendency and progress of said actions, or either of them, a party therein.

[3] Having arrived at this conclusion, the next question which arises is as to whether the above-described interest of the Bank of Napa in the properties involved in each of said actions is to be regarded as such an interest as would create and constitute a disqualification of the judge of the court in which such actions were and are pending in the presence of the conceded fact that such judge was, prior to and at all times during the pendency of said actions, and still is, a stockholder and director in said bank. To this inquiry there seems to us but one reply. The rule declared by this court in the case of Adams v. Minor, 121 Cal. 372, 53 P. 815, to the effect that the judge who is a stockholder in a bank which is a party to an action involving the validity of the bonds of an irrigation district, a portion of which is held by said bank, is an "interested" party, within the meaning of section 170 of the Code of Civil Procedure, has been consistently adhered to in the later and recent decisions of this court. Hall v. Superior Court, 245 P. 814; Lindsay-Strathmore Irr. Dist. v. Superior Court, supra, and cases cited. In the face of these authorities we are constrained to hold that the interest of the respondent judge herein in these actions arising out of his relation to said bank was at all times during the pendency thereof and still is such as to bring him within the disqualification to sit or act therein defined in section 170, subdivision 1, of the Code of Civil Procedure. It follows necessarily that whatever action, orders, or judgments have been taken, made, given, or entered by said judge in said actions, or either of them, during the existence of such disqualification, the same and each of them were, are and continue to be wholly void. Lindsay-Strathmore Irr. Dist. v. Superior Court, supra.

[4] The respondents, however, contend that the writ sought herein should not issue for the reason that the plaintiff in said actions and petitioner herein has taken and perfected an appeal from the judgments rendered and entered therein, and that the superior court has thereby been bereft of jurisdiction over said causes, and each of them, and hence could not be commanded to make any order whatever therein. There is no merit in this contention. The superior court, notwithstanding such appeal, retained jurisdiction under the express terms of the statute to hear and determine motions for a new trial, and also to hear and determine all questions arising in proceedings independent of and collateral to the proceedings wherein the judgments or orders appealed from were given or made. Possessing such jurisdiction the trial judge of necessity also possesses the power of determining its own disqualification to sit or act in all such proceedings as are not involved in such appeals, and upon such disqualification being established, is bound to the duty of sitting and acting in such causes no further than to make and enter an order or orders for their transfer to another court in conformity with the provisions of section 398 of the Code of Civil Procedure.

[5] The respondents make the further contention that the plaintiff's motion for such transfer came too late, but this contention is answered by our decision in the case of Finn v. Spagnoli, 67 Cal. 330, 7 P. 746, wherein the motion for transfer under the foregoing Code section was made after judgment and while a motion for new trial was pending before the disqualified judge. In the case of Lindsay-Strathmore Irr. Dist. v. Superior Court, supra, the disqualification of the trial judge was not asserted until the cause had been tried and the findings of fact and conclusions of law signed and filed by the trial judge; nevertheless, the writ of prohibition issued commanding said judge to refrain from proceeding further with said cause. For the like reason, a writ should issue in the instant proceeding embracing a similar prohibition, coupled with the command directed to the respondent judge herein to perform the duty enjoined upon him by the terms of section 398 of the Code of Civil Procedure, by the entry of an order transferring said actions and each of them to the nearest or most accessible court where the like cause for making such order does not exist, unless within 30 days after the going down of the remittitur the parties agree upon a court, as provided in section 398 of the Code of Civil Procedure, or agree that the Governor designate a qualified judge to try the cause in Napa county, as authorized by section 8 of article 6 of the Constitution. Let such writ accordingly issue.

The petition for a rehearing herein is denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

79 Cal. App. 464

PEOPLE v. JEANS. (Cr. 941.)

(District Court of Appeal, Third District, California. Oct. 11, 1926.)

1. Criminal law ⚷786(3)—Requested instruction that defendant's testimony was not to be mistrusted merely because he was defendant held erroneous.

Statement in requested instructions that when defendant takes stand his testimony is not to be distrusted merely because defendant, but is to be weighed in same light as that of any other witness, *held* error because on credibility of witness.

2. Criminal law ⚷723(5)—Statement of prosecutor that it was not safe to let negro slaughter white man held not prejudicial misconduct.

That prosecutor stated that it would not be safe if defendant, a negro, were permitted to come in and slaughter a white man, *held* not prejudicial misconduct where he immediately stated he did not wish to appeal to race prejudice.

3. Criminal law ⚷730(14)—Prosecutor's mention of kind attitude of public toward murderers did not prejudice defendant, in view of court's instruction to disregard it.

Where prosecutor, mentioning kind attitude of public toward murderers, was admonished by court, there was no prejudice to defendant, jury being instructed to disregard statements.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Albert Jeans was convicted of manslaughter, and he appeals. Affirmed.

W. D. L. Held, of Ulsiah, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the crime of murder and was convicted of manslaughter. He has appealed from the judgment and the order denying his motion for a new trial.

The evidence is amply sufficient to support the verdict and judgment, and appellant makes no contention to the contrary. In appellant's brief it is said:

> "Two points are made on the appeal, viz.: (1) That the court erred in refusing to give an instruction requested by the defendant; and (2) that the district attorney was guilty of misconduct prejudicial to the defendant."

[1] The instruction referred to reads as follows:

> "I charge you that every witness is presumed to speak the truth. This rule applies to the testimony of the defendant, if he takes the stand in his own behalf, as well as to that of any other witness. You are instructed that his testimony is not to be disregarded or discredited or entitled to less weight for the reason that he is the defendant and stands charged with a criminal offense. He is entitled to the same privileges, and his testimony is to be weighed by you with the same care and by the same rules as that of any other witness."

The proposed instruction was properly refused for the reasons stated in People v. Brown, 62 Cal. App. 96, 103, 104, 216 P. 411.

[2] Most of the statements made by the district attorney in his argument to the jury, and now claimed by appellant to constitute prejudicial misconduct, were within the bounds of legitimate argument, and counsel for defendant made no objection thereto at the time, and did not assign them as misconduct or ask the court to instruct the jury to disregard them. The most serious of the statements to which no objection was made at the time was that:

> "It will not be safe if you permit a defendant, a negro, to come in and slaughter a white man."

The defendant is a negro and the remark of the district attorney, standing alone, would appear to be an appeal to race prejudice, but, almost immediately thereafter, the district attorney said:

> "I want to be fair and I don't ask anything outside of your oath, I don't want it. I don't ask you to be unjust to any person, and neither do I ask anything against a defendant because he is a negro. I believe one man is as good as another, regardless of race or creed or color."

[3] The district attorney referred to the prevalence of crime in this country as compared with other countries and to the fact that but few murderers are hanged, and then said:

> "And what do you do when you do convict them? You put them in San Quentin for a life sentence and they are out in four or five years."

Counsel for defendant objected to the language quoted, assigned the statement as misconduct, and requested the court to admonish the jury to disregard it. The court thereupon instructed the jury "to disregard the statement," and admonished the district attorney "to refrain from further * * * statements in that regard." Thereafter the district attorney stated that:

> "A five-time life murderer escaped from a road camp, and they hunted for him seven days and finally found him and put him back in Folsom."

At a later point in his argument he said:

> "I don't ask you to hang this man because, with the kindest of feeling, I don't believe you have the nerve to do it, and the American people are becoming so kind and so reforming that they are making their prisons palaces, and now days it is better to be in San Quentin than work in the woods."

In each instance, on objection being made by counsel for the defendant, the court instructed the jury to disregard the statement.

Under the circumstances stated, the misconduct of which complaint is made cannot be held to be prejudicial. People v. Craig (Cal. Sup.) 235 P. 721, 724; People v. Krompbold, 172 Cal. 512, 522, 157 P. 599; People v. Glaze, 139 Cal. 154, 159, 72 P. 965; People v. Owens, 132 Cal. 469, 471, 64 P. 770; People v. Molina, 126 Cal. 505, 507, 59 P. 34; People v. Wilson, 61 Cal. App. 611, 628, 215 P. 565; People v. McRoberts, 1 Cal. App. 25, 27, 81 P. 734. The district attorney urged the jury to return a verdict of murder of the first degree, and the verdict of manslaughter, only, indicates that the language of which complaint is made did not influence the jury to the prejudice of the defendant.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; HART, J.

---

79 Cal. App. 514

PEOPLE v. EDWARDS. (Cr. 948.)

(District Court of Appeal, Third District, California. Oct. 16, 1926.)

1. Larceny 🔑24.

To constitute "attempt to commit larceny," there must be overt act, which, if not intercepted by some intervening cause, would culminate in larceny.

2. Larceny 🔑66.

Evidence as to overt acts *held* to support conviction of attempted larceny of automobile, though engine had not been started.

3. Criminal law 🔑1037(2).

Court will not pass on alleged objectionable remarks of prosecutor, where no instruction to disregard same was requested below.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Clifford Edwards was convicted of an attempt to commit larceny, and he appeals. Affirmed.

Mark L. Burns, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the crime of attempt to commit larceny, alleged to have occurred on the 14th day of July, 1926, in the county of Sacramento. This appeal is from the order denying his motion for a new trial and judgment of conviction entered in said cause. The appeal is based upon insufficiency of the evidence.

The record shows the following facts: That on or about the 14th day of July, 1926, one Dudley Belchamber, the owner of a certain Buick roadster automobile, parked the same on Ninth street, between H and I, at about 8:30 o'clock a. m.; that he returned to the place where the automobile was parked shortly after 1 o'clock on the same day, and, upon inspection of the machine, found that the switch lever had been tampered with, that there were marks thereon which, apparently, had been made by some instrument. The marks were similar to such as would be made by pliers. Mr. Belchamber, after finding his automobile in this condition, went to see his brother, who was in business a short distance from where the car was parked. About five minutes later, upon returning to the automobile, he found the defendant sitting therein behind the steering wheel. Mr. Belchamber first saw the defendant when he was something like half a block away from the automobile. Upon the approach of Belchamber to within six or eight feet of the automobile, the defendant jumped from the car. Being asked what he was doing there, the defendant replied, "Oh, I am leaving a note for a friend to meet me somewhere," and exhibited some kind of a note. Thereupon Mr. Belchamber said: "That does not satisfy me. Let's hunt up an officer and see if you are telling the truth"—to which the defendant replied: "No; I have got to go to a ball game." Mr. Belchamber then started in search of an officer and the defendant departed in an opposite direction. Shortly after this occurrence the defendant was arrested and the defendant, Mr. Belchamber, and the officer came back to the automobile, when it was discovered that the switch lever had been broken off. During all of this time the registration certificate of the car was strapped to the steering wheel where it was in plain sight. The defendant's story was to the effect that on a previous evening he was out at Joyland and there met a man named Jack Fallon, whom he had known in San Francisco; that this Jack Fallon spoke to him about going to a ball game and told the defendant that he would meet him anywhere on Ninth street between I and J; if he was not there, his car would be parked along there somewhere on Ninth street: that Fallon said that his car was a Buick roadster. The defendant was asked by Mr. Belchamber to accompany him to an officer to explain the matter, and the defendant replied: That Mr. Belchamber had nothing on him; that he had no reason to suspect him of anything. The following questions and answers disclose the testimony of Belchamber upon this point:

> "Q. What excuse did he give at that time for not wanting an officer to arbitrate the matter? A. Well, he said that I—he told me I had nothing on him, that I had no reason to suspect him of anything like that; that was the only excuse he offered."

The defendant's version on the witness stand of why he did not explain the matter to an officer appears in the transcript as follows:

> "Now, the reason, then, as I understand it, that you didn't want to have an officer arbitrate this matter was because you wanted to go to a ball game; was that correct? A. Yes, sir; I didn't see why I should have an officer. I was in a hurry at that time.
>
> "Q. And what was the reason you were in a hurry? A. I wanted to see this other man here, and also get to the ball game."

The defendant further testified that Mr. Belchamber, the owner of the car, said he was connected with the police department, and the defendant asked him for his authority. This appears in the transcript as follows:

> "Q. Well, didn't he want you to go and refer the matter to a police officer? A. But first he says: 'I am a police officer; you better come with me.' I asked him to show his authority. Later he asked me to go to a police officer. He says: 'If you are innocent, you will go with me to the Hall of Justice.'"

The defendant was searched upon his arrest and no tools or implements were found upon his person. The record also shows that if the lock on the automobile had been broken on the inside so that the lever could be turned over the car would run.

Much stress is laid upon the fact that no pliers or other similar tools were found upon the prisoner. The fact is overlooked, however, that the defendant had ample opportunity during the absence of Mr. Belchamber to find an officer to make away with any such instruments. The record further shows that the defendant had been a resident of Sacramento for about two months and had been engaged as a salesman for a dealer in secondhand tires. Upon the foregoing state of facts, it is argued that no attempted larceny is proven.

[1, 2] In behalf of this contention the case of People v. Carter (Cal. App.) 238 P. 1059, is cited as authority for what is necessary to prove such an offense. In that case the facts show that the engine of the automobile had been put in motion and other overt acts looking toward the commission of the offense of larceny had been performed by the defendant. That case, however, does not decide that other acts may not be sufficient to prove the allegations of an information charging an attempt. The law is well settled that there must be some overt act, which, if not intercepted by some intervening cause, would ultimate in the commission of the offense of larceny. 7 Cal. Jur. 874, 875. The facts as recited herein show, first, that the car was parked on Ninth street in the city of Sacramento, with the registration certificate strapped to the steering wheel, showing plainly the registered ownership of the car; that the ignition lock had been tampered with by the use of some kind of an instrument; that during the absence of the owner of the car, after the discovery that the lock had been tampered with and upon the return of the owner of the car, the defendant had come upon the scene and was found in the car with his hands on the steering wheel; that in the interval of time elapsing between the discovery that the lock on the car had been tampered with and the return of the owner the ignition lever, or switch lever, as it is called, had been entirely broken off. This, coupled with the fact that, if the ignition lever were turned entirely over and the lock broken, the car would run, establishes clearly that an attempt was being made to put the car in such condition that it would run, and the defendant was found in a position where he ought not to have been and in a car where the ownership could have been discovered if any such desire had been manifested. The person named Jack Fallon never appeared on the scene, was not heard of thereafter, and the jury, we think, had a right to conclude that he was mythical. From the foregoing statements we think the jury had a right to conclude that the defendant had tampered with the lock on the automobile in question and that during the few minutes' absence of the owner from the car after his discovery that the lock had been tampered with and the finding of the defendant in the machine upon his return, that the defendant was the person who had attempted to turn the switch lever or ignition switch entirely over, so that the car would run, and in so doing had broken off the switch lever. The doing of these constituted overt acts just as much as putting the engine of the car in motion, as referred to in the case of People v. Carter, supra. The turning on of the ignition switch was a necessary act before the engine could be started, and when the acts necessary to put the car in motion were begun, overt acts sufficient to sustain the conviction of attempt certainly appear. These acts do not necessarily need to be proven by direct testimony, but may be established by circumstantial evidence sufficient to convince the jury beyond any reasonable doubt. We think the facts in this case establish sufficient overt acts to support the verdict of the jury.

[3] Objection is also urged to some remarks of the district attorney during the argument of the case to the jury. The record shows, however, that the court was not requested to instruct the jury to disregard such remarks, and therefore need not be considered here.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; HART, J.

79 Cal. App. 485

SPINDLER v. WITTEMANN CO.

(Civ. 5630.)

(District Court of Appeal, First District, Division 2, California. Oct. 13, 1926.)

1. Master and servant ⚷80(10).

Evidence *held* to sustain finding that salesman was entitled to balance found due for commissions.

2. Appeal and error ⚷1195(4).

Rule that, when case on appeal is sent down for retrial on same admissions in pleadings and same evidence and findings, judgment should be as directed by appellate court, does not apply where evidence is not same on retrial.

3. Trial ⚷96.

Where only part of witness' answer was not responsive to question, refusal to strike it out on general objection was not error.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Charles Spindler against the Wittemann Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willard P. Smith, of San Francisco (Kennett B. Dawson, of San Francisco, of counsel), for appellant.

Dozier, Kimball & Dozier, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover commissions alleged to have been earned while acting as a salesman. The defendant answered, and a trial was had before the court sitting without a jury. The trial court made findings in favor of, and ordered judgment for, the plaintiff. From that judgment the defendant has appealed.

Before taking up the points made by the appellant it should be noted that this is the second appeal. See Spindler v. Wittemann Company, 54 Cal. App. 207, 201 P. 604. An examination of the decision in that case discloses that the record as made on the first appeal shows that a number of payments were made by the defendant to the plaintiff, but the record did not disclose whether those payments or which ones were made to the plaintiff on the account on which the plaintiff sued in this action.

When the case went back for the second trial, other evidence was introduced, and the trial court made findings slightly different from the findings made on the first trial.

[1] The first point made by the appellant is that the plaintiff is bound by the admission in the complaint to the effect that "plaintiff agreed with the defendant to a deduction of $365 from said commission, leaving the net balance thereof in the sum of $827.50." The appellant thereupon proceeds to show that the respondent has received $800.10, and thereupon the appellant argues that the utmost the respondent should have recovered was $27.40. The vice in that contention arises by reason of the omission to give due consideration to a peculiar fact developed in the evidence. Both parties concede that there was some evidence introduced which tended to support the finding that the commission agreed upon should be estimated at 15 per cent. Both parties agreed that 15 per cent. amounted to the grand total of $1,192.50. There is no conflict in the evidence but what moneys were paid by the defendant totaling $800.10. However, the plaintiff testified that of those moneys $365 was received by the plaintiff, not for himself but as a gratuity transferred by the plaintiff to one Oppel for having assisted in negotiating the sale. He further testified that that same $365 was, by consent, to be deducted from his commission. It follows that the total commission which the plaintiff was entitled to charge was $827.50. If we subtract from $800.10, the total payments, $365, there remains $435.10, which was paid by the defendant to the plaintiff on his individual claim for commissions. Deducting the $435.10, the payments received on his personal account, from $827.50, there remains $392.40 as the amount owing from the defendant to the plaintiff. The findings and the judgment are in direct accord with those figures.

[2] The second point made by the appellant is that, where a case has once been tried and gone up on appeal and is sent back for retrial on the same admissions in the pleadings, the same evidence and the same findings, the judgment should have been as directed by the appellate court for $27.40. That point rests on the assumption that the evidence was the same. The record does not show such to be the fact.

[3] The last point made by the appellant is that the trial court received, over the objection of the appellant, some evidence which was objectionable. There are several of these assignments in the transcript. On the argument, in reply to questions by the court, the appellant stated that it relied on the following incident which occurred during the cross-examination of the plaintiff:

> "Mr. Smith: Did you have any authority from the Wittemann Company to pay Oppel any money? A. No; not for twenty-seven years that I was with them; but I acted in that way and it was always accepted and it was the understanding between the firm and myself. I had the authority for it.
>
> "Mr. Smith: I will ask that that go out, your Honor."
>
> "The Court: I will allow it to stand."

It is perfectly clear that the first part of the answer was responsive and should not have been stricken out. The motion to strike was not sufficiently specific. In the form in which the motion was made, the trial court did not commit any error when it refused to grant the motion.

The judgment is affirmed.

We concur: NOURSE, J.; CABANISS, Presiding Justice pro tem.

79 Cal. App. 505

TEDFORD v. SAN DIEGO ELECTRIC RY. CORPORATION. (Civ. 4586.)

(District Court of Appeal, Second District, Division 1, California. Oct. 15, 1926.)

Appeal and error ⚷103.

Order striking out portion of defendant's amended answer is not appealable.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Sarah J. Tedford against the San Diego Electric Railway Corporation. From an order striking out portion of amended answer, defendant appeals. Appeal dismissed.

Read G. Dilworth and V. F. Bennett, both of San Diego, for appellant.

Glidden, Brant & McKay, of San Diego, for respondent.

PER CURIAM. It appearing from inspection of the record that the purported appeal is directed against a nonappealable order, to-wit, an order striking out a portion of defendant's amended answer, it is ordered that the appeal be and the same hereby is dismissed.

CALIFORNIA REPORTER

250 PACIFIC REPORTER

250

80 Cal. App. 269

PEOPLE v. TAYLOR. (Cr. 945.)

(District Court of Appeal, Third District, California. Dec. 13, 1926.)

1. Criminal law 🔑1130(5)—Where state failed to file points within time prescribed by Supreme Court rules, appeal could not be dismissed (Supreme Court rule 5; Pen. Code, §§ 1248, 1253).

Where state appealed from order granting defendant's motion for new trial, but did not file points and authorities within time prescribed by Supreme Court rules, appeal could not be dismissed on defendant's motion, but case would be placed upon calendar for oral argument, in view of rule 5, Pen. Code, §§ 1248, 1253.

2. Criminal law 🔑1130(4)—No brief being filed, criminal case is placed on calendar for oral argument, and judgment is affirmed, if appellant fails to appear (Supreme Court rule 5; Pen. Code, §§ 1248, 1253).

On appeal, criminal case is placed on calendar for oral argument, even though no brief has been filed, and judgment is affirmed, if appellant fails to appear at time set for argument, in view of Supreme Court rule 5, Pen. Code, §§ 1248, 1253).

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Proceedings between the People and Jesse E. Taylor. From an order granting motion for new trial, the People appealed, and defendant moves to dismiss the appeal. Motion denied.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mark L. Burns and L. M. Shelley, both of Sacramento, for respondent.

FINCH, P. J. This is a motion by respondent to dismiss the appeal herein from the order of the trial court granting defendant's motion for a new trial. The motion is made upon the ground that the appellant has failed to file any points and authorities within the time prescribed by the rules of the Supreme Court.

The transcript was filed July 30, 1926. The notice of motion to dismiss was served November 9, 1926, and filed on the following day, and it is stated therein that the motion would be made November 29, 1926. Appellant's opening brief was filed November 26, 1926.

[1, 2] Rule 5 provides that, if "appellant's points and authorities be not filed within the time prescribed the appeal may be dismissed on motion, upon notice given. If * * * the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." No criminal case has been cited or discovered wherein this rule has been applied. Section 1248 of the Penal Code provides:

> "If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed."

Section 1253 provides:

> "The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear."

The rule which has been uniformly followed is to place a criminal case on the calendar for oral argument, even though no brief has been filed, and to affirm the judgment if the appellant fails to appear at the time set for argument. This procedure is in harmony with the provisions of the foregoing sections of the Penal Code, and no reason appears for departing therefrom in this case.

The motion is denied, and it is ordered that the cause be placed on the January calendar for oral argument; the respondent to have ten days after the filing of this opinion within which to file his points and authorities.

We concur: HART, J.; PLUMMER, J.

199 Cal. 508

HOME v. SOUDEN et al. (L. A. 9186.) [*]

(Supreme Court of California. Oct. 16, 1926.)

1. Municipal corporations 🔑200.

Widow of deceased fireman, drawing pension of one-third of his active pay under St. 1905, p. 412, *held* entitled to increase to one-half pay as provided by pension ordinance, unaffected by subsequent adoption of amendment to Los Angeles City Charter, art. 11½, continuing status of existing pensions.

2. Municipal corporations 🔑200.

Under ordinance providing that, after examination by commission of pensions, said commission found that pension should be continued, person receiving such pension should have same privileges as department members under pension ordinance, widow of deceased fireman, drawing one-third active pay of husband, *held* entitled to increase to one-half pay.

3. Municipal corporations 🔑200—Widow's pension increase from one-third to one-half pay of deceased fireman held not invalid as gratuity, though increase was given after rendition of fireman's services.

Widow's pension increase from one-third to one-half pay of deceased fireman *held* not invalid as gratuity, since general pension statute was in force when fireman's services were rendered, and so pension was part of contemplated compensation, even though increase was given by ordinance passed after services had been rendered.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Mandamus by Ella B. Home against O. M. Souden and others to compel increase in pension. From a judgment in mandamus, defendants appeal. Affirmed.

Jess E. Stephens, City Atty., and Chas. B. MacCoy, Deputy City Atty., both of Los Angeles, for appellants.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

WASTE, C. J. The defendants appeal from a judgment in mandamus. Thomas S. Home, husband of plaintiff and respondent, was killed on April 17, 1907, while in the performance of his duties as a member of the fire department of the city of Los Angeles. At the time of his death he held the rank of captain, and the salary which then attached to his position was $125 per month. On May 2, 1907, Ella B. Home was granted a pension, under the provisions of the act creating a firemen's pension fund (Stats. 1905, p. 412), equal to one-third of the amount of the salary attached to the rank which her husband held in the department at the time of his death.

In 1913 the council of the city of Los Angeles adopted an ordinance (No. 28252, N. S.) creating a commission, and providing for the establishment of a pension fund. By the terms of section 13 of the ordinance the commission was authorized to continue payment to persons already receiving pensions under the general state law, supra. Since the passage of the ordinance, the pension paid respondent has been continued, and it is conceded by appellants that she has been paid an amount equal to one-third of the salary attached to the rank of captain in the fire department, as the same has been increased from time to time.

The ordinance, supra, was amended in certain respects. Ordinances Nos. 38884, 39144, and 39725, N. S. By the terms of Ordinance No. 39725, N. S., it was provided (section 5) that, "whenever any member of said Fire Department shall lose his life while in the performance of his duty, then * * * said commission shall order and direct that a yearly pension equal to one-half of the amount of the salary attached to the rank or position which he may have held in the fire department" shall be paid to his widow during her life. The amended ordinance further provided (section 13) that the commission should examine and consider all pensions theretofore granted under the general laws of the state, or under the provisions of Ordinance No. 28252, N. S., supra, and if, in the opinion of the commission, such pensions should be continued, the persons receiving the same should be entitled to all the rights and privileges granted under the ordinance, as if they were at that time members of the city fire department. After the passage of the amended ordinance, respondent presented to the commission her claim for an increase in her pension from one-third to one-half of the amount of the salary paid Capt. Home at the time of his death. Her demand was refused on the ground, it is asserted by appellants,

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[*] Rehearing denied November 15, 1926.

that the amendment, increasing the amount of the pension to be paid in the event of the death of a member of the fire department, did not apply to pensions which had been granted or accrued under the general state law of 1905.

Subsequently, there was adopted an amendment to the charter of the city of Los Angeles, by the addition of a new article, designated as article XI½, creating a department of the government of the city known as "the Fire and Police Pension Department." Section 4 of the article provides for a pension to be paid to the dependents of a member of the fire or police department who shall die as a result of injuries received in the discharge of his duty in an amount equal to one-half of the salary attached to the rank or position which the deceased person held at the time of his death. It is also provided in section 5 that:

> "The provisions as herein in this charter contained shall apply to all members of the fire and police departments as in this section defined, and to all members of said departments who have heretofore been granted pensions; provided, however, that all pensions granted heretofore and still in operation shall remain and continue to operate the same as when granted."

After the adoption of the charter amendment, the respondent instituted this proceeding in mandamus, praying that she be allowed and paid a pension equal to one-half of the amount of the salary attaching to the rank held by her husband at the time of his death; the increased allowance to run from the date of the ordinance, increasing the amount of the pension to be paid in such cases. Judgment was entered in her favor, and this appeal followed.

[1] It is the contention of the appellants that the Ordinance of 1913 merely continued in force the pension originally granted to the respondent under the general state statute, and that the subsequent amendment to that ordinance increasing the amount to be paid to the widows of deceased firemen was, in terms, prospective only in its operation, and therefore not applicable to respondent. This construction of the amendment to the pension ordinance, they assert, was announced and adhered to after its passage, and they contend that such interpretation was approved and ratified by the voters of the city when they amended the charter by the adoption of section XI½, supra. To accept the contentions of the appellants is, we think, to nullify the effect of the ordinances relating to the pension system of the city of Los Angeles which were in force when the charter amendment was adopted. By virtue of the terms of section 13 of the Ordinance of 1920, supra, if in the opinion of the commissioners, pensions granted under the general state law should be continued, the persons receiving such pensions were granted "all the rights and privileges," under the ordinance, as if they were at the date of its passage "members of said fire department." The effect of this provision was to remove distinctions between pensions granted under the state law and those granted under the city system. In the case of respondent, she was forthwith entitled to a pension equal to one-half, instead of one-third, of the amount of the salary attached to the rank held by her husband at the time of his death. Consequently, the adoption of the amendment to the city charter, supra, has no bearing on the facts of the present case other than to ratify the right of respondent to a pension in the increased amount claimed by her.

[2] Appellants deny the persuasive effect of the cases relied on by respondent (Aitken v. Roche, 48 Cal. App. 753, 192 P. 464; Kavanagh v. Board of Police Pension Fund Commissioners, 134 Cal. 50, 66 P. 36; O'Dea v. Cook, 176 Cal. 659, 169 P. 366), and also contend that they are not in point, and do not support the position of the respondent, for the reason that they deal with questions affecting "members" of the departments involved, while, in the present case, the claimant is but the widow of a deceased member, and under no consideration can be regarded as a member of the city fire department. As to the first suggestion of appellants, we see no present reason for departing from the reasoning found in the decisions cited. As to the second contention, we need only point to the provision contained in the pension ordinances that, when upon examination by the commission of pensions granted under the state law it was of opinion that such pensions should be continued, "the persons receiving such pensions" under the act should be entitled to all the rights and privileges under the ordinance as if they were at the time "members of said fire department." The decisions relied on by the respondent clearly hold that members of such departments, retired on pension, are entitled to the benefit of legislation increasing the salary of active members.

[3] The further contention of appellants that, if the respondent is entitled to an increase of pension under the ordinances, after her pension right has vested, such increase constitutes a gift or gratuity, and renders the ordinance to that extent void, is, we think, satisfactorily answered by the decision of this court in O'Dea v. Cook, supra.

The judgment of the lower court is affirmed.

We concur: RICHARDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

FINLAYSON, J., not voting.

199 Cal. 512

PEOPLE v. RYAN. (Cr. 2915.)*

(Supreme Court of California. Oct. 16, 1926.)

1. Criminal law 🔑1170(1)—Extortion 🔑15—Where defendant claimed that at time of alleged extortion he was giving automobile driver a citation slip for speeding, exclusion of citation slip not showing time held not error, and harmless, if erroneous.

Where defendant claimed that at time of alleged extortion he and another were giving an automobile driver a citation slip for speeding, exclusion of citation slip which did not show time it was delivered, *held* not error, and harmless, if erroneous, where it had been produced and exhibited to court and jury in connection with testimony of witnesses, and later read to jury without objection.

2. Criminal law 🔑1166½(12)—Remark of court in ruling on admissibility of certain slips that defendant might prepare them in anticipation of use as alibi held not reversible error, where he later directed jury to disregard remark.

Where trial court, in extortion prosecution, in ruling on admissibility of citation slips to prove alibi, remarked that defendant could prepare such certificates in anticipation of such an instance, but later directed jury to disregard its remarks, and instructed them that they were not to consider the remark as bearing upon credibility of any of the testimony, it was not prejudicial misconduct and reversible error.

3. Criminal law 🔑683(4)—Where alibi witness fixed time by his observation of a sign, rebuttal evidence that sign could not be seen held admissible.

Where defendant's witness, in extortion prosecution, in attempting to prove alibi by fixing time defendant stopped him for speeding, had stated that a road sign induced him to look at watch, rebuttal evidence tending to show that sign could not be seen *held* admissible.

4. Criminal law 🔑720(5)—District attorney's remarks, assailing defendant's witness' testimony, which rebuttal tended to show was untrue, held not prejudicial misconduct.

Where alibi witness, had stated that road sign had induced him to look at watch, and rebuttal evidence tended to show that sign could not be seen, district attorney's comments, assailing said witness for untruthfulness respecting sign, *held* not prejudicial misconduct.

5. Witnesses 🔑236(1).

Exclusion of questions asked alibi witness in abortive effort to lead witness to fix date of certain episode, with more definiteness than he was able to do, *held* not error.

6. Criminal law 🔑703.

In extortion prosecution, attempt of prosecuting attorney on cross-examination of defendant to get admission of previous extortion as a basis for defendant's impeachment *held* not misconduct.

7. Criminal law 🔑656(3).

Statement of court, in extortion prosecution, in excluding evidence of former extortion by defendant, that he did not doubt good faith of counsel on either side, *held* not sufficiently partial or improper to constitute misconduct.

8. Witnesses 🔑277(4), 301—Where defendant claimed he had never seen prosecuting witness, cross-question whether he had a scar from appendicitis operation was not improper, where prosecuting witness claimed that defendant had exhibited such a scar, which defendant denied (Const. art. 1, § 13; Pen. Code, § 1323).

Where prosecuting witness had testified that at time of alleged extortion defendant had stated that he had had an appendicitis operation, and exhibited a scar, and defendant, on direct examination, testified that he had never seen the prosecuting witness, cross-question whether defendant had had an appendicitis operation, and had such a scar, was not improper under Const. art. 1, § 13, providing that defendant in criminal case cannot be compelled to testify against himself and Pen. Code, § 1323, providing that he may be cross-examined as to matters about which he was examined in chief.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Thomas Ryan was convicted of extortion and he appeals. Affirmed.

S. Luke Howe, Markham Johnston, J. R. Hughes, Howe, Hibbitt & Johnston, and Hughes, Bradford, Cross & Prior, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

RICHARDS, J. [1] This appeal is prosecuted by the defendant from a judgment of conviction upon the charge of extortion. The defendant was accused in separate indictments of two offenses in the nature of extortion committed upon two Japanese persons, one being named Takeuchi and the other Watanabe. Upon the trial the two charges were consolidated and tried together, with the result that the defendant was convicted in the Takeuchi case and acquitted in the Watanabe case. The defendant and appellant herein assigns several grounds upon which he bases his contention that the judgment, and also the order denying a new trial herein, should be reversed. The first of these relates to an alleged error of the trial court in refusing to admit in evidence certain so-called "citation slips" offered by or on behalf of the defendant in connection with the testimony of certain witnesses for the defendant in order to establish the defense of an alibi which the defendant had presented and testified to upon the trial. The evidence offered by the prosecution, and testified to by the prosecuting witness Takeuchi and others, was to the effect that the defendant, accompanied by one

*Rehearing denied November 15, 1926.

Owen Davies, and representing themselves to be prohibition enforcement officers, had presented themselves at the home of Takeuchi on the night of July 11, 1925, and threatened to arrest the latter upon the charge of the unlawful manufacture of intoxicating liquor, and demanded of him the sum of $300 in order to avoid arrest, and that finally, after some conversation, the sum of $200 was paid over to the defendant and said Davies for such purpose, and under the compulsion of such threat of arrest. Both the defendant and said Davies denied being at the home of said Japanese at said time or at all, and, in support of said denial, testified that at the precise time they were together at a point on the Stockton boulevard several miles away, and where Davies had overhauled an automobile driver named Eric Hebbe upon a charge of speeding, and when Davies had given the latter a "citation slip" or written notice to appear in court to answer to said charge. The witness Hebbe testified to the fact that he had been presented with such a paper by Davies at or about said time and place, and identified the original of said "slip." The defendant thereupon offered the original of said "citation slip" in evidence, and also offered a carbon copy thereof, which Davies testified had been transmitted by him to the office of the motor vehicle department, and which the chief inspector of said department had produced at the trial from the record thereof. The trial court refused to admit in evidence these documents, and its refusal so to do is assigned by the appellant herein as error. It appeared affirmatively that there was nothing upon the face of said "citation slips" which would serve to fix or otherwise identify the time at which the original of them was delivered by Davies to the witness Hebbe.

[2] It is not contended by the appellant that either the original or the carbon copy of the "citation slip" handed by Davies to Hebbe was an official record of any sort, or that they were documents which were of such character as to render them, or either of them, admissible in evidence under any express statute. They had fully subserved their purpose when they had been produced and exhibited to the court and jury in connection with the testimony of these two witnesses for the defendant. Their content otherwise was immaterial, and could amount to no more than the unsworn and self-serving statement of the witness Davies who had prepared them. Besides, at a later point in the testimony of said witness Davies he read the entire contents of the original of these "citation slips" to the jury without objection. It thus clearly appears that the defendant suffered no injury from the exclusion as such of these "citation slips" when the same were tendered in evidence by him, and hence that their exclusion does not afford sufficient ground for a reversal of this cause. It was in connection with the offer of said "citation slips" in evidence that certain proceedings took place upon which the appellant predicates his second assignment of error. The trial court in ruling upon the admission of these documents, and during the colloquy between court and counsel at the time of such ruling, indulged in certain remarks, viz.:

> "Unless it is made by law, the records of the office, prima facie evidence of the fact stated therein, and stands as proof of the facts stated in the certificate until the contrary was established, or unless it is required by law, such a record to be kept, it would not be admissible. It would be merely a self-serving statement or declaration. The defendant, if he was going out on this line of work, might go out and just issue those certificates, showing them to the motor vehicle department, and file them the next day, and whenever it was filed—I don't think there is even anything said about the date that even it was filed, but they could prepare these certificates, and file them, just for the—anticipating just such an instance as this."

Counsel for the defendant objected to the foregoing remarks of the judge, and assigned the same as error, whereupon the court said:

> "Well, the court will instruct the jury that the court does not in any way assume that that was the fact in this case, and doesn't say it was or it was not. It has no knowledge upon the subject, or information, in any way, shape, or form or manner, and what was said by the court was merely said for the purpose of illustrating the inadmissibility of such a document in evidence, and the court will instruct the jury that they are not to consider the remark of the court in any way as bearing upon the credibility of any of the testimony, but merely on the—for the legal admissibility of such a document."

Counsel for the defendant did not request any other or further instruction or other action on the part of the court, but still insist that the remarks of the trial judge constituted prejudicial misconduct and reversible error. We cannot agree with this contention. The prompt disavowal on the part of the trial judge of any intention to criticize the defendant's action or evidence, or to reflect upon the credibility of the testimony offered, and the immediate direction, of its own motion, to the jury to disregard its remarks, would, we think, have the effect of entirely removing from the minds of the members of the jury any impression discreditable to the defendant or his witnesses with respect to the foregoing episode.

[3] The appellant's next contention has reference to the alleged error of the trial court in permitting the introduction of certain evidence in rebuttal bearing upon, and to a degree contradicting, certain testimony given by the witness Hebbe. The said witness, in the course of an attempt to fix the time when he had been stopped and cited for speeding by Davies and the appellant, testified that, while he had been driving along the Stockton boulevard at about 11 o'clock on the night

of the alleged extortion, and while passing an automobile going in the same direction, the lights of his machine had shown on the advertising sign of a certain hotel in Stockton, which was upon the edge of the highway, and which contained the words "38 miles to Stockton," and that he then looked at his watch, and found that it was the hour of 11 o'clock p. m. and that, since he was anxious to reach Stockton by 12 p. m., he had speeded up to the extent that caused his detention by Davies a few moments later. He stated that said sign was 8 or 10 feet from the edge of the concrete highway. The prosecution in rebuttal produced a witness named Nash, who was chief draughtsman for the highway commission in that particular division, and who was permitted to testify, over the defendant's objection, that there were no signs along that strip of highway within the line of its width nor otherwise than beyond the fence line and on private property; that the width of the roadway at that point was about 110 feet between its fence lines; that the concrete highway, 25 feet wide, lay along the center of the roadway; and that it was about 40 feet from the edge of such highway to the fence line on either side. The purpose of this evidence was to cast doubt upon the credibility of the witness Hebbe, and we think such evidence was admissible in rebuttal for such purpose. To illustrate, if the people had offered evidence in rebuttal which showed that there was no such sign as that to which the said witness had testified, such evidence would undoubtedly be admissible, since it would tend strongly to show that the witness had not been led by the observance of such a sign to look at his timepiece when he said he did. The evidence which was offered, while it did not go to that extent, tended in some degree, at least, to show that such sign, if it existed, was outside of his line of vision at that place and time. It would thus, by the same reasoning, be admissible, though less cogent than testimony as to the entire absence of such a sign might be, but its comparative weight would be a matter for the jury, and hence we are satisfied that the trial court was not in error in admitting such testimony.

[4] The appellant's next contention grows out of the one just disposed of, since he charges the district attorney with prejudicial misconduct committed while commenting upon the testimony of the witness Hebbe, in the course of which he very bitterly assailed said witness for his asserted untruthfulness in his testimony respecting said sign. But if, as we have seen, his testimony upon that subject was weakened or rendered improbable by the proper admission of the rebuttal evidence above adverted to, the district attorney had the right in argument to draw his own inferences, within the bounds of reason, as to the extent to which the testimony of Hebbe had been thereby rendered unworthy of belief. Besides, an examination of the record which embraces the district attorney's address to the jury discloses that, while counsel for the defendant did upon various occasions interrupt such address with charges and assignments of misconduct, no such interruption, charge, or assignment occurred with respect to the comment of the district attorney upon Hebbe's testimony either during or after his discussion of that phase of the case. We therefore consider appellant's assignment of misconduct on the part of the prosecuting officer to be without merit.

[5] The appellant's next contention is that the trial court was in error in excluding the testimony of the witness Schmidt offered on behalf of the defendant. The testimony of said witness was offered in aid of the defendant's alibi. An examination of the record shows that the strictures which the appellant makes upon the action of the trial court with respect to said witness and his testimony are not justified. The witness was permitted to testify that on one occasion he was with the witness Davies when he overhauled the driver of a closed car upon the Stockton highway, but the witness was apparently unable to fix the date when such an episode occurred, and the rulings of the court were evidently directed against the abortive effort of counsel for the defendant to lead the witness up to the point of a more definite fixation of the date of its occurrence than he was able to make.

[6, 7] The appellant's next grievance is over the alleged misconduct of the district attorney evinced in his somewhat persistent attempt to get from the defendant when upon the witness stand an admission that he raided the place of a man named Cartiselli in 1924, and obtained from him the sum of $300 for the alleged purpose of quashing a prosecution against him upon a charge of violating the prohibition laws. The contention of the prosecuting officer was that he was entitled to ask the question showing intent as a basis for the defendant's impeachment. There was considerable argument over the matter, but the trial court sustained the objection to the question. In doing so the court said:

> "I haven't any doubt about the good faith of counsel on either side, but the court has ruled that it is not admissible in evidence."

The appellant urges that the district attorney was guilty of misconduct in attempting to get before the jury evidence of a prior crime of extortion which he knew was not admissible. The entire discussion as given in the record shows, we think, that the prosecuting officer was actuated by good faith in his inquiry, and was relying upon a recent case in the California reports, which he cited to the court, as sustaining his position and as evidence of his good faith. We do not find sufficient in the record to justify the charge of misconduct, nor do we think that the comment of the court acquitting counsel for both sides in a somewhat heated, and at times turbulent, trial of bad faith was sufficiently partial or improper as to constitute misconduct on the part of the court. Counsel for the appellant cites the case of People v. Frank, 71 Cal. App. 575, 236 P. 189, as sustaining his contention in this regard; but in that case the objectionable comment of the court which was held to constitute misconduct consisted in commendatory remarks made by the court and concurred in by the district attorney concerning the "high standing" of certain important witnesses for the prosecution, and which would be a manifest interference with the province of the jury as applied to witnesses in a case before it. There is no parallel between that case and the instant one. Besides, the record fails to disclose that objection to the court's expression was made at the time, nor was there any assignment of misconduct in that particular made at any time during the trial of the cause. The appellant's present contention has, therefore, no merit.

[8] The final contention urged by appellant is that the trial court committed prejudicial error in the admission in rebuttal of certain evidence offered in impeachment of the defendant as a witness in his own behalf. The facts were these: When the prosecuting witness, Takeuchi, was upon the stand, and was telling the story of the alleged extortion, he stated that, when the defendant Ryan and his companion Davies demanded of him the sum of $300, he pleaded his poverty, due to the fact, among others, that he had been at large expense for operations for appendicitis performed upon his wife and boy, whereupon, as he stated, Ryan replied that he also had had an operation for appendicitis a short time previously, and unbuttoned his clothes, and showed him the scar caused by the operation. When Ryan was called as a witness in his own behalf, he denied utterly having ever been at the home of the Japanese or having ever had such a conversation or any conversation whatever with him there or elsewhere. Upon cross-examination he was asked certain questions bearing upon this particular part of the alleged conversation, and in that connection was asked whether he had then and there exhibited to the Japanese a scar. He denied having done so or having had any conversation relating to a scar of any kind. He was then asked upon such cross-examination whether he had in fact undergone such an operation and had such a scar. This was objected to as not proper cross-examination, and as beyond the scope of the defendant's examination in chief, and in violation of the provisions of section 1323 of the Penal Code, and in contravention of section 13 of article 1 of the Constitution, in each of which it is provided that "a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself." The section of the Penal Code above referred to contains, however, the additional provision: "But if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." The defendant, as a witness in his own behalf, was examined in chief as to his presence at any time in the home of Takeuchi and as to whether he had ever held any conversation with him there. He denied that he had ever seen the latter or any member of his family prior to his trial. He further undertook to establish an alibi by testifying that he was elsewhere at the time of said alleged visit and conversation. Upon the credence to be given by the jury to the defendant's denial of his presence in the home of the Japanese, and to the holding of the incriminating conversation to which the latter had testified, depended the defendant's acquittal or conviction in the case. The episode of the existence and exhibition of the scar to which the prosecuting witness had testified as occurring in the course and as a part of such conversation was of such a nature that the said witness would not in all reasonable probability have known of except from the lips and acts of the defendant at the time. Whether or not, therefore, the defendant had had such an operation and possessed such a scar would be a very significant circumstance for the jury to consider in drawing its inferences and conclusions as to the truth or falsity of the defendant's testimony, wherein as a witness in chief he had denied in toto the truth of the story told by the presecuting witness, and which included his alleged statement as to the fact of the operation and presence and exhibition of the scar. It was therefore clearly within the proper scope of cross-examination under the provisions of the Penal Code above quoted. People v. Rozelle, 78 Cal. 84, 20 P. 36; People v. Mullings, 83 Cal. 138, 23 P. 229, 17 Am. St. Rep. 223; People v. Soeder, 150 Cal. 12, 87 P. 1016.

The final objection made by the appellant to the comments of the district attorney upon the foregoing testimony in his argument fails, in the presence of our ruling that such matter was admissible as within the proper scope of cross-examination and hence of comment on the part of the prosecuting attorney. We do not find that the latter went beyond the scope of legitimate argument as to the inferences to be drawn by the jury from the defendant's admission as to the performance of the operation and existence of the scar.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

199 Cal. 471

PEOPLE v. ARNOLD et al. (Cr. 2787.)*

(Supreme Court of California. Oct. 11, 1926.)

1. Homicide 🔑354.

Court must impose death penalty, where simple verdict of guilty of first degree murder is returned.

2. Homicide 🔑253(6).

Evidence *held* sufficient to sustain conviction for first degree murder committed in perpetration of attempt to commit robbery, under Pen. Code, § 189.

3. Criminal law 🔑572.

Testimony not excluding possibility of defendant's presence at scene of homicide *held* of no value as alibi evidence.

4. Criminal law 🔑739(2).

Sufficiency of alibi evidence to create reasonable doubt of guilt, in prosecution for murder under Pen. Code, § 189, *held* for jury.

5. Criminal law 🔑434—Time records not prepared by witness and tending to prove alibi held inadmissible (Code Civ. Proc. § 2047).

Garage time records tending to prove alibi by showing time of work on defendant's car *held* properly excluded, in view of Code Civ. Proc. § 2047, where they were not prepared by witness.

6. Criminal law 🔑700—District attorney has right to make "opening statement," but is not required to make it.

District attorney has right to make "opening statement," which is to prepare minds of jury to follow evidence and to more readily discern its materiality, force, and effect, but is not required to make it.

7. Criminal law 🔑703.

Opening statement is not evidence.

8. Criminal law 🔑1171(2).

Conduct of district attorney in making opening statement, to be reversible error, must be flagrantly improper or work legal prejudice against defendant.

9. Criminal law 🔑369(1)—Evidence of separate and distinct crimes is inadmissible.

Evidence of separate and distinct crimes, which have no reasonable connection with commission of crime charged, is inadmissible.

10. Criminal law 🔑372(1)—Evidence of other crimes pursuant to plan tending to show continuing conspiracy is admissible.

Evidence of commission of other crimes, pursuant to a plan logically tending to prove existence of continuing conspiracy, is admissible.

11. Homicide 🔑9—Existence of intention does not raise inference that it existed prior to its manifestation.

In murder case, intention may be simultaneously formed and its existence cannot be adopted as predicate from which inference can be logically drawn that it existed prior to its manifestation.

12. Homicide 🔑18(5)—Proof of intent, deliberation, or premeditation held not required to constitute first degree murder, where homicide was committed in attempt to commit robbery (Pen. Code, § 189).

Where murder was committed in perpetration of or attempt to commit robbery, proof of intent, deliberation, or premeditation is unnecessary to constitute murder of first degree, proof that killing was done by one of participants in robbery being sufficient, in view of Pen. Code, § 189.

13. Criminal law 🔑730(13)—Reference to other crimes in opening statement held not prejudicial.

Reference in opening statement to other crimes than that charged *held* not prejudicial where jury was admonished not to consider such reference and evidence of such crimes was excluded.

14. Homicide 🔑169(4)—Evidence of meetings of defendants prior to murder held admissible (Pen. Code, § 31).

Evidence of meetings of defendants prior to murder *held* admissible either on theory that they were coconspirators, or under Pen. Code, § 31, making those who aid and abet in committing crime principals.

15. Criminal law 🔑351(5).

Evidence showing defendants' false and fictitious registrations at hotels *held* admissible, where that was part of plan to avoid detection.

16. Criminal law 🔑345—Evidence showing preparation to commit crime and acts and circumstances in pursuance of its accomplishment is admissible.

Evidence tending to show preparation to commit crime as well as acts and circumstances in pursuance of its accomplishment, such as concealment of identity, clandestine movements by defendants, and plans for escape from scene of crime, is admissible.

17. Criminal law 🔑1171(2)—Reference, in opening statement in murder case, to unpaid alimony of one defendant, if error, held not prejudicial.

Reference, in opening statement in murder case, to unpaid alimony of one defendant, if error, *held* not prejudicial where court of its own motion withdrew all references thereto from jury's consideration and instructed jury to disregard them.

18. Criminal law 🔑1170½(1)—Allowing district attorney to impeach or refresh mind of his witness as to whether defendants registered at his hotel, and whether they appeared to be "bad men," if error, held not prejudicial.

Allowing district attorney to impeach or refresh mind of hotel proprietor who was his witness, as to whether defendants registered at his hotel and whether they appeared to be "bad men," if error, *held* not prejudicial where,

---

*Rehearing denied November 8, 1926.

on cross-examination, such witness refused to identify defendants as persons who registered.

19. Homicide 🔑170.

Sales contract *held* admissible to connect deceased murderer with ownership of abandoned car found on highway after killing, in prosecution of those alleged to have been with him.

20. Homicide 🔑174(2).

Appearance and manner of deceased murderer three hours after commission of homicide *held* admissible in prosecution of those alleged to have been with him.

21. Homicide 🔑268.

Weight, effect, and sufficiency of evidence of appearance and manner of deceased murderer three hours after commission of homicide *held* for jury.

22. Homicide 🔑171(1)—Where defendants were alleged to have been aiding murderer in committing robbery at time of killing evidence of murderer's participation in crime held admissible, though he was dead at time of trial.

Where defendants were alleged to have been aiding murderer in committing robbery at time of killing, evidence of murderer's participation in crime *held* admissible, though he was dead at time of trial, since it it was incumbent on prosecution to show that he was one of perpetrators of crime in order to make case against defendants.

23. Criminal law 🔑703—Reference, in opening statement, to statements by deceased murderer to third persons relative to his guilt held not willful misconduct in prosecution of those alleged to have aided him.

Reference, in opening statement, to statements by deceased murderer to third persons relative to his guilt *held* not willful misconduct by prosecuting attorney in prosecution of those alleged to have aided such murderer, notwithstanding that supporting evidence was inadmissible.

24. Homicide 🔑162.

Where killing was admittedly done by another than defendants who were alleged to have been with him, any legal evidence tending to connect defendants with murderer *held* material, in view of Pen. Code, § 31.

25. Criminal law 🔑438—Photograph of deceased murderer held admissible in prosecution of those alleged to have aided him.

Admission in evidence of photograph of deceased murderer by which certain witnesses identified him, and which was without doubt scrutinized by jurors, *held* not error, in prosecution of those alleged to have aided him.

26. Criminal law 🔑351(9)—Evidence of attempted escape from jail held admissible.

Evidence tending to show defendants' attempt to escape from jail by sawing bars *held* admissible to show consciousness of guilt.

27. Criminal law 🔑823(1)—Where final charge was not unfavorable, infirmities in a few instructions held not to deprive defendants of fair trial.

Where final charge was not, as a whole, unfavorable to defendants, infirmities in a few instructions when disassociated from context *held* not to deprive defendants of fair trial.

28. Criminal law 🔑789(4).

Court should not attempt to enlarge on approved instructions on reasonable doubt.

29. Criminal law 🔑789(8)—Instruction that proof "beyond reasonable doubt" meant that evidence must satisfy mind, conscience, and judgment of juror to moral certainty and beyond reasonable doubt, held proper.

Instruction that proof beyond reasonable doubt meant that evidence must satisfy mind, conscience, and judgment of juror and satisfy him of defendants' guilt to moral certainty and beyond reasonable doubt, followed by instruction that proof of guilt to absolute certainty was not required and instructions warning against unlawful prejudice, *held* proper.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beyond a Reasonable Doubt.]

30. Criminal law 🔑823(16)—Error in abstract instruction that those who aid "or" abet were principals, held cured by correct statement in following concrete instruction (Pen. Code, § 31).

Error in abstract instruction as to law of principals stating that those who aid "or" abet were principals, *held* cured by following concrete instruction correctly using "and" instead of "or," as used in Pen. Code, § 31.

31. Criminal law 🔑823(1)—Though defendants did not testify, instruction that if they suppressed evidence presumption was that such evidence was adverse held improper but not prejudicial in view of instructions on their right to remain silent (Code Civ. Proc. § 1963, subd. 5).

Instruction in prosecution in which defendants did not testify, but in which their right to remain silent was covered by instructions, that if defendants willfully suppressed evidence there was presumption, in absence of contrary proof, that evidence would be adverse to them, based on Code Civ. Proc. § 1963, subd. 5, *held* improper but not prejudicial.

32. Homicide 🔑340(1)—Instruction, in homicide case, that determination as to death penalty was in jury's discretion but such discretion was not arbitrary, held not of itself to warrant reversal.

Instruction, in homicide case, that determination of whether death penalty should be pronounced was in jury's discretion but that such discretion was not arbitrary, *held* not of itself to warrant reversal, though any suggestion indicating limitation on jury's right to unhampered exercise of discretion is not advisable.

33. Criminal law 🔑778(5)—Instruction that, when alibi was established, it constituted defense of most conclusive and satisfactory character held not to put burden on defendants to establish it beyond reasonable doubt.

Instruction that effect of alibi, when established, was like that of any other conclusive fact, and that, when credited, it was a defense of most conclusive and satisfactory character, *held* not to put burden on defendants to establish such defense beyond reasonable doubt.

34. Criminal law 🔑823(6)—Instruction that evidence of alibi should be carefully scrutinized held not prejudicial, in view of rest of charge.

Instruction that evidence of alibi should be carefully scrutinized to be sure it was not fabricated *held* not prejudicial, in view of rest of charge stating that alibi was conclusive defense if it raised reasonable doubt of guilt, and that jury should not hesitate to give it full weight when established.

35. Criminal law 🔑829(1)—In instruction defining murder and penalties, failure to tell jury what it must do, if defendants were innocent, held not error, where repeatedly covered.

In instruction defining murder in different degrees and penalties attaching thereto, failure to tell jury what it must do, if defendants were found innocent, *held* not error, where such matter was repeatedly covered throughout charge.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Ray Arnold and another were convicted of murder in the first degree with sentence of death, and, from the judgments and from orders denying their respective motions for new trial, they appeal. Orders and judgments affirmed.

K. D. Robinson, of Auburn, Ralph H. Lewis, of Sacramento, and George A. Connolly, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SEAWELL, J. [1] By an information filed against them on the 29th day of November, 1924, by the district attorney of the county of Placer, Ray Arnold and Edward K. Sayer were jointly accused of the crime of murder, it being alleged therein that they did on the 5th day of November, 1924, in said county of Placer, this state, unlawfully and with malice aforethought kill a human being, to wit, Tamae Ninomiya. Arthur H. Muller, who fired the fatal shot, as will hereafter appear, was never arrested or informed against, as his dead body was identified in San Francisco on the day following the murder. The defendants entered separate pleas of not guilty, went to trial thereon, and the jury returned a simple verdict of guilty of murder of the first degree against them. The court, pursuant to the laws of this state, was required to and did pronounce a judgment imposing the death penalty upon each of said defendants. An appeal from said judgments and the court's orders denying the motions of defendants for a new trial were taken to this court, and said judgments and orders were affirmed. Thereafter a petition to this court for a rehearing of said cause was granted, and the appeal is again before us for decision after reargument by respective counsel.

Appellants have specified many errors committed by the trial court by rulings made in the admission and rejection of evidence. Misdirections of the court in matters of law in its charge to the jury, misconduct upon the part of the district attorney so grave in its demeanor as to have deprived the defendants of a fair trial, and the insufficiency of the evidence to support the judgments are also urged as reasons which should compel the granting of a new trial.

The district attorney, in his opening statement in outlining his theory of the case and the facts he expected to prove, stated to the jury, against the vehement protest of counsel for the defendants, that he would show a general plan, system, scheme, and conspiracy upon the part of the defendants and Muller to make a continuous trip with the use of automobiles into the outlying districts of the San Joaquin and Sacramento valleys, and there to commit a series of robberies upon merchants and tradespeople of the Japanese race. As a part of and in furtherance of the execution of the general plan and purpose as agreed upon and outlined by said defendants and Muller, the district attorney offered to show five or six robberies or attempted robberies of Japanese suburban merchants and dealers committed successively by the defendants, beginning November 2d and ending in murder November 5th. The evidence offered by the district attorney as tending to establish the conspiracy outlined by him was objected to on the ground that such evidence merely had a tendency to connect the defendants with the commission of other independent, isolated crimes which in no way tended to connect them with the crime charged against them. The court, being doubtful as to the admissibility of this class of evidence, ruled that it was not admissible. The correctness of this ruling will be considered at a later period.

[2] The evidence upon which the defendants were convicted consists of both positive or direct evidence and circumstantial evidence. Either considered without reference to the other makes out a strong case against the defendants, and when both are considered together there would seem to have been left little room for the existence of a reasonable doubt on the part of the jury as to the identity of the defendants with the commission of

the murder charged, which was committed in the perpetration of an attempt to commit robbery, and is therefore declared by section 189, Penal Code, to be murder of the first degree.

The material and outstanding facts in the case which tend to connect the defendants with the murder charged against them, as disclosed by the record, may be summarized as follows:

Ray Arnold, Edward K. Sayre (frequently addressed by his associates as "Eddie"), and Arthur H. Muller, three young men whose ages do not appear as matters of record, were unquestionably associates, if not intimates, on and prior to November 1, 1924, and all of them were then residents of the city of San Francisco. Very little appears of record as to the antecedents or as to the mode or manner of life of said persons, except it is shown that Arnold formerly lived at Sacramento, where his father resided, and that while living there he worked as an automobile mechanic for Arnold Bros., who are his uncles and who are dealers in automobiles and conduct automobile repair shops. Sayer, it seems, was or had been the driver of a bus (presumably a motor bus) in the city of San Francisco, and Muller was a frequenter at the Reo Motor Company's place of business in San Francisco and was well acquainted with at least one of its employees, H. E. Buckner. Covering several days, beginning a few days immediately prior to November 1, 1924, Arnold, who was the owner of a new-appearing four-cylinder Essex coach, was at said Reo Motor Company's place of business as often as four or five times a day in close conversation with Muller.

On October 31, 1924, Muller purchased on a sales contract a used Essex touring car from Louis Casalini, upon which he paid down $200 and agreed to pay the balance in monthly installments. Both Arthur H. Muller and the seller, Casalini, signed the contract. The state license number which the car bore was 579907. Arnold brought Muller and Casalini together and assisted in negotiating the sale. The uncontradicted testimony of Buckner is that Arnold, at about the time he was making frequent calls upon Muller at the Reo Motor Company's place of business, furnished Muller with $100 to apply upon the purchase of a car. On the afternoon of November 1st, Muller borrowed from Buckner an automobile tire, size 31–3–75, upon which Buckner, in order to distinguish it from the stock supplies belonging to his employer, wrote or marked his name, "Buckner." This tire would not fit Muller's Essex touring car, but would fit Arnold's Essex coach. Arnold and Sayer admitted they left San Francisco on the first or second day of November in Arnold's Essex coach, but each persistently denied at all times that he had seen Muller since he left San Francisco, or at any time during their five days' trip into the Sacramento valley. The defendants made contradictory statements as to the purposes of their trip into the country, having stated upon one occasion that it was just a "pleasure trip," and upon another that they made a trip into Stockton in quest of liquor, and again that Ray Arnold had ordered tires from Arnold Bros. Company at Sacramento, which had not been received at San Francisco, and that Arnold was investigating the delay in delivery. That the three men left San Francisco on the night of November 1st or the morning of November 2d, Arnold and Sayer in the Essex coach and Muller in the Essex touring car which Arnold helped to purchase, with an understanding as to the next place of meeting, there can be no reasonable doubt.

The first witness called to prove the commission of a robbery in the line of the common plan and agreement, as outlined, was a Japanese fish dealer doing business at a small place known as Florin, near Sacramento. Upon the witness being asked as to the presence of either of the defendants at his place of business on November 2d, an objection was interposed by the defendants, and, after much argument in the absence of the jury, the objection was sustained by the court on the theory that such evidence might tend to connect the defendants with another crime. Another Japanese witness identified Arnold, Sayer, and Muller—the latter by his photograph used at the trial—as the three men who came to her place, located in a small community known as West Sacramento, on November 2d. No other witnesses were offered by the prosecution, in view of the court's ruling, to show the commission of other crimes similarly executed, and, as the prosecution claimed it was able to show, an alternating plan whereby one man remained at the steering wheel of the automobile while the other two, in turn, entered stores and with drawn revolvers terrorized the persons in charge into submission.

A Japanese groceryman identified Arnold as one of two men who entered his store situate in South Sacramento about 10 a. m. November 4th. Sayer was not the person who entered the store with Arnold. A soiled handkerchief was left near the cash register by the "other" man. The wife of this witness also identified Arnold as one of two men who entered her husband's store. She declared, as did her husband, that Sayer was not the other man. She described the other man as a "little big." Muller, the evidence shows, was the tallest of the three.

The evidence, without contradiction, further shows that Muller on November 2d appeared unheralded, driving an automobile, at the home of an elderly lady residing at Stockton, within whose home he had resided as a youth, and remained all night with his old friend and was called upon by Arnold and Sayer on the following morning. Both were positively identified at the trial by the lady as the men who called upon Muller while he was a guest at her home. Arnold was driving the car which he and Sayer occupied. Muller, Arnold, and Sayer held an extended conversation in Arnold's car without the hearing of the witness. Arnold and Sayer soon departed, and Muller visited them at least twice in their room at the Marion Hotel in Stockton. The hotel proprietor, who saw Muller twice as he visted Arnold and Sayer at his hotel, identified a photograph used at the trial as the photograph of the man who visited Arnold and Sayer at their rooms. Arnold and Sayer paid their bill in advance and left the hotel unobserved. Arnold signed the hotel register for both, but the names which he wrote upon the register were kept from the jury upon defendants' objection. Muller left the place at which he was stopping early on the morning of November 4th.

The murder was committed in a store situated in the Japanese quarters of Penryn, Placer county, commonly referred to by the witnesses as Yamanaka store, which seems to have been managed by Saichi Ninomiya and his deceased wife, Tamae Ninomiya. Penryn is 29 or 30 miles distant from the city of Sacramento.

On the afternoon of November 5th, the exact time being variously estimated by the Japanese witnesses at 4:05, 4:10 and 4:15 o'clock, an Essex touring car, according to said witnesses, containing three persons, drew up and was parked in front of the Yamanaka store. A Japanese barber, named Fujimoto, was sitting on the sidewalk near where the car was stopped, and a Japanese named Ikeda was standing in front of said store. Two men stepped from the automobile and entered the store, while the third remained at the wheel of the automobile. Ikeda was carrying in his arms his infant child. As the men entered the store, Ikeda followed them. Mrs. Ninomiya was alone in the store engaged in writing a letter. Ikeda had gone but a little way into the store when Sayer drew a pistol and leveled it upon him, and at the same time Muller drew a pistol upon Mrs. Ninomiya. Muller ordered Mrs. Ninomiya to stand by Ikeda, but instead she attempted to escape from the store by the rear door, and, when within a few feet of the exit, she was shot through the body by Muller and soon thereafter expired. Ikeda fled from the store, giving an alarm by crying "Holdup," as he reached the street. Both men left the store by the front entrance and jumped into the waiting automobile and were soon speeded away by Arnold, who was at the wheel. Neither of the men who entered the store wore a mask or was disguised in any way. Fujimoto, alarmed by the cry of Ikeda, drew near to the automobile into which the two entered, making some sort of a demonstration. He saw the men as they arrived and also as they departed. He testified that he was positive in his identification of Arnold and Sayer, while Ikeda was likewise positive as to Sayer, who had held him at bay in the store, and also as to Muller, whose dead body he viewed in San Francisco two days after the murder.

A fruit raiser whose property adjoins the Japanese quarters was at work in his field at a point about 40 feet from the highway on November 5th. He testified that at about the hour of 3:45 or 3:50 p. m. he saw an Essex coach pass along the highway traveling at a very high rate of speed toward Penryn. He was sure he observed two men in the coach. Within three or four minutes the coach returned, traveling very fast. Another car in front of it, also traveling very fast, was passed by the coach. His view was somewhat interrupted by intervening objects and he was not able to obtain a continuous view for more than a few moments at a time. He said it was traveling too fast for him to tell whether it was a four or six cylinder car. He also thought the car had disc wheels. The witness was of the impression that the two men in the coach occupied the front seat.

Late on the afternoon of November 5th an abandoned Essex four-cylinder touring car was discovered at the side of the highway leading out of Penryn, at a distance of about one mile and a half therefrom. It was the car which Muller had purchased, with the aid of Arnold, from Casalini six days prior to the murder, and it carried the same license plates that were on it at the time Muller purchased it from Casalini. A soiled rag was wrapped about the front plate in such a manner as to conceal the first two figures of the license plate, and the rear license plate was bent in such fashion as to conceal the first three numbers thereon.

Arthur H. Muller appeared at his father's residence in Sacramento at about 7 o'clock on the evening of the murder. On the following day he was dead in San Francisco. Detective Sergeant Gregson of the San Francisco police department placed both Arnold and Sayer under arrest on November 6th. Arnold was found at about 2 o'clock p. m. in front of a Leavenworth-Street apartment house at which he was living, cleaning his Essex coach. He said he arrived in San Francisco on the first boat from Vallejo. Upon his tire rack was found the tire which Muller had borrowed from Buckner on November 1st and upon which Buckner's name was written. Arnold admitted his trip into the country with a fellow called "Eddie," but denied that he knew his surname or his place of residence. After continued questioning by the officer, he told him that his companion on the trip was Edward Sayer, and accompanied the officer to the latter's residence. Sayer admitted his acquaintance with Muller, but denied that he had seen him since the day before he and Arnold left San Francisco. Sayer stated to the officer that Arnold did not take him to his door on the return trip, but let him out of the car about two blocks from his residence.

Neither one of the defendants took the witness chair in his own behalf and the evidence as herein summarized, was not directly contradicted or impeached by any witness presented by the defense. The defendants relied upon the defense of alibi, and offered evidence tending to show that they were not at Penryn at the time fixed by the witnesses called by the people as the time of the commission of the murder, to wit, a few minutes after four o'clock, but were at the city of Sacramento, some 29 or 30 miles distant from Penryn, and it was physically and geographically impossible for them to have participated in the commission of the crime.

[3, 4] Eight witnesses were called to establish the alibi. Of this number, three were blood relatives of the defendant Arnold—uncles; two were employees of one or more of said uncles; one was a close acquaintance of one of said uncles; and the other two were employed as barbers in a barber shop which Arnold was in the habit of patronizing. The two latter testified that Arnold and Sayer left the barber shop at 12:30 p. m. November 5th, and one of said two employees testified that he saw defendant Arnold at the Arnold Bros.' garage at 5 o'clock p. m. on the same afternoon. Horace Arnold, an uncle, and the acquaintance above referred to testified that they saw Arnold and Sayer in a restaurant in Sacramento between 2 and 2:30 o'clock p. m. on November 5th, but did not speak with them. The testimony of these five witnesses, standing alone, had no value as alibi evidence. Given full credence, still the defendants would have had ample time and opportunity to have been at the place of the homicide and to have participated in its execution.

We have made a careful examination of the alibi evidence offered by the defense—in fact, of all the evidence received in the case—and we feel impelled to say in answer to the earnest and insistent claim of counsel to the effect that the alibi evidence was legally sufficient to raise a reasonable doubt in the minds of reasonable men as to the guilt of the defendants, that the failure of the alibi evidence to impress the jury can reasonably be accounted for upon the theory that it lacked sufficient convincing force to create a reasonable doubt in the minds of the jurors. The other three alibi witnesses, who testified that the hour at which Arnold and Sayer were at the Arnold Bros.' place of business was at or very near the time the homicide was committed—according to the time fixed by the Japanese witnesses—estimated the time, as did all the other witnesses called to prove the alibi except one, with reference to the time fixed by an article which appeared in a metropolitan newspaper on November 7th, implicating Arnold in the crime. The newspaper article stated that the homicide was committed at about 4 or 4:15 o'clock on the afternoon of November 5th. The testimony of the witness who comes within the exception above mentioned was given by an employee of Arnold Bros., and the reason assigned by him for looking at his watch at the particular time he saw Arnold and Sayer, and the reason he gave for the incident impressing him as to the exact time, within one minute, was a matter for the jury's consideration in passing upon the probability of his statements and weighing all of his testimony in subordination to the rules of evidence. Thomas Arnold testified that he saw his nephew, Ray Arnold, and Sayer at the garage between 3:30 and 4 o'clock on the afternoon of November 5th. What has been said as to the probability and consistency of witnesses' statements and their relation to the subject-matter of the action were matters for the jury's consideration. Arthur G. Arnold testified that his nephew and Sayer were at the shop or garage at 3:53 on the afternoon of November 5th, and, of course, if this be true, they could not have arrived at Penryn, a distance of 30 miles, within the latest period of time fixed by the witnesses for the people as the time the homicide was committed, to wit, 4:15 o'clock. Estimated according to the testimony of some of the witnesses, they would have been compelled to travel 30 miles in 12 minutes, and under the estimates of others it would have been necessary for the defendants to have covered 30 miles in 17 and 22 minutes, respectively.

[5] Special emphasis is laid on the ruling of the court excluding from the jury's inspection certain time records which it is claimed, if admitted, would have fixed the time that Arthur G. Arnold met and conversed with Ray Arnold and Sayer at the Arnold Bros.' garage at the hour of 3:53 o'clock p. m. November 5th. The witness made no note of the time he saw the defendants on that day and had no recollection of the time and was only able to testify to the hour by accepting certain entries of time made on certain cards and slips of paper by another person, which purported to give the time that repair work was suspended on the car belonging to the brother of the witness in order to give an employee an opportunity to adjust the carburetor of defendant Arnold's car. No adjustment or other repair work was done on Ray Arnold's car, however, as it was in first-class running condition, at least, for fast driving.

We know of no rule of law that would sustain appellants' contention. Section 2047, Code of Civil Procedure, provides that a witness may "refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the *fact* occurred, or immediately thereafter, or at any other time when the *fact* was fresh in his memory, and he knew that the same was correctly stated in the writing. * * *" (Italics supplied.) The fact sought to be established was the time Arnold and Sayer were at the garage, a fact (the time) about which the witness was absolutely without knowledge and was compelled to rely upon an entry made by a third party, who alone was competent to testify to the correctness of the facts embraced in the entry, but who was not called as a witness nor was his absence accounted for. The only party that was entitled to read the memorandum to the jury was the district attorney. Section 2047, Code Civ. Proc. Had the witness made the writing, or had it been made under his direction, with a knowledge of the facts therein contained, it would have been admissible, even though the facts had passed from his mind. But no such case is before us. All that the witness was entitled to testify to, however, went to the jury. The court, under the circumstances of the offer, did not commit error in excluding the memoranda.

[6-9] Appellants assign as gross misconduct on the part of the district attorney all references made by him in his opening statement to the jury as to other specific robberies or attempted robberies committed by the defendants in their excursion into the territory invaded by them, beginning November 2d and ending November 5th. In outlining to the jury the facts he expected to prove, he stated that he would show a general plan and agreement on the part of Muller, Arnold, and Sayer to make an invasion into the territory which they entered for the purpose of committing a series of robberies upon Japanese suburban merchants, and that the specific offenses or attempted robberies, including that of the Yamanaka store, were but a part of the general plan and conspiracy. He offered to show, and evidence was received which tended to establish his theory, that preparations had been under way by defendants and Muller for some days prior to November 1st, as shown by their automobile transaction, their meeting and conferring together, and the methods of travel and concealment of identity of person, and the execution of the crimes which they had planned to commit, and, as contended, did commit, and other concerted acts tending to establish a conspiracy, all of which, he claimed, tended to show a general plan and scheme, and that the murder was but a likely incident of the lawless enterprise.

An opening statement is precisely what the term implies. It may or may not be made by the district attorney. There is no provision of law that compels him to make a statement. The right, however, has never been questioned. Its office is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect. The statement is not evidence, and no jury would accept it as facts proved. If the district attorney overstates his case or fails to sustain his opening statement by evidence, or, if, by the court's ruling, the evidence offered to support it is ruled inadmissible, the misfortune or error of judgment is likely to react to his disadvantage. It is only in cases where the conduct of the district attorney is flagrantly improper or works a legal prejudice against the defendant that an appellate court would be justified in reversing a judgment. It was the theory of the appellants that the several robberies claimed to have been committed by the defendants were separate and distinct offenses, and tended in no way to connect the defendants with the perpetration of the attempted robbery by which the Japanese woman lost her life. It is elementary that separate and distinct crimes which have no reasonable connection with the commission of the crime with which a defendant is upon trial cannot be shown against him. But that is not the question before us. Here the district attorney offered to prove a conspiracy, an agreement to confederate together in the commission of a series of criminal acts to be executed on a definite tour of criminal enterprise, in a similar manner with the aid of rapid-transit agencies.

[10] The principle that evidence tending to connect a defendant with the commission of other crimes is admissible if there be a rational connection between the offenses or crimes sought to be proved and the main charge, if it fairly appears that in the commission of said crimes the participants acted in concert pursuant to a well-prepared scheme to engage in the commission of a series of crimes upon a definite, specific criminal enterprise, was accepted, without question, as settled law in the early case of People v. Brown, 59 Cal. 345. Brown was jointly charged with four others with the murder of William Wright. The facts, as established by the evidence, are stated in the opinion as follows:

> "The defendants lay in ambush, and they were there not for any lawful purpose, but in pursuance of an agreement which they had made to go into Mendocino county to commit larceny, burglary, and robbery, and particularly, to rob the tax collector of that county, and to resist by force any who might attempt to interfere with them or to capture them. All of them had been ex-state prison convicts, and, in pursuance of their agreement, they met in Mendocino county, in the spring of 1879, armed with Winchester rifles, guns, and pistols, and supplied with ammunition, and opened their unlawful enterprise by stealing a steer, which they killed and converted into jerked beef for their use. In that act they were discovered by a constable of the county, who made a complaint against them before a magistrate of the county. The magistrate issued a warrant against them by fictitious names; and, upon receiving it, the constable summoned a posse comitatus to assist him in arresting the defendants."

Wright led the posse, and, coming to an extinguished camp fire, stooped down to feel the ashes. The outlaws fired upon the posse and killed Wright and another. On principle, there is no distinction between the Brown

Case and the instant case. We do not hold that the commission of isolated, separate crimes, haphazardly committed by habitual criminals or by those who are merely criminally inclined, is sufficient to permit the introduction of evidence of other crimes, but where the persons are engaged in a plan, as pointed out by the authorities, the commission of other crimes which logically tend to prove the existence of a *continuing* conspiracy is admissible.

The identical question urged by appellants was decided against their contention in People v. Wilson et al. (Cal. App.) 245 P. 781, Mr. Justice Finlayson writing the opinion. The defendants were charged by an indictment containing two counts with two specifically described burglaries. Evidence was admitted to show the commission of other robberies and acts done by the defendants in the furtherance of a common design to rob persons generally in and about the city of Los Angeles. The court correctly stated the law in the following language:

> "In such cases, it is no objection that the evidence covers a great many transactions and extends over a long period of time, or that it may show the commission of other crimes. When the question is whether the accused was a party to a general conspiracy, distinct overt acts in furtherance of such a design may be given in evidence. People v. Collins, 64 Cal. 293, 30 P. 847; People v. Berry, 191 Cal. 109, 122, 215 P. 74; Commonwealth v. Scott, 123 Mass. 222, 25 Am. Rep. 81; Hall v. State, 3 Lea (Tenn.) 552. See, also, Comm. v. Stuart, 207 Mass. 563, 93 N. E. 825; State v. Roberts, 95 Kan. 280, 147 P. 828; Jenkins v. Commonwealth, 167 Ky. 544, 180 S. W. 961, 3 A. L. R. 1522; and Worden v. United States, 204 F. 1, 122 C. C. A. 315. In Commonwealth v. Scott, supra, it was held that, on the trial of one charged with breaking into and entering a bank with intent to commit robbery therein, evidence by an accomplice of a general conspiracy previously formed between the defendant, himself, and others to rob banks, in pursuance of which the robbery in question was planned and carried out, as well as evidence of the acts of the conspirators in making preparations to carry out the robbery, is admissible. In that case the court, on page 235 says: 'There being evidence sufficient to be laid before the jury to prove the conspiracy as to which the presiding justice was, in the first instance, to determine, it was competent for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed.' In Hall v. State, supra, the Supreme Court of Tennessee held that under an indictment for the burning of a house evidence was admissible of the organization of a band of conspirators to rob and burn houses generally, if the particular act was done by them in furtherance of the general design, although this particular house was selected by them after the original agreement was entered into." See, also, Dorsey v. State, 25 Ariz. 139, 213 P. 1011; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

Appellants direct our attention to a line of cases which, they contend, sustain them in the claim that the evidence by which the district attorney offered to show the commission of other robberies was inadmissible, and the appellants were, therefore, prejudiced thereby. The first case is Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077. The crime of which appellants Boyd and Standley were convicted was the murder of Lunsby, committed April 6, 1890, while Boyd, Standley, and one John Davis were attempting to commit robbery upon one of a group of persons. Davis, a confederate, was also shot and killed in the firing that ensued as a result of the alleged attempted robbery.

Evidence was allowed by the court which showed that on April 15, 1890, Stanley robbed Richard C. Brinson and Samuel R. Mode; that on March 17, 1890, he and Boyd robbed Robert Hall; that on March 20, 1890, Standley and Davis robbed John Taylor; that on April 5, 1890, David, Boyd, and Standley robbed Rigsby's store. The court gave strong intimations that had the evidence as to prior robberies been limited to the robberies committed upon Rigsby and Taylor—the first of which was committed one day before the robbery that resulted in the homicide and in which robbery both of the defendants and Davis were shown to have participated, and the second, which was committed sixteen days prior to said homicide, in which only Standley and Davis were shown to have participated—the verdict of the jury would not have been disturbed, although the evidence offered to establish said two prior robberies went beyond the objects for which it was allowed by the court, to wit, identification of the defendants. The other alleged robberies were regarded by the court as being remote. It is further to be observed that the three persons who were participants in the alleged attempted robbery which resulted in murder were not shown to have been participants in any one of said prior robberies except the one committed the day before the murder in question. The reception of the evidence as to that robbery, it will be noted, was not held to be error. Further, the court points out that evidence was received in the case tending to show that the defendants were not engaged in an attempt to commit robbery at the time of the homicide, but were merely resisting an attempt on the part of the person killed and his associates, none of whom were officers, to arrest them for the commission of said alleged prior robberies or some of them. If this claim of the defendants was true, then, of course, the commission of other alleged prior robberies could have had no connection whatsoever with the murder, as the homicide was not committed in the perpetration of or attempt to perpetrate robbery. Because the facts, as stated in the opinion, bear no resemblance to the facts of the instant case, the Boyd Case cannot be regarded as an authority here. It is to be further observed that no claim of conspiracy was made as between Boyd, Standley, and Davis in the commission of all of said prior robberies, and, obviously, upon the facts as stated, no such claim could successfully have been made. Boyd, Standley, and Davis were not shown to have been coconspirators in a general plan and purpose in the commission of but one of said prior robberies, to wit, the robbery committed the day before the homicide. All other alleged prior robberies were, therefore, separate and distinct crimes haphazardly committed by outlaws, and neither the evidence, so far as the facts are disclosed by the opinion, nor the circumstances of the various crimes—possibly with the exception of the two pointed out in the opinion—justified their reception in evidence. No claim of conspiracy was made, and no such evidence of a general plan and purpose, as the district attorney outlined in his opening statement in the instant case, was shown to exist in the case relied upon by appellants.

People v. Jones, 31 Cal. 565, is not an authority to the point for which it is cited. The major question in that case was whether the corpus delicti had been established. The court held that it had not been established, and that proof of other robberies committed by the defendant and his associates *subsequent* to the commission of the robbery for which he was on trial, being distinct and different offenses, could not be used as evidence of the commission of the crime of robbery charged against the defendant, as to the commission of which there had been a failure of proof. Such evidence, as the decision cited by appellants with much frequency observes, was "incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute." People v. Lane, 100 Cal. 379, 34 P. 856. The law ruling the Jones Case, supra, was correctly stated. People v. Lane, supra, involves the question of the admissibility of evidence showing the shooting of a second person by a peace officer some few minutes *after* he had shot and killed another person in an attempt to place said person under arrest. The officer was on trial charged with murder, as defined by section 187, Penal Code. No claim was made that the killing was done in the perpetration of robbery or in an attempt to commit robbery, as defined by section 189, Penal Code. The court properly held that, under the facts of the homicide, the shooting of the second person in no wise tended to establish a preexisting intention on the part of the officer to commit, with premeditation and deliberation, the murder charged against him. In that case, it was necessary to establish all of the elements constituting murder, as defined by section 187, Penal Code. To constitute murder of the first degree there must be shown to exist in the mind of the slayer a deliberate, premeditated, preconceived design to take life. The subsequent shooting of the second person, under the facts of the Lane Case, did not have the remotest tendency to establish malice on the part of the slayer.

[11, 12] This court, in discussing the question of intent, which is a vital question in all homicide cases where the killing is not committed while the slayer is engaged in the perpetration of any one of the felonies named in section 189, supra, properly observed that in murder an intention may be and is often simultaneously formed, and its existence cannot be adopted as a predicate from which an inference can be logically drawn that it existed prior to its manifestation.

> "That it [intention] may have existed before is conceded; but that it did exist before, the subsequent fact does not either logically or clearly tend to prove." People v. Lane, supra.

The question of intent, as that term is understood in its relation to murder, was the gravamen of the Lane Case. It is there said that:

> "Collateral evidence may often be both relevant and competent to prove motive, which is *comparatively permanent and constant*, while it would be neither relevant nor competent to show intention as an isolated fact." (Italics supplied.)

In the instant case, the law does not require proof of intent, deliberation, or premeditation on the part of the slayers to constitute murder of the first degree. All that the law exacts is proof that the Japanese woman was killed by any one of the participants in the robbery, if it be shown that the homicide was committed in the perpetration of or in an attempt to commit robbery.

The cases above reviewed are typical of other cases cited by appellants, and it would serve no useful purpose to point out the elements of fact which distinguish them from the instant case.

[13-16] Conceding, for purposes of illustration only, the soundness of appellants' claim to the effect that evidence as to other crimes was not admissible, still appellants were not legally injured as the court ruled with them, excluding all evidence offered to show other crimes, and admonished the jury upon several occasions during the progress of the trial and at its conclusion not to consider any references made by the district attorney to any other crime or crimes than the one charged. Evidence of the meetings of Arnold, Muller, and Sayer at Stockton, Florin, and other places was clearly admissible, even though the general conspiracy theory be untenable, and it matters not that possible unfavorable impressions might have arisen from such associations. It was relevant to the specific crime described in the information. The excluded evidence showing false or fictitious registrations by the defendants at certain hotels was also admissible. The several cases cited by appellants which held it to be error to admit evidence showing the defendant had at other times assumed a fictitious name are wide of the mark. In those cases, the assumption of a false name had no possible connection with the fact of participation in the crime charged. In the instant case, registration under false names by the defendants was a part of the plan adopted to avoid detection in the commission of the crime.

The rule is without exception that evidence which tends to show preparation looking to the commission of a crime, as well as acts and circumstances in pursuance of its accomplishment, such as concealment of identity, clandestine movements on the part of the accused, and plans laid for escape from the scene of the crime, is admissible against one charged with crime. So, too, the meeting together of persons, prior to the commission of a crime with which they are charged, and the circumstances thereof may be relevant to the questions of preparation and concert of action, and therefore may be properly brought to the attention of the jury. Such evidence would be admissible to identify the defendants with the commission of a single offense upon the theory that they were coconspirators, or under the provisions of section 31, Penal Code, which makes all persons who aid and abet in the commission of a crime principals in any crime so committed.

[17] Appellants also assign as prejudicial error the following statement made by the district attorney in his opening statement of what he expected to show, to wit, that on the morning of November 5th Muller, Arnold, and Sayer went to the house of Mrs. Arnold, the divorced wife of Ray Arnold, in the city of Sacramento, and the latter met his former wife and discussed various matters with her; that Mrs. Arnold said she was going into the foothills to pick red berries; that Ray Arnold said, "Come with us, we are going to the foothills;" that Sayer disapproved of her going; that they discussed putting on a party later; and Mrs. Arnold inquired of Arnold, why, if he had money to put up for a party, he did not pay alimony which he owed for the support of their child. At this point one of the attorneys for the defendants, without making any formal objection to the proposal of the district attorney, addressed the court and stated that it seemed to him that the district attorney was again clearly attempting to prejudice the defendants' cause by stating matters which were absolutely immaterial and irrelevant. The court, of its own motion, withdrew from the jury's consideration all references made to unpaid alimony, holding the subject to be immaterial, and instructed the jury to disregard them. The fact that the defendant Arnold was in arrears in the payment of alimony could not have incited the jury to return its verdict against either or both of the defendants, especially after the court's statement to it that the subject was not material to the issues of the case. Mrs. Arnold was not a witness in the case, and the alimony incident was not again referred to.

[18] Appellants complain that irreparable injury was done the defendants during the examination of witness W. J. Walsh, the proprietor of a hotel at Vallejo. Some time after midnight on November 5th, two men whom the district attorney claimed were Arnold and Sayer entered Walsh's hotel, and one registered for both. Walsh described them to the district attorney as being nervous men, and further said that they impressed him as being "bad men." Walsh's testimony at the trial was a disappointment to the district attorney. Upon being requested by the prosecution to describe the manner of the men who entered his hotel and to relate all that happened, the witness stated that they entered the hotel and registered and he assigned them to a room, and that was all he could say about the matter. Upon further questioning he said, "They appeared to be a little nervous." Upon an attempt to show that the witness was suppressing the actual appearance of the persons whom he was called to identify as the defendants, the district attorney asked the following questions, which the court permitted:

> "Q. Did you not tell Sheriff Gum and myself in the presence of the Chief of Police of Vallejo * * * that these defendants were very nervous; that Sayer was extremely nervous; and how, as a hotel man who rented rooms for a number of years during your life, that was the first time you ever had the thought go through your mind that you were renting a room to a couple of bad men? A. I did."

On cross-examination the witness completely destroyed the effect of his testimony, as the following proceedings show:

> "Q. So far as you know, you never saw these two men on trial before in your life? A. Not that I know of.
>
> "Q. Before to-day? A. Well I was here [Auburn] just about a week ago. I thought I saw them up in court.
>
> "Q. You are not willing to positively identify these two defendants as the two men who were at your hotel, are you? A. I would not want to swear to it; no.
>
> "Q. And you realize what it might mean, and you want to be fair to the defendants? A. I do; yes sir.
>
> "Q. As near as you are willing, you say at this time there were two men that came there—that true—registered? A. Yes, sir.
>
> "Q. And whether or not these are the same ones, you are not going to swear to it? A. No; I am not positive.
>
> "Q. That is all."

This concluded the examination of the witness. It is very apparent from the examination above set out that the witness failed to identify the defendants as the men whom the witness thought were "bad men." The error committed by permitting the district attorney to impeach or refresh the mind of the witness, grant it to be error, was not sufficiently prejudicial to justify a reversal of this case had the witness testified in somewhat positive language, and much less so when its force is wholly destroyed by the witness, who stated under oath that the appearances of the two persons, which created in his mind the thought which he previously gave expression to, did not convince him that the persons that confronted him in court were the same men that registered at his hotel. The most the witness gave was his impression, which did not amount to a statement of fact.

[19] The father of Arthur Muller was called as a witness by the prosecution for the purpose of eliciting certain alleged statements made by the son to him shortly after the homicide and to identify the signature of the son to the Muller-Casalini automobile sales contract, and also to identify a shirt which had been delivered to him by the coroner of San Francisco. The sales contract was clearly admissible as a circumstance connecting Muller with the ownership of the abandoned car found on the highway a short time after the homicide was committed, and the entire subject-matter, taken in connection with all the other facts of the case, was properly submitted to the jury's consideration. The shirt and other wearing apparel presumably worn by Muller at the time of his death were inconsequential in effect.

[20-22] The appearance and manner of Muller three hours after the commission of the homicide was admissible in evidence relative to consciousness of guilt; its weight, effect, and sufficiency being solely a matter for the jury's consideration. It was incumbent upon the prosecution to show that Muller was one of the perpetrators of the crime, in order to make out a case against the defendants. That Muller appeared nervous was but a circumstance that might or might not have special significance. The fact that Muller was not on trial or was not even alive at the time of trial did not foreclose the prosecution from showing his participation in the crime. Evidence showing the means of his escape, the route taken by him on his flight, and every incriminatory act done by him, and any evidence of the crime that may have been found upon his person was admissible, even though Muller was dead at the time of the trial.

[23] The district attorney attempted to get before the jury, limited solely to Muller, a purported conversation which the latter had with his father at the time he appeared at the father's home. In his opening statement to the jury the district attorney stated, against the protests of the defense, that he expected to show that Muller appeared at his father's home and told him and Muller's sister-in-law "what had happened; told them of the other events that I have narrated—." Here the defendants interrupted and assigned the statement as misconduct on the part of the district attorney. The sentence was not finished, but sufficient appears to warrant the inference that the son had related to the father substantially the facts which the district attorney expected to prove as related by him in his opening statement. The court remarked to counsel for the defendants that the district attorney had not stated what Muller had said to his father. After much discussion between court and counsel, the district attorney, continuing, said:

> "Muller asked his sister-in-law if she would testify, in case he was brought in, that he had been home all the afternoon. She protested, and after some discussion she said she would so testify."

Counsel for the defense also assigned this statement as misconduct. The court ruled that any alleged conversations between Muller and third persons not in the presence of the defendants were not admissible. The district attorney suggested that he would again present the question during the trial. The father of Muller was called in keeping with the suggestion of the district attorney and asked to relate the conversation he had with his son at the time of the latter's visit at his home. The defendants' attorney objected to the evidence, and the court excluded it. We cannot say that the district attorney was guilty of willful misconduct in his effort to get before the jury the statement made by Muller to his father as to his part in the crime. Had Muller been alive the statements made to the father would have been admissible, at least as against him. But, however that may be, the court excluded the evidence and upon numerous occasions admonished the jury to disregard the statements of the district attorney as to any conversations which he claimed took place between Muller and his father.

[24] It is proper here to observe that the shooting of the Japanese woman by Muller, if not actually admitted by counsel for the defendants, was not seriously questioned at the trial, their efforts being, so far as Muller was concerned, to break the force of any evidence that might tend to connect them in crime with him. Of course, any legal evidence tending to connect the defendants with Muller was material and relevant. If this were not so, section 31, Penal Code, would be rendered meaningless and ineffectual, and the statutes penalizing conspiracies would fall with it.

[25, 26] It was not error to admit in evidence the photograph of Muller, by which certain witnesses identified him, and which was, no doubt, scrutinized by the jurors. No evidence was offered to show that it was not a true likeness. His father was on the stand and an opportunity was given to minimize its value as identifying evidence, if it was vulnerable to impeachment. The registrations testified to by the hotel proprietors, had the handwriting been identified as that of either of the defendants, would also have been admissible. The testimony of the dep-

uty sheriff who acted as jailer of the Placer county jail and one or two other attendants, who heard sounds emanating from the cells occupied by the defendants and another prisoner, pending trial, and the finding of fresh cuts upon the cell bars immediately thereafter, and the location of about a dozen saws concealed in a box to which the defendants had access was properly admitted. The admissibility of such evidence as a circumstance tending to show a consciousness of guilt was approved in the case of People v. Crowley, 13 Cal. App. 322, 109 P. 493, wherein the facts showing an attempted escape from jail were not unlike the facts testified to by the jail attendants in the instant case. See, also, People v. Ellis, 188 Cal. 682, 206 P. 753, and People v. Welsh, 63 Cal. 167.

[27] The final charge to the jury was unusually lengthy and certainly cannot be said to have been unfavorable to the defendants. The instructions, however, are vigorously attacked and some few of them, disassociated from the context of the entire charge, may appear vulnerable to the critical analysis to which they have been subjected by appellants, but, when considered as a whole, it cannot be said that the infirmities contained therein deprived the defendants of a fair and impartial consideration of the case by the jury. Time after time the jury was instructed that, unless every essential element constituting the crime was proved beyond a reasonable doubt and to a moral certainty, the verdict must be one of not guilty. The burden of proving the defendants guilty beyond a reasonable doubt and the presumptions of innocence which accompanied them throughout the trial were phrased in many different forms, and the jury was repeatedly told in positive language that, unless the defendants were shown to be guilty of the specific offense alleged against them, the jury must find them not guilty.

[28, 29] We agree with counsel that instructions on the subject of reasonable doubt should be expressed in the language that has been frequently approved by this court. No enlargement upon the approved instructions should be attempted. Trial courts should not assume the unnecessary risk of improving upon the age-tested instruction as prepared by Chief Justice Shaw. We have examined the instruction given in this case and find nothing therein that can be said to be a material departure from the standard instruction on the subject. Every principle of law announced by the instructions given has been approved by cases of this and other courts. By instruction No. 7 the jury was told that proof of guilt beyond a reasonable doubt "means that the evidence must be such that it will satisfy the mind, conscience, and judgment of the juror, and satisfy him of the guilt of the party to a moral certainty and beyond this reasonable doubt."

Instruction No. 8 was as follows:

> "The prosecution is not called upon nor is not bound to prove the guilt of any person accused of crime to a demonstration, to an absolute certainty, for moral certainty of guilt is all that the law demands, such certainty as satisfies and directs the minds of those who are bound to conscientiously act upon it."

Besides the foregoing instructions on the subject of reasonable doubt, an instruction framed by the defense and doubtless entirely satisfactory to it was given. The jury could not have suffered from a want of enlightenment on the subject. By four elaborate instructions the jury was warned against harboring any prejudice against the defendants by reason of statements made by the district attorney as to the commission of other crimes by the defendants or otherwise arising during the trial. The two which follows are typical of the others:

> "You are instructed in this case that you must disregard and banish from your minds any statements or offer of proof by the district attorney, evidence in support of which was not admitted by the court; and you are distinctly instructed that statements of the district attorney in his opening statement as to proof of other crimes must be entirely disregarded by you, and you must not in any wise consider them in determining the question of guilt or innocence of these defendants.
>
> "Under your oaths as jurors you are to consider only such evidence as has been admitted by the court, and you must disregard and discard from your minds every impression or idea entertained by you before being sworn as jurors in this case; you must also disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to and the objections to which were sustained. This case is to be tried only on the evidence which is before you, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted. You must not consider any evidence that has been excluded by the court in determining any fact in this case."

[30] The court in attempting to instruct the jury in the language of section 31, Penal Code, defining principals in crime, used *or* instead of *and*, the instruction reading:

> "All persons concerned in the commission of a crime, whether they directly commit the act constituting the crime or aid *or* abet its commission, shall be prosecuted and punished as principals."

This instruction was given in the abstract and immediately following it a specific, concrete instruction was given on the subject and the conjunction *and* placed in its proper order. If the instruction as given in the abstract was erroneous, it was cured by the elaborate instruction that followed. People v. Dole, 122 Cal. 486, 55 P. 581, 68 Am. St. Rep. 50. The jury in the instant case, as was said in the case above cited, could not, in view of what followed and the general circumstances of this case, "have taken the charge as to aiding and assisting in its narrow and literal sense," as used in the first instruction.

[31] Exception is taken to an instruction framed on section 1963, subdivision 5, Code of Civil Procedure, defining disputable presumptions, given upon request of the prosecution. The subdivision provides that evidence willfully suppressed is presumed to be adverse, if produced. The instruction was to the effect that if the jury should find that the defendants had *willfully* suppressed evidence, in the absence of proof negativing the presumption, it should consider that such evidence, if produced, would have been adverse to the defendants. The issue to which this instruction could have been applicable is not apparent. It should not have been given. Appellants claim that it could only have been regarded by the jury as equivalent to stating that the failure of the defendants to take the stand and testify was a suppression of evidence and raised the presumption that, had they done so, their testimony would have been adverse to their case. We do not think the language of the instruction is susceptible of such a construction. Their failure to become witnesses could not have been considered as a *willful suppression* of evidence. They had a legal right to remain mute, and the court by numerous instructions repeatedly, at the request of the appellants' counsel, told the jury that no adverse or unfavorable inference could be indulged against them because they had not taken the witness chair. *Three* separate instructions supporting the right of the defendants to remain silent and instructing the jury that no adverse presumption should be indulged against defendants for not testifying in the case were given. Giving effect to the natural meaning of words, the instruction cannot be denounced as prejudicial error, especially in the light of the other instructions.

[32] Complaint is made to the giving of the instruction that has been frequently before this court during the past two years, wherein the jury was instructed that in determining whether the death penalty should be pronounced, or whether the defendants should be relieved of the extreme penalty of the law, was within the discretion of the jury, but the discretion was not an arbitrary one, etc. This court, while it has refused to reverse cases solely because of the giving of the instruction, has, nevertheless, advised against any suggestion coming from the court which might be regarded as a limitation upon the jury's right to exercise unhampered its discretion in determining whether the defendants should suffer death or be imprisoned in the state prison for life. The precise instruction was held not to be error by the decisions of this court in our earlier cases, and has been given special attention in a number of recent decisions which, it would seem, should be known to all prosecuting attorneys trial courts, and members of the profession. We again repeat, the instruction does not, of itself, compel a reversal of a criminal case. People v. Craig (Cal. Sup.) 235 P. 721; People v. Casade, 194 Cal. 679, 230 P. 9; People v. Wolfgang, 192 Cal. 754, 221 P. 907; People v. Connelly, 195 Cal. 584, 234 P. 374; People v. Perry, 195 Cal. 623, 234 P. 890.

[33, 34] The alibi instruction given in People v. Lee Gam, 69 Cal. 552, 11 P. 183, was given verbatim in the instant case. This court, confining itself to the *only* instruction given on the subject of an alibi in the Lee Gam Case, but which is not true of the instant case, said:

> "Taking the charge as a whole, and giving it an unstrained interpretation, it does not appear that the jury were instructed upon the weight of evidence.
>
> "The part objected to was very similar to that given by the learned judge below in the case of People v. Wong Ah Foo, 69 Cal. 180 [10 P. 375], and as was said there, so it should be declared here, that, 'viewed in the light of good sense, we do not see that the language complained of went beyond a reasonable and fair latitude of observation permissible from the judge to a jury.' Bishop's Crim. Proc. 982–1064."

The portions of the instruction which are vigorously assailed by counsel for the defendants read:

> "The effect of an alibi, when established, is like that of any other conclusive fact presented in a case. Showing, as it does, that the party asserting it could not have been present at the time of the homicide, and therefore did not participate in it, is, when credited, a defense of the most conclusive and satisfactory character.
>
> "The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated; that, even, when wholly false, its detention may be matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance; these are considerations attendant upon this defense which call for some special suggestions upon the part of the court.
>
> "These are, that while you are not to hesitate at giving this as a defense full weight, that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitled the defendants to an acquittal, still you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

There is no merit in the complaint of appellants that the first paragraph of the instruction tended to cast upon the defendants the burden of proving or establishing beyond a reasonable doubt the alibi defense. It simply informed the jury that when the alibi is established it constitutes a defense of the most conclusive and satisfactory character, and by the last paragraph of said instruction the jury was told, in effect, that it mattered not whether the alibi was conclusively established or whether the evidence was such as to merely create a reasonable doubt in the minds of the jury, the defendants would be entitled to an acquittal in either case. The instructions given in the cases of People v. Roberts, 122 Cal. 378, 55 P. 137, People v. Levine, 85 Cal. 39, 22 P. 969, 24 P. 631, and People v. Lattimore, 86 Cal. 403, 24 P. 1091, which are cited as passing upon an instruction substantially identical with the instruction given in the Gam Case, supra, and the instant case, differ materially from the latter. The instruction in the Roberts Case told the jury that an alibi is a good defense "when satisfactorily proven," and "whether or not an alibi was proven and established to your satisfaction in this case is a fact for you to decide," etc. No suggestion was made in the case that, if the alibi was sufficient to raise a reasonable doubt, the defendant was entitled to an acquittal.

The instructions given in the Levine and Lattimore Cases, supra, which were identical, went far beyond the language used in the instant case in unfavorable comment as to the defense of alibi and were lacking in curative language, and yet both judgments were affirmed. In the Lattimore Case, the court, addressing itself to the alibi instruction, said:

> "We again repeat that the defense of alibi is 'not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause;' and we may add that if trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed. But in this case, as in the Levine Case, the charge of the court, taken as a whole, was so full and fair to the defendant that we cannot conceive that any injury resulted to the defendant from this unnecessary instruction in regard to the scrutinizing of the evidence given in support of the defense of alibi."

In People v. Girotti, 67 Cal. App. 399, 227 P. 936, the court had before it an instruction similar to the one given in the instant case. Before the question of alibi had been reached the court had concluded that the case must be reversed because prejudicial error was committed by the court in its ruling on a matter of evidence. The court criticized the instruction here given, and, without stating definitely whether the assumed error was reversible error, concluded by saying "the instruction should never be given." It will be observed, however, that Mr. Justice Finch, who was the author of the opinion in the case last cited, had no occasion to consider the effect of many curative instructions such as were given in the instant case. People v. Smith, 189 Cal. 31, 207 P. 518, contains the last expression of this court on the subject of alibi as a defense. That decision is not strictly accurate in the statement that the Levine and Lattimore instructions were the same as the Lee Gam instructions, and it is in error in the statement that an instruction similar to the Lee Gam instruction was held to be reversible error in the Roberts Case, "upon the grounds that they constitute a charge upon the weight of the evidence, and that they cast the burden of proof upon the defendant." The Roberts instruction, as we have already pointed out, was unquestionably amenable to the vice imputed to it, but this cannot be said of the Lee Gam instruction as to the point of casting the burden of proof upon the defendant to prove the alibi. The decision, however, approves the judgment for the reason "that the state of the evidence in the case at bar renders the error harmless."

It would seem that if there is such a thing as surcharging a jury's mind with the importance of giving full faith and credit to a defense based upon an alibi that it was accomplished in the instant case. Nine separate instructions of considerable length and covering every possible phase of the law, as contended for by the defendants, were given. A fair sample of the instructions given follows:

> "The court instructs the jury that an alibi simply means that the defendants were at another place at the time the crime charged is alleged to have been committed, and therefore could not have committed it. All the evidence should be carefully considered by you, and, if the evidence on this subject, considered with all the other evidence is sufficient to raise a reasonable doubt as to the guilt of the defendants, you should acquit them. The defendants are not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of their presence at the time and place of the commission of the crime charged, if you find that a crime was committed."

The defense, when examining jurors on their voir dire, made special emphasis of alibi as a defense and examined practically every juror as to whether he would carefully, conscientiously, and honestly consider such a defense. No juror was accepted who did not answer satisfactorily the many questions propounded as to whether he would give the same careful, unprejudiced consideration to the defense of alibi as he would to any other defense known to the law. We are of the opinion that the defendants were not prejudiced by the court's charge taken in its entirety.

The depreciated portions of the instructions which are pointed out in the above-cited cases cannot, under legal precedents of this court, be held to constitute reversible error in the instant case for the reasons herein stated. Nevertheless, we again call to the attention of district attorneys who continue to offer, and to trial courts which continue to give them, that in so doing they assume an unnecessary risk.

Appellants further complain that the court in giving its charge to the jury assumed in its illustrations of propositions of law that certain facts had actually been proved in the case, which was to the prejudice of the defendants. The record does not sustain appellants' complaint.

[35] The court, of its own motion, gave as the last instruction one defining murder in its different degrees and the penalties attaching thereto. Bitter complaint is made because the court failed to tell the jury in this single instruction what it must do "in case they found the defendants innocent." The court was here merely instructing the jury as to the several kinds of verdicts it might return in the event that it should find the defendants guilty. There was no occasion to inform them concerning the return of a simple verdict of not guilty, but the court in this connection did read to and submit to the jury a verdict of not guilty. The court repeatedly throughout the charge instructed the jury in various forms and combinations of words that it must return a verdict of "not guilty" and acquit the defendants, unless they were proved guilty in the manner prescribed by law. The contention is wholly without merit.

Other assignments of error have been made, and those which are not disposed of in the discussion of the major questions are deemed not to be of sufficient importance to require an extended discussion.

A careful examination of the entire record convinces us that the defendants were fairly tried and legally convicted, and that no errors of law of sufficient gravity to warrant a disturbance of the verdict of the jury were committed. The court was fair and impartial in its rulings and maintained that judicial calm which should always characterize trial judges in presiding over cases where human life is involved. The district attorney was zealous, but it cannot be said from the record that he was guilty of willful misconduct or contumacious demeanor. His zeal, however, was not greater than that shown by counsel for the defendants in their earnest effort to protect the rights of the defendants.

The orders and judgments appealed from are therefore affirmed as to each defendant.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

---

199 Cal. 506

REGENTS OF UNIVERSITY OF CALIFORNIA v. RILEY, State Controller. (S. F. 12081.)

(Supreme Court of California. Oct. 14, 1926.)

1. Statutes ⚿107(7), 119(3)—Act providing appropriation for additional agricultural school facilities held not in violation of constitutional provision that every act shall embrace but one subject expressed in title (St. 1923, p. 645; Const. art. 4, § 24).

St. 1923, p. 645, providing for purchase of land and erection of buildings for agricultural school, *held* to embrace but one subject and therefore not to violate Const. art. 4, § 24, providing that every act shall embrace but one subject as expressed in its title.

2. Statutes ⚿119(3).

St. 1923, p. 645, appropriating money in two installments for purchase of land and erection of buildings for agricultural school, *held* not to violate Const. art. 4, § 34, providing that every act shall embrace but one item of appropriation as expressed in its title and provisions.

In Bank.

Original petition by the Regents of the University of California for a writ of mandate against Ray L. Riley to compel respondent, as Controller of the State of California, to draw his warrant for money appropriated. Writ granted.

Jno. U. Calkins, Jr., and Calkins, Hagar, Hall & Linforth, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., for respondent.

WASTE, C. J. The petitioner is here seeking a writ of mandate to compel the respondent, as controller of state, to draw his warrant for the sum of $50,000, appropriated by the act of June 5, 1923 (Stats. 1923, p. 645), for the purchase of lands and the erection of buildings for the College of Agriculture of the University of California. The respondent, who has refused to honor the demand of the board of regents of the University, has demurred to the petition on general grounds, and advances the contentions that the act violates section 24, article 4, of the state Constitution, which provides that every act shall embrace but one subject, which subject shall be expressed in the title, and is also violative of section 34 of the same article, which declares that no bill making an appropriation of money, except the budget bill, shall contain more than one item of appropriation, and that for a single and certain purpose to be therein expressed.

The act is entitled:

> "An act to provide additional land and buildings for use in connection with the department of agriculture of the University of California at

Berkeley, and making an appropriation therefor."

By section 1, there is appropriated out of any money in the state treasury, not otherwise appropriated, the sum of $50,000, or so much as may be necessary, to be used by the regents for the purchase of land near the grounds of the University of California at Berkeley, and for the erection of greenhouses, either on said land so to be purchased, or on other lands of the University, at Berkeley, for use in connection with the department of agriculture. By section 2, the additional sum of $50,000, or so much as may be necessary, is appropriated out of any money in the state treasury after July 1, 1925, for the same purposes as are specified in section one. Section 3 of the act provides that no money shall be paid out of the state treasury until the regents of the University shall file with the state controller a certificate, stating that they have in their hands the sum of at least $50,000 available for use for the purposes specified in the act, in addition to the amount of the appropriation.

[1] We are of the view that neither of the contentions advanced by the respondent can be upheld. The act embraces but one subject, namely, an appropriation to provide additional facilities for the use of the department of agriculture of the University of California, at Berkeley, which is sufficiently expressed in its title. People v. Dunn, 80 Cal. 211, 214, 22 P. 140, 13 Am. St. Rep. 118; McClure v. Riley (Cal. Sup.) 243 P. 429. See, also, Estate of Wellings, 192 Cal. 506, 519, 221 P. 628.

[2] We are also satisfied that the appropriation carried by the act consists of but one item, and that it is for a single and certain purpose clearly and concisely stated in the title and in the provisions of the act heretofore cited. State v. Sloan, 66 Ark. 575, 53 S. W. 47, 74 Am. Rep. 106. This conclusion finds further support, if any were needed, in the language of section 4 of the act whereby it is declared to be the intent of the Legislature, as soon as the additional sum of $50,000 mentioned in section 3 is available, all or any part of the money appropriated may be used as a deposit on account of the purchase of land, or for the erection of all or any part of the contemplated buildings. The fact that the appropriation is to be paid in two installments does not render the bill subject to the objection urged by respondent.

The petitioner has in its hands the sum of $50,000 available for the purposes specified in the act, and has fulfilled all the requirements imposed upon it by law as conditions precedent to the issue by respondent of the warrant demanded by it. The funds necessary for the payment of the warrant are available for that purpose.

No good reason having been shown by respondent why the demand of the regents of the University should not be honored, it is ordered that a peremptory writ of mandate issue as prayed for.

We concur: RICHARDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

79 Cal. App. 482

JARRETT v. REDMAN et al. (Civ. 5318.)

(District Court of Appeal, First District, Division 1, California. Oct. 13, 1926.)

1. Appeal and error ⚷907(3)—All intendments are indulged in support of judgment on appeal on judgment roll, and findings construed to support judgment.

Where appeal from judgment declaring judgment of justice court void was taken on judgment roll alone, there being no showing that evidence was presented to show judgment of justice court valid, all intendments must be indulged in support of judgment appealed from, and findings construed to support judgment, and uncertainty construed to uphold rather than defeat judgment.

2. Justices of the peace ⚷129(1).

Judgment of justice court does not of itself import verity, since jurisdiction of justice courts is special and limited.

3. Justices of the peace ⚷129(3)—Party asserting right under judgment of justice court must affirmatively show facts necessary to confer jurisdiction.

There is no presumption in favor of jurisdiction of justice court, and party asserting right under judgment rendered in such court must affirmatively show every fact necessary to confer jurisdiction.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Pearle H. Jarrett against E. O. Redman and others. Judgment for plaintiff, and defendant A. C. Cooney appeals. Affirmed.

Claire T. Van Etten, of Los Angeles, for appellant.

Jas. McLachlan, of Los Angeles, for respondent.

TYLER, P. J. Appeal from a judgment declaring void a justice court judgment.

The facts are as follows: Defendant E. O. Redman executed a certain mortgage to secure the payment of a promissory note given to one Norma G. Tucker for the sum of $3,000. The note was subsequently assigned to plaintiff Pearle H. Jarrett, said assignment being duly recorded January 3, 1914. On December 20, 1916, plaintiff and the mortgagor entered into a written agreement extending the time of payment of the note for the period of three years. On the 8th day of May, 1922, foreclosure proceedings were instituted to recover the balance due upon the note, and appellant Cooney was joined as a defendant, it being alleged that he claimed an interest in the mortgaged property. By way of answer Cooney alleged that he had a lien upon the mortgaged property by virtue of a judgment in his favor duly given and made by a justice court in Long Beach township against the mortgagor Redman, an abstract of which judgment was recorded in the county of Los Angeles on January 20, 1919. As a further and affirmative defense, Cooney pleaded the statute of limitations, alleging that the mortgage was more than four years past due when his abstract of judgment was recorded and became a lien upon the property, and that as to him plaintiff's cause of action was barred by the provisions of section 337, Code of Civil Procedure, and his lien of mortgage extinguished. He prayed that his alleged judgment lien be determined to be prior and superior to the mortgage of the plaintiff herein, and upon the sale of the mortgaged property the proceeds arising therefrom be first applied in payment and satisfaction of his lien before the application of any of said proceeds be made in satisfaction of plaintiff's mortgage. Two issues were thus presented for determination: First, as to the existence of appellant's justice court judgment and the lien thereof; and, second, as to the priority of such lien over plaintiff's mortgage. Trial was had, and the court found that the alleged judgment obtained by Cooney in the justice court of Long Beach in his favor and against the mortgagor Redman was null and void, and that he take nothing in the action. This finding disposed of the question of the priority of appellant's lien, and no finding was made thereon. Judgment was accordingly rendered in favor of plaintiff and against Redman in the sum of $4,723.21, and the mortgaged property was ordered sold to pay such judgment. Defendant Cooney appeals. On his behalf it is claimed that the findings of fact and conclusions of law are insufficient to support the judgment invalidating the justice court judgment held by appellant. The sole question here presented, therefore, is the sufficiency of the findings of fact to support the judgment. The findings in substance recite that the complaint filed by the defendant Cooney in the justice court of the township of Long Beach against defendant Redman contains no allegation that Redman resided in Long Beach, or that the contract upon which the complaint was based was contracted to be performed in such township or was incurred therein, or that the defendant Redman was a nonresident of the county of Los Angeles or of the state of California, or is there any other allegation in the complaint or averment in any documents filed with the justice of the peace upon which the said justice issued the summons in said action in said justice court that brought the case within any of the requirements of section 832 of the Code of Civil Procedure necessary to confer jurisdiction upon said justice or authorize him to issue a summons from said justice court; that the summons of said justice court was served upon the defendant Redman, in the township of Los Angeles; that the alleged judgment set forth in the answer of defendant Cooney as having been secured in the justice court of Long Beach township against Redman was null and void for want of jurisdiction of said court.

[1] In support of his contention as to the insufficiency of the findings to sustain the judgment invalidating the justice court judgment, appellant claims that it is apparent therefrom that the trial court rendered judgment against him upon the theory that the justice court judgment was void because of the fact that the documents upon which the justice of the peace issued the summons contained no jurisdictional averments, and because the summons was served in Los Angeles township. We do not so construe them. They clearly state that the Long Beach justice court had no jurisdiction to render the judgment in question and that it was null and void. Appellant had a right at the trial to introduce evidence showing that the justice court had jurisdiction. Whether he did so or not we have no means of knowing, for this appeal is taken on the judgment roll alone. Under such circumstances all intendments must be indulged in support of the judgment appealed from, and findings should be so construed as to support the judgment, and any uncertainty will be construed to uphold rather than defeat it. Breeze v. Brooks, 97 Cal. 72, 31 P. 742, 22 L. R. A. 257; Krasky v. Wollpert, 134 Cal. 338, 66 P. 309.

[2, 3] The judgment itself did not import verity. The rule is elementary that the jurisdiction of the justice courts is special and limited. The law presumes nothing in favor of their jurisdiction, and a party who asserts a right under a judgment rendered in such court must affirmatively show every fact necessary to confer jurisdiction. Estate of Sharon, 179 Cal. 447, 177 P. 283; 15 Cal. Jur. p. 503. Here there is no evidence before us that such a showing was made. On the contrary, the findings indicate that there was evidence showing a lack of jurisdiction, and that the judgment was therefore null and void. We see no merit in the appeal.

The judgment is affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

79 Cal. App. 794

Pearle H. JARRETT, Plaintiff and Respondent, v. E. C. REDMAN et al., Defendants, and A. C. Cooney, Defendant and Appellant. (Civ. 5319.)

(District Court of Appeal, First District, Division 1, California. Oct. 13, 1926.)

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Claire T. Van Etten, of Los Angeles, for appellant.

Jas. McLachlan, of Los Angeles, for respondent.

TYLER, P. J. Suit to foreclose a mortgage. Plaintiff alleged that defendant Redman was indebted to him in the sum of $2,000 evidenced by a promissory note and secured by a mortgage upon certain real property situated in Los Angeles county. Defendant Cooney was made a party defendant to the foreclosure proceeding for the reason that he claimed an interest in the mortgaged premises by reason of a certain lien upon the property.

Judgment was rendered in favor of plaintiff and against defendant Redman. The judgment determined that defendant Cooney had no interest in the property for the reason that the judgment under which he claimed his lien attached was null and void. Defendant Cooney appeals. The precise question here involved is discussed and decided in Jarrett v. Redman et al., No. 5318 (Cal. App.) 250 P. 183, this day decided. Upon the authority of that case the judgment herein is affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

---

79 Cal. App. 545

TRULL v. DUNN et al. (Civ. 3136.) *

(District Court of Appeal, Third District, California. Oct. 25, 1926.)

Adverse possession ⟹114(1).

Evidence of adverse possession, by plaintiff and predecessor, of lots cultivated and improved as farm lands, within terms of Code Civ. Proc. § 325, subd. 2, *held* to support judgment quieting title in plaintiff.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Ella Smith Trull against James T. Dunn and others. From a judgment for plaintiff, defendants Dunn appeal. Affirmed.

Wm. T. Kendrick and Victor H. Kendrick, both of Los Angeles, for appellants.

R. D. McLaughlin and H. R. Collins, both of Los Angeles, for respondent.

PLUMMER, J. Plaintiff commenced this action to quiet title to 13 lots situate in the town site of Howard, formerly the town site to Rosecrans, in the county of Los Angeles. Judgment was awarded the plaintiff, from which judgment the defendants Dunn appeal.

The complaint alleges that the plaintiff is the owner and for a long time preceding the filing of the complaint was and has been the owner of said lots, in the possession of and entitled to the possession thereof, and that the defendants assert some interest therein adverse to the plaintiff, and that such asserted claim or interest is without right or title. The defendants answered by denying the ownership and possession of the plaintiff and also denied that the claims of the defendants are without right.

While the answer of the defendants does not allege title in the defendants nor ask any affirmative relief from the court, the course of the trial, and the testimony introduced, show that the defendants attempted to establish title in themselves to the premises in controversy. The record shows that on the 14th day of May, 1887, the title to all the property described in the complaint as well as a much larger tract was owned by one Jotham Bixby. On the said 14th day of May, Jotham Bixby bargained, granted, sold, and conveyed to Emil R. d'Artois and Adelaide d'Artois the south half and the northwest one-quarter of section 12 in township 3 south, range 14 west, San Bernardino Meridian, being a part of the Rosecrans tract and containing 480 acres of land, situate in Los Angeles county, state of California. On the 6th day of July, 1892, Emil R. d'Artois granted, bargained, sold, and conveyed to Adelaide d'Artois the following described lands situate in Los Angeles county, state of California: The northwest quarter of the west one-half of the northeast quarter of section 12, township 3 south, range 15 west, S. B. M., containing 240 acres of land. Also, all the right, title, and interest of the first party in and to the town site of Rosecrans, as per the recorded map of said town site. Also, lot No. 3 of the Mondon tract, as per the recorded map of said tract, containing about 5 acres. Also, all the right, title and interest of the party of the first part in and to a certain tract of land situate on the southwest corner of Cypress and Vermont avenues, containing about 4⅗ acres of land, "and all of the right, title and interest of the party of the first part in and to any and all real estate owned by him & situated in said County of Los Angeles, California. It being the intention of the grantor herein to convey to grantee by this deed, all of the real estate that he now owns in said county."

On the 17th day of September, 1892, Adelaide d'Artois remised, released, and forever quitclaimed to W. E. De Groot, all and singular the following described real property situate in the county of Los Angeles:

"All of the right, title and interest of the party of the first part in and to all the lots in the town site of Rosecrans in the county afore-

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 251 P. 226. Hearing denied by Supreme Court December 23, 1926.

said as per the recorded map of said town site to which reference is hereby made for further description."

On the 3d day of November, 1892, W. E. De Groot remised, released, and forever quitclaimed to James T. Dunn, one of the defendants in this action, certain described property situate in the county of Los Angeles, state of California, to wit: Here follows a description of 64 lots included in the town site of Rosecrans, as per map of said town site recorded in book 22, page 59 et sequitur, miscellaneous records of Los Angeles county; and, second, "all interest as record owner to all lands lying within the boundary lines of said town site of Rosecrans excepting lots 22 & 23, blk. 69, town site of Rosecrans." The lots specifically described in this conveyance remising and quitclaiming property to the defendant do not include any of the lots claimed by the plaintiff herein. They are only included, if included at all, in the following words which we have quoted from said instrument of conveyance, to wit:

> "All interest as record owner to all lands lying within the boundary lines of said town site of Rosecrans," etc.

On the 19th day of April, 1900, Emil R. d'Artois and Kate D. d'Artois, his wife, granted, bargained, sold, and conveyed to Fred Smith, now deceased, then the husband of the plaintiff, the following described real property situate in the county of Los Angeles, state of California:

> "Lots 16, 17, 18, and 19, block 58; lots 8, 9, 11, 12, block 85; lot 11, block 81; lot 18, block 83; lot 24, block V; and lots 25 and 26, block 80 of the town site of Howard, formerly Rosecrans; and which is a subdivision of the south ½ of sec. 12 township 3 north; range 14 west, S. B. M., and which subdivision is recorded in Book 22, page 59 et sequitur, of the Miscellaneous Records of Los Angeles county."

On the 20th day of October, 1913, a decree of distribution was entered in the matter of the estate of Fred Smith, deceased, distributing to the plaintiff, together with other property, all and singular the real estate described in the conveyance from Emil R. d'Artois and Kate D. d'Artois to Fred Smith hereinbefore set forth.

It thus appears that on the 6th day of July 1892, Emil d'Artois conveyed to Adelaide d'Artois all the real estate which he then owned situate in the county of Los Angeles. Just what Adelaide d'Artois conveyed to W. E. De Groot by the instrument executed on the 17th day of September, 1892, is left somewhat in doubt. This instrument, in its granting clause, reads, as we have stated:

> "All of the right, title and interest of the party of the first part in and to all the lots in the town of Rosecrans in the county aforesaid as per the recorded map of said town site to which reference is hereby made for further description."

The map was not introduced in evidence and the lands covered by the conveyance are not anywhere particularly described. Likewise, the deed executed the 3d day of November, 1892, between W. E. De Groot and the defendant James T. Dunn is uncertain and indefinite, save and except as to the 64 lots therein described, as it refers only to other lands by the following words:

> "All interest as record owner to all lands lying within the boundary lines of said town site of Rosecrans excepting lots 22 & 23, Blk. 69, town site of Rosecrans."

The testimony shows that there were between 300 and 400 lots in the town site of Rosecrans, and just what property this general clause or blanket provision in the deed under consideration refers to is not made to appear other than as herein stated.

The conveyance executed and delivered by Emil R. d'Artois and Kate D. d'Artois, his wife, to Fred Smith, the immediate predecessor of the plaintiff, was made some eight years after said Emil R. d'Artois had executed the instrument dated July 6, 1892, purporting to convey all his right, title, and interest in and to the town site of Rosecrans, also, all real estate then owned by him situate in the county of Los Angeles.

The plaintiff claims title by adverse possession, alleging that she and her grantor entered under color of title and had adversely possessed the premises for more than five years preceding the commencement of the action. The defendants deny the adverse possession of the plaintiff, and, while not asking for any affirmative relief in their answer, have introduced in testimony the conveyances to which we have referred and argue therefrom that the defendants have the legal title to the premises in controversy. This contention of the defendants, however, is not made good by reason of the failure of proof to show what lands are included within the words, "all interest as record owner of all land lying within the boundary lines of said town site of Rosecrans." The testimony shows that in the year 1908 James T. Dunn, the defendant herein, having a son named John J. Dunn, told his son that he might farm all of his property in the town site of Howard by paying a nominal rent therefor. This lease was a verbal one. The testimony of the son is that his father said:

> "Go ahead and farm all of my lands. Farm my entire interest in the Howard town site."

Nowhere does it appear from the testimony that there was any definite agreement as to the particular land to be farmed. John J. Dunn then proceeded to farm all but two of the lots in controversy and the large tract of land belonging to the defendant. His testimony is as follows:

> "I farmed, plowed, and sowed land other than the land described in the complaint (referring

to the 13 lots). I refer to the land adjoining, land which is a part of that tract. All told, I farmed about 320 to 330 acres. * * * All the lands were farmed alike, regardless of their location. James T. Dunn claimed to own about 300 or 400 lots, scattered around that whole tract. There are 24 to 26 lots in some blocks and 48 lots in others. I rented a few lots of two or three different parties—probably 100 lots. * * * My father claimed to own personally probably one-third of the whole tract. I farmed quite a good deal of the tract without getting the agreement—probably one-third of it."

On October 26, 1912, Fred Smith, the immediate predecessor of the plaintiff herein, visited the premises now in controversy and John J. Dunn executed and delivered to him a writing, in the following words and figures:

> "This is to certify that I, J. J. Dunn, as tenant for Fred Smith, the owner, have farmed the following described lots, situate in the town site of Howard (formerly Rosecrans) for the years 1909, 1910, 1911, and 1912, and have same rented for the year 1913. * * *" (Here follows a description of the lots described in the complaint and also certain others.)

Thereafter, said John J. Dunn continued to farm the premises included in this case and paid rent to Fred Smith, and, after his death to the plaintiff herein every year up to and including the year 1918. The premises were unfarmed during the years 1919 and 1920 and thereafter were rented to a party named Charles Lang. The record shows that lots 25 and 26 in block 80 were not farmed by John J. Dunn, but were farmed by another person as tenant of the plaintiff. The record also shows that the plaintiff and her predecessor in interest have paid all the taxes on said premises from about the date of the conveyance thereof to plaintiff's immediate predecessor until the time of the beginning of this action. The record shows that the rental paid to the plaintiff was about $1 per lot, per annum.

The contention of the appellant is that John J. Dunn was the tenant of James T. Dunn, that said John J. Dunn entered into possession of the lots claimed by the plaintiff as a tenant of James T. Dunn, and that any attornment made by him to the plaintiff was void, under the provisions of section 1948, Civil Code, which reads:

> "The attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction."

The record, as we have said, is to the effect that John J. Dunn was to farm the interest of James T. Dunn in the town site of Howard. He was not rented any land except that in which James T. Dunn might have an interest.

The testimony also leaves it very doubtful as to whether John J. Dunn ever paid James T. Dunn any rental for the use of the lands in controversy. The testimony of John J. Dunn in this particular is set out in the transcript as follows:

> "I don't remember whether I agreed to pay him anything or not. He was to receive a part of the crop—fourth interest. I commenced in 1908. My father and I had a conversation at that time. Then I did farm the land. I farmed it every year. At least, for the first few years, I delivered father the hay. He had a fuel and feed store. He sold his portion down there. When he sold the yard, he couldn't use the hay so I sold it and paid the taxes."

It may here be stated that the taxes paid did not include any of the taxes assessed against the lands in controversy. This witness further continued:

> "I met Fred Smith in 1911. During the time from 1908 right up to 1919, except one or two years when I wasn't able to, I paid my father. I paid Smith a little. I don't know how much, very little. I just paid him to get rid of him. I was farming all of these lots they now claim to belong to Smith, and I knew what lots they were. I paid him a little payment every year. * * * I planted and plowed the lots described in the complaint every year, sowed them either in barley or oats. It was sometimes barley, sometimes oats."

The record shows that John J. Dunn was farming the lots belonging to his father, the lots claimed by the plaintiff for which he paid rent to the plaintiff and a number of other lots belonging to other people, with whom he had no agreement and to whom he paid no rent. It may be, as contended by appellant, that the son did not say anything to his father about paying rent to the plaintiff for the simple reason that he was farming a much larger tract of land of which his father only owned one-third and, therefore, would have no interest in what the son may have paid to the owners of other lands, or whether he paid them anything. From the indefinite language used in the verbal lease, if such it may be called, from James T. Dunn to his son, John J. Dunn, the trial court was justified in concluding that the lots in controversy were not included in the premises claimed by the appellant. The record shows that the appellant, during all the years the lots in controversy were farmed by John J. Dunn, never paid any taxes on the lots claimed by the plaintiff and never listed the same in his assessments, which, as stated in Janke v. McMahon, 21 Cal. App. 781, 787, 133 P. 21, is strongly persuasive that the appellant did not then claim the premises in controversy, never intended to rent the same, that they were not included within the terms of the verbal lease, and only became of interest to the appellant by recent events giving some possible value to the lots in the town site of Howard.

The record shows that the lots described in the plaintiff's complaint were farmed and cultivated in the usual manner of farming and cultivating farming lands in the neighborhood where the same were situated, and therefore subdivision 2 of section 325 of the Code of Civil Procedure applies.

It would serve no useful purpose to enter into a discussion of the acts necessary to constitute adverse possession. The trial court had the witnesses before it, and the testimony set out in the record, we think, sufficient to support the findings of that court to the effect that the plaintiff and her predecessor in interest acquired title to said premises by adverse possession, that John J. Dunn was their tenant, that he never was the tenant of James T. Dunn as to the lots in controversy, and that the acts performed by the plaintiff and her predecessor in interest and tenant justified both the findings and conclusion of the trial court in favor of the plaintiff.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

79 Cal. App. 458

BENNETT v. SAN RAMON VALLEY BANK et al. (Civ. 5541.)*

(District Court of Appeal, First District, Division 2, California. Oct. 11, 1926.)

1. Mortgages 🔑194.

Bank *held* not guilty of converting selling price of land sold for owner, which it had not received, having accepted initial payment which it still held.

2. Mortgages 🔑194.

Where owner of incumbered land deeded it to bank, and authorized bank in two writings to sell it for stipulated prices, and apply proceeds to his debt to bank, "proceeds of sale" in second instrument *held* properly construed by bank as subject to payment of mortgages which were prior liens, in view of Civ. Code, §§ 1638, 1641–1643.

3. Trial 🔑397(5).

Where identity of directors of defendant bank was immaterial in action for conversion, omission to find as to whether certain person was director *held* not error.

4. Banks and banking 🔑227(2)—Exclusion of evidence of value of entire tract of plaintiff's land held not error in action against bank for conversion of selling price of part of it.

Exclusion of evidence of value of entire tract of plaintiff's land *held* not error in action against bank for conversion of selling price of part of it, sold at stipulated price with plaintiff's consent, where no question of sale at sacrifice was presented; value of entire tract being immaterial.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Norman H. Bennett against the San Ramon Valley Bank and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Peck, Bunker & Cole, L. W. Bennett, and C. M. Peck, all of Oakland, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondents.

STURTEVANT, J. This is an action in conversion. The judgment went for the defendants, and the plaintiff has appealed.

[1] The plaintiff executed a writing in words and figures as follows, to wit:

"November 1, 1921.

"San Ramon Valley Bank, Walnut Creek, Cal. —Gentlemen: We hand you herewith deed dated October 21, 1921, in favor of yourself, to property known as the Netto ranch, containing one hundred and sixty-six (166) acres, more or less.

"Also agreement of sale between Norman H. Bennett and wife to L. Ratto et al., duly assigned to you, on which there is a balance due of $10,000.00 and interest from March 8, 1921.

"Also agreement of sale between Norman H. Bennett and wife to Marie Huddleston, on which there is a balance of $650.00 and interest due from March 4, 1921, at 7%, which contract is duly assigned to you.

"It is understood that you are to sell the unsold portion of land covered by the above deed at a minimum price of $8,500.00 with the understanding that the proceeds of the sale shall be applied by you towards the payment of my indebtedness to your bank.

"You will please collect the contracts herein assigned to you and apply the proceeds, together with what is necessary from the sale of the 100 acres, toward the mortgage indebtedness now on the land; and you will also please issue deeds to the parties purchasing under the accompanying agreements of sales.

"It is understood that in case of sale of the 100 acres above referred to that we shall be permitted to rent the same until not later than June 1, 1922, for which we will be willing to pay a rent of $200.

"In connection with this deal we hereby agree to execute a new chattel mortgage covering the personal property which we own, to secure our indebtedness now held by you.

"It is understood that in the sale of the 100 acres herein referred to that any buildings which we may erect on the place after this date will be considered as my personal property upon my giving possession of the place. It is understood that we reserve the right to remove any new buildings or any additions to the present buildings which we may erect subsequently to the date hereof at the time we surrender possession to the land. Norman H. Bennett.

"Harriett B. Bennett.

"Accepted this 1st day of November, 1921.

"San Ramon Valley Bank,

"F. A. Marshall, Cashier."

As stated above 66 acres were included in the agreements to sell mentioned above. Ninety-eight acres remained unsold. The plaintiff was indebted to the bank on unsecured promissory notes in the sum of $8,000 The entire property was covered by two mortgages. One mortgage was in favor of

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 8, 1926.

M. S. Netto, given to secure the payment of a promissory note for $14,500, dated April 7, 1919, payable five years after date, with interest at 5 per cent. per annum computed annually. The second mortgage was given to secure the payment of a promissory note for $3,300, dated March 1, 1920, payable on or before four years after date, with interest at 6 per cent. per annum computed annually. There were also some small statutory liens incurred in campaigns to destroy squirrels. No sale of the 98 acres having been made, the plaintiff executed another written instrument in words and figures as follows:

"Walnut Creek, California, January 13, 1923.

"San Ramon Valley Bank, Walnut Creek, Cal. —Gentlemen: The undersigned hereby consent that the San Ramon Valley Bank may sell the unsold portion of the land referred to in paragraph four of that certain instrument dated November 1st, 1921, and signed by the undersigned for the sum of $8,000.00 instead of $8,500.00, with the understanding that the proceeds of the sale shall be applied by you towards the payment of the undersigned persons' indebtedness, as of the date hereof, to your bank. It being understood between the undersigned and the said bank that all provisions in the said instrument dated November 1st, 1921, hereinbefore referred to, which are contrary to or interfere with the carrying out of those provisions contained herein, are expressly waived.

"Yours very truly,
"Norman H. Bennett.
"Harriett B. Bennett.

"Agreed to this 15th day of January, 1923.
"San Ramon Valley Bank,
"B. G. Ensign, President."

Soon after the second instrument was signed, the defendant bank obtained a purchaser who made an initial payment of $500 to the bank on an agreement to purchase the 98 acres above mentioned. The bank did not collect any other moneys on the transaction until March 14, 1924. On that date numerous transactions were had in such a manner that all could fairly be said to be one transaction. All mortgages were paid off, and likewise the liens. Thereupon the bank collected moneys under the contracts to sell, and at the same time executed deeds to the purchasers. To accomplish all of these acts the bank was compelled to put into the transaction $400 of its own money. The mortgage liens could not be removed before March 14, 1924, because one of the mortgages was not due and payable, and the mortgagee refused to accept payments. However, on March 14, 1924, the mortgages had to be paid, because at that time the mortgagees were threatening foreclosure proceedings. This action was commenced September 4, 1923. It was the contention of the plaintiff that the bank was guilty of conversion, because it did not apply the $8,000 collected on the sale of the 98 acres on the indebtedness owing by the plaintiff to the defendant bank. An examination of the facts above recited discloses that the bank had not received the $8,000 on September 4, 1923, and could not on that date apply the sum of $8,000 on the plaintiff's debt. On the date last mentioned the bank had paid out no moneys. It had received $500 on the purchase price of the last sale, and still held that sum to be thereafter applied under the written instruments which we have quoted. Under these circumstances the trial court committed no error when it made a finding that the respondents had not converted $8,000, the property of the appellant.

[2] The appellant contends that the words "proceeds of the sale," as used in the instrument dated January 13, 1923, mean gross proceeds, and that to place any other meaning on the language is to write into that instrument words not used by the maker. The respondents argue that the words may be read as though the maker had used the expression "net proceeds of the sale." In the form as made we do not feel called upon to adopt either contention. The language of the contract is to govern its interpretation. Civ. Code, § 1638. The whole of the contract is to be taken together so as to give effect to every part, if reasonably practicable; each clause helping to interpret the other. Civ. Code, § 1641. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. Civ. Code, § 1642. The contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect. Civ. Code, § 1643. In taking the course which the bank took, it placed an interpretation on the two written instruments which was authorized by, and was not in conflict with, the statutory rules which we have cited. The fact that nothing remained to be applied on the unsecured account owing by the appellant to the defendant bank was in no manner created by any act of omission or commission by the bank. That fact arose because the liabilities were too large and the assets were too small. The fact that the mortgages were paid off before foreclosure proceedings were commenced was expressly authorized by the first instrument, and was not prohibited by any language contained in the second instrument. If the liquidation could have taken place November 1, 1921, and the running of interest could have been stopped as of that date, there would have been an equity of over $2,000 in favor of the appellant. The appellant testified that he so estimated the situation when he executed the instrument dated November 1, 1921. That equity was entirely eaten up by the interest which accrued after that date.

The appellant testified that both documents were executed for the purpose of securing the bank. If the contention which he makes at this time is upheld in its entirety it is perfectly clear that neither instrument would operate to secure the bank, and that no action whatever could be taken by the bank under either instrument. Guided by the authorities which we have cited, the contention of the appellant cannot be sustained.

[3] In his complaint the plaintiff alleged that certain persons are directors. The only denial on the subject in the answer of the defendants is a denial that B. G. Ensign is a director. It might have been material to know, under certain circumstances, who were directors when the alleged conversion took place, but it was immaterial who were the directors when the complaint was filed or when the answer was filed. The trial court found the facts in the language of the complaint as to all of the directors except B. G. Ensign. As to him it made no finding. The omission to find on the immaterial issue was not error. Furthermore, there was no evidence that any one of the directors was informed of, or took any part in, the alleged conversion.

[4] The appellant complains of a ruling made by the trial court sustaining an objection to a question propounded to one of the witnesses as to what was the value of the entire tract of real estate, the proceeds of the sale of a portion of which it was alleged the defendants converted. The entire tract included 166 acres, and all but 98 acres was under contracts of sale, and was conveyed to the defendant bank subject to such contracts. The remaining 98 acres were, with the plaintiff's consent, sold for $8,000. The case does not present any question of sales at a sacrifice, and we perceive no materiality in the subject-matter of the value of the entire property conveyed by the plaintiff, as of the date of the conveyance or as of any other date, and the selling price of which was fixed by the plaintiff.

The judgment is affirmed.

We concur: CABANISS, Presiding Justice, pro tem.: NOURSE, J.

---

79 Cal. App. 488

PEOPLE v. RIORDAN. (Cr. 1341.) *

(District Court of Appeal, Second District, Division 2, California. Oct. 14, 1926.)

1. Embezzlement 🔑44(1).

Evidence *held* to sustain attorney's conviction for embezzling client's securities and money.

2. Criminal law 🔑1159(2)—Judgment will not be reversed for insufficiency of evidence unless there is no substantial evidence supporting verdict, or unless evidence is so inconsistent or improbable as to be unworthy of credence.

It is for jury to determine truth of and weight to be given evidence, and, having done so, their verdict is conclusive, and judgment will not be reversed for insufficiency of evidence unless there is no substantial evidence to support verdict, or unless evidence is so inconsistent or improbable as to be unworthy of credence.

3. Embezzlement 🔑35.

Under Pen. Code, § 1131, indictment charging embezzlement of notes of certain value was sustained by proof that accused embezzled notes of less value.

4. Embezzlement 🔑23.

Defendant in embezzlement prosecution could not question prosecuting witness' ownership of notes assigned to defendant to enable him to deal with them as her attorney and agent.

5. Embezzlement 🔑11(2).

If defendant in embezzlement prosecution collected money as agent and attorney for prosecuting witness, no demand was necessary to constitute embezzlement.

6. Jury 🔑131(13)—Trial court's refusal to permit accused's attorney to ask same questions of other jurors as were asked by court of first juror and collectively of others, held not error.

Where jurors, asked collectively by court whether they would give same answers to qualifying questions propounded by court to first juror, answered in affirmative, *held* that trial court's refusal to permit accused's attorney to ask same questions of jurors was not error, though better practice would be to permit each juror to answer for himself.

7. Jury 🔑131(3).

Trial court has full discretion to refuse to permit accused's counsel to ask questions of jurors serving only as basis for peremptory challenge.

8. Criminal law 🔑656(5)—Statement by court in granting district attorney's request for permission to cross-examine state's own witness on ground of surprise and apparent hostility of witness, held not instruction that witness was hostile.

Where district attorney, on ground of surprise and apparent hostility of witness who contradicted his own previous testimony, obtained permission to examine witness further, statement by court that evidence might not tend to impeach such witness' direct testimony but that he having testified both ways, evidence was presumably offered to impeach his conflicting story on cross-examination, *held* not an instruction that witness was hostile.

9. Witnesses 🔑219(3)—Client may waive rule of secrecy as to communications with attorney, and fact that testimony relating thereto impeaches attorney does not make it inadmissible (Code Civ. Proc. § 1881).

Under Code Civ. Proc. § 1881, secrecy thrown about communications between attorney and client is for client's protection, which client may waive, and fact that client's testimony relating thereto tends to impeach attorney does not make it inadmissible.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

---

*Hearing denied by Supreme Court December 13, 1926.

Daniel Riordan was convicted of embezzlement, and he appeals. Affirmed.

W. T. Helms and W. R. Barnes, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was convicted of the crime of embezzlement and appeals from the judgment and from an order denying his motion for a new trial.

The indictment consisted of five counts, and the jury returned a verdict of guilty upon the first, fourth, and fifth counts.

The charges upon which appellant was convicted were, respectively, that as the agent and bailee of one Clara E. Burg, he did during the months of June and July, 1925, willfully, unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate to his own use a $3,500 promissory note of the value of $1,525, $300 in cash, and a promissory note for $5,991.71 of the total value of $5,591.71.

Since the appellant urgently insists that the verdict and judgment as to all three counts are not only contrary to the evidence, but that "there does not appear to be any evidence of the commission of any crime whatsoever on the part of the defendant," we deem it imperative that this point receive first consideration. If appellant were correct in this view of the case, consideration of other issues would become unnecessary. A concise detail of the facts may facilitate clarity and obviate the necessity for extended discussion of manifestly incidental and dependent questions.

[1] There is evidence tending to show the following facts, which, in view of the verdict, we must assume to be true: Miss Burg, the complaining witness, at the time she first met the defendant was the owner of a promissory note executed to herself by Charles B. Widmeyer and wife for $3,500, upon which had been indorsed thirteen credits of $75 each, and one of $1,000, on account of the principal. She also owned a promissory note executed to herself by Clyde Colby and wife for $5,991.71, upon which were indorsed payments on account of principal amounting to $500. Each note was secured by a trust deed. Previously to February 22, 1925, Miss Burg had adjusted a business transaction with one Sanders by crediting the sum of $1,000 upon the note of Widmeyer, who in turn executed his promissory note to Sanders for a like amount. Being dissatisfied with such settlement, she desired to collect the $1,000 from either Widmeyer or Sanders, and consulted the appellant, who was then a licensed, practicing attorney. At the instance of appellant, Miss Burg subsequently returned to his office with various documents, including the Widmeyer note and trust deed and the Colby trust deed, which she left with the defendant, and for which she was given a receipt. She testified that, upon inspection of the papers, Riordan said:

> "Defraud! Embezzlement! Criminal offense! Penitentiary act! I can get the money for you immediately. All fraud. Illegal. I can annul the whole thing."

He was then employed to collect the $1,000, and the parties agreed upon a fee of $500, of which she paid $100 at that time, and $150 thereafter. Appellant subsequently obtained from Miss Burg a power of attorney, of which he forwarded a copy to Widmeyer, and notified the latter that future installments of $75 falling due on the note should be paid to Riordan. Four such payments were so made and constitute the basis for the fourth count of the indictment herein. It is conceded that appellant paid Miss Burg no money, but during the month of May or June he visited her and inquired as to whether or not she had received the $1,000 from Widmeyer, to which she replied in the negative. Appellant thereupon drew a red line through this credit on the back of the note, and caused her to sign an indorsement thereon, prepared by himself, stating that said sum had not been paid and that the entry was a mistake which she thereby corrected. Appellant thereafter sold this note to one B. S. Yost for $1,149, and when introduced in evidence it bore three additional indorsements, one signed by Clara E. Burg, transferring to Riordan all her right, title, and interest therein, one signed by Riordan purporting to reinstate the credit of $1,000, and also Riordan's assignment to Yost. The prosecuting witness testified that she did not remember having signed such transfer to the defendant.

The Colby note, when introduced in evidence, bore an indorsement signed by Clara E. Burg, transferring and assigning all her rights therein to Riordan, and a like indorsement by Riordan, assigning the same to Florence W. Evans. Miss Burg testified that appellant obtained this note from her upon the pretext that he required it in connection with a suit against Sanders, but that there was no writing above her indorsement when she signed her name. She also testified that appellant, when asked for the Colby note, stated that he had traded it for two mortgages. Mrs. Evans testified, and the defendant admitted, that he transferred this note to her as part of the consideration for a piece of real property which he purchased from her. In the foregoing, there is abundant evidence to sustain the jury's verdict.

The defendant testified that he exchanged the Widmeyer note for shares of stock in the G. E. Miller Company in the interests of Miss Burg, and that he obtained the Colby note for the purpose of raising $2,500 to

$3,000 required to finance a $50,000 suit which he had instituted for her against Mr. and Mrs. Sanders. It was testified that the Miller stock was worthless in any event, and, also, Miss Burg unqualifiedly denied having had any such arrangement with the defendant. He also testified that Miss Burg had assured him that he need not pay her the $300 which he had collected, since she had full value in stock and was therefore "not entitled to the $300." This, also, she denied.

[2] Much argument is forcefully advanced on behalf of appellant attacking the credibility or reliability of the testimony of the prosecuting witness because of her advanced years. It is said by his counsel that she was "a woman over sixty, almost an imbecile, in the hands of a crooked lawyer, also over sixty, and the lawyer is not only crooked, but criminal." The most of these diagnoses are expressly approved by counsel for respondent, except the assertion that the victim of the alleged swindles was verging upon senile dementia. The jury, under exhaustive instructions of the trial court, passed upon the credibility of this witness and the weight to be given to her testimony. There was much oral, documentary, and circumstantial evidence which abundantly substantiated her statements. The defendant's culpability is not lessened by the fact that he was a member of the bar of this state, sworn to protect the interests of one whom he asserts to have been "almost an imbecile." His explanations on the stand, under oath, were in the main positively and directly contradicted by those with whom he testified to having had dealings. It lay within the province of the jury to determine as to the truth of and the weight to be given to the evidence, and, having done this, their verdict is conclusive. A judgment will not be reversed on the ground of insufficiency of the evidence unless there is no substantial evidence to support the verdict upon which it is based, or unless the evidence is so inconsistent or improbable as to be unworthy of credence. People v. Niino, 183 Cal. 126, 190 P. 626.

[3] The indictment charged that on the dates of the alleged embezzlements the Widmeyer note was of the value of $1,525 and that the Colby note was of the total value of $5,991.71, whereas the evidence tended to show that after allowing proper credits their values were, respectively, $1,443.61 and $5,481.71. It is contended by appellant that this shows by absolute mathematical demonstration that he was convicted of crimes which could not have existed. In legal effect, this criticism amounts to an assertion that there was a fatal variance between the allegations of the indictment and the proof.

There is no merit in this contention for the reason that in proving the embezzlement of valuable securities the allegation of the indictment is sustained, if the offender be proved to have embezzled any valuable security, although the particular valuable security be not proved. Pen. Code, § 1131. People v. Gray, 66 Cal. 271, 5 P. 240, applied this provision of the Code to the embezzlement of money where the amount proved was less than that alleged. The section expressly includes "valuable securities," and applies the same rule to the embezzlement of them as to that of money. In the instant case, it is clear that the securities embezzled were proved to have been "valuable securities."

[4, 5] It is further insisted that the assignment of the notes to Riordan divested Miss Burg of their ownership, and that she had no interest which the defendant could have embezzled. There was testimony to the effect that the assignment was not understood by the parties to be for the purpose of transferring title to the notes, but only to permit the defendant to more readily deal with them as Miss Burg's attorney and agent. Under such circumstances, he cannot question his principal's ownership. Also, appellant argues that there was no embezzlement of the $300, since there was no showing that Miss Burg made demand for its return, or as to the disposition made of the funds by himself. As we have seen, it appears from the defendant's own testimony that the notes were indorsed to him for use in the promotion of Miss Burg's personal business interests, which constituted him her agent and bailee. He also testified that Miss Burg told him, in effect, that he might retain the $300. It is immaterial as to what he may have done with the money. If it was Riordan's own property, its use was a matter of his personal concern, whereas if he collected it as the attorney and agent for Miss Burg no demand was necessary. People v. Goodrich, 142 Cal. 216, 75 P. 796. However, it appears that on July 13, 1925, demand was made for the delivery forthwith of all papers or other property belonging to Miss Burg.

Thirty-two requested instructions of the defendant were marked by the trial court "refused, except as covered by instructions given," and the refusal to give them is assigned as error. We think, from a careful reading of the instructions given, that they covered the issues of the case. The portions which the court excluded were not erroneously omitted, and appellant's general criticism of the action of the trial court in this respect does not attempt to indicate wherein any prejudicial error was committed.

[6, 7] The trial court examined the prospective jurors generally, by propounding questions which in themselves properly expounded the law as to the duties of jurors, stating that the fact that the defendant was indicted was no evidence of guilt, that he

should be presumed innocent at all stages of the proceedings until and unless proven guilty beyond a reasonable doubt and that the jury should adhere to such presumption throughout the trial. They were then asked collectively if they felt that, if charged with an offense of like character, they would be unwilling to be tried by jurors each of whom was of the same frame of mind as themselves, if they could give the defendant a fair and impartial trial, if they would be guided by the presumption of innocence as defined by the court, and if they would be governed by the evidence and the instructions which the court would give them. To each of these questions it appears that there was "no response." Defendant's counsel then began an examination of one of the jurors, whom he interrogated somewhat thoroughly, but when later counsel turned to the next juror the court interrupted, saying:

> "Just a moment. Are there any of the other jurors in the box who would answer any of the questions that counsel has just asked in any other or different manner than as answered by Mr. Buchanan?"

To this question there was no response. Counsel thereupon asked:

> "Can I interrogate any of the other jurors?"

To which the court responded:

> "They have all answered those questions in the same way. That is a fact, is it not, ladies and gentlemen?"

To this question the record shows the following answer:

> "Jurors: Yes."

The court then stated:

> "They so indicate. No use repeating and covering the same ground. * * * You may ask any other or different questions, but not the questions that have already been asked and answered."

Counsel again attempted to ask some of the questions of individual jurors which had been propounded to them in a body, but was not permitted to do so.

It is contended, on behalf of the appellant, that this was improper and insufficient examination to test the qualifications of the jurors; that their silence was no answer whatever, whereas the trial court ruled that they did answer, and thus deprived the defendant of all opportunity to fairly ascertain the condition of mind of each juror. It was said by the court during the proceedings that the jurors had served repeatedly in other cases and were familiar with their duties and with the necessary qualifications. When asked collectively if they were acquainted with the defendant, juror Farnsworth promptly stated that he had known him casually at Pasadena, and the juror was examined at length in this respect. The juror was ultimately excused.

In People v. Edwards, 163 Cal. 752, 127 P. 58, the authorities were reviewed and the Supreme Court proceeded to "declare the rule so that the trial courts may confidently follow it." It was there said:

> "The conclusion is that there is no statutory authority for the examination of jurors solely for the purpose of a peremptory challenge or for the allowance of questions which do not tend to prove some fact material to a challenge for cause."

As we have stated, the jurors were asked if they would give the same answers which Mr. Buchanan had given in their presence to questions theretofore propounded, to which they replied, "Yes." The defendant's counsel then attempted to ask some of the same qualifying questions which the court held to have been answered, but, when given ample opportunity to ask other or different questions which he might deem of importance in determining whether or not there was ground for challenge, he declined to do so.

The complaint of appellant is therefore reduced to the refusal of the court to allow questions which it ruled had been asked and answered. As to those which were asked for the purpose of a peremptory challenge only, the trial court had full discretion. Since it need not allow such questions to be asked at all, it is plain that no error can have been committed, even though the ruling that they had been asked and answered was incorrect. Questions which the court had asked the jurors generally appear to have been of that class. Some of the questions put to the juror Buchanan by counsel for the defendant would, if answered, have been a possible basis of challenge for cause, but the court ruled that these questions when asked of one juror had been asked and answered, and the record shows this to be the case; that is, that the jurors other than Buchanan answered collectively. It is usually better practice to have each juror say for himself whether or not he would answer any of the questions asked of another juror differently from the answers given by the latter. When the jurors are examined en masse, there is a considerable likelihood of a juror not fully understanding the question and remaining silent, when should he give an answer, it might show ground for challenge. Also, the reporter might easily be mistaken in concluding that all of the prospective jurors being questioned had responded "Yes," or "No," and yet we cannot say, as a matter of law, that the method pursued in this case, under the circumstances shown by the record, did not result in the questions asked of juror Buchanan being answered by the others. It is certain that there is nothing to impeach the record, which shows that they were answered.

In some states it is provided by statute that the examination of jurors in criminal cases shall be directed to "each juror," "any juror," or "a juror," while in other states such limitation applies only to capital cases. It has been held, however, that in the absence of such legislation the examination of jurors is largely within the sound judicial discretion of the trial court. Comm. v. Nye, 240 Pa. 359, 87 A. 585; State v. McGee, 80 Conn. 614, 69 A. 1059; State v. Munch, 57 Mo. App. 207; Connors v. United States, 158 U. S. 408, 15 S. Ct. 951, 39 L. Ed. 1033; Murphy v. United States (C. C. A.) 7 F.(2d) 85. It has repeatedly been decided that, in jurisdictions where no statutory limitation or restriction of such examination to individual jurors exists, a judgment will not be reversed unless it shall affirmatively appear that the defendant was precluded from interrogating the jurors upon matters not theretofore covered, or that any juror who served was prejudiced or not qualified. Nichols v. State. 97 Tex. Cr. R. 174, 260 S. W. 1050; Murphy v. United States (C. C. A.) 7 F.(2d) 85; State v. Munch, 57 Mo. App. 207; Johnson v. State, 29 Wyo. 121, 211 P. 484. While not intending to encourage this method of examining jurors, we cannot say that its use in this case constituted an invasion of the defendant's substantial rights to his prejudice.

It is further contended that objections of the district attorney were improperly sustained during cross-examination of the prosecuting witness. It is said that the excluded evidence was offered for the purpose of impeaching the witness, but none to which our attention is called tended to impeach her. Furthermore, much of the testimony then sought to be elicted was subsequently admitted. We find no error in this respect.

[8] A witness for the people contradicted his own testimony during cross-examination, and the district attorney thereafter confronted him with a verified answer which he had filed in another suit, involving the same property about which he was testifying. Allegations of his said answer, which tended to support his testimony on direct examination, were read to him, and he admitted having verified the answer. The defendant moved to strike out the paragraph which had been read, which motion was denied, whereupon his counsel inquired if the witness was to be deemed hostile to the prosecution. The court replied that it had ruled upon the objections and motions but expressed no opinion in the matter, as that was a question for the jury to decide. It is contended that, under the circumstances and the ruling permitting the district attorney to "cross-examine his own witness," it amounted to an absolute statement by the court that the witness was, in fact, hostile. There is no merit in this point. Permission was asked by the district attorney, upon grounds of surprise and apparent hostility, to examine the witness further, and was granted. The court stated, in reply to the defendant's motion, that the evidence might not tend to impeach the witness' direct testimony, but that, he having testified both ways, it was presumably offered for the purpose of impeaching his conflicting story upon cross-examination. This did not amount to an instruction that the witness was hostile. The jury and counsel were told that the court expressed no opinion and made no ruling as to the attitude of the witness.

[9] The defendant, during cross-examination, declined to answer certain questions upon the ground that they involved confidential relations between himself and a client. The latter thereafter testified to the transactions in question and stated that she had no objection to Riordan testifying, expressly waiving her right to so object. It is here contended that such testimony was coerced, was confidential, and an attempt to impeach the defendant. The record does not support such assertions. The witness contradicted testimony of the defendant, stating that she realized nothing from the stock which appellant transferred to the prosecuting witness at an assumed valuation of $2,600. It was no concern of his if his former client waived the right to treat their transactions and conversations as confidential. The secrecy thrown about communications of this character is a legal protection to the client, but there is no bar to its revelation if the client chooses to waive the rule. Code Civ. Proc. § 1881; Hardy v. Martin, 150 Cal. 341, 89 P. 111; Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512; Estate of Nelson, 132 Cal. 182, 64 P. 294. Nor is the fact that her testimony tended to impeach the defendant any ground for objection to its admissibility.

Many rulings of the court are seriously assailed. We have examined them all. In some instances, error was committed. For instance, the prosecuting witness was being examined in response to a question which called for the answer either of "Yes" or "No." She began, "My contractor said," when the defendant's counsel attempted to interpose an objection. The court, instead of preventing the witness from stating obviously irrelevant and hearsay matter, allowed her to finish her answer, and then struck it out and instructed the jury to disregard it. However, it cannot be said that the defendant was prejudiced by this or other error in the reception of evidence to which our attention has been called.

Other alleged reasons for reversal are founded upon questions asked by the trial court of a Mrs. Herrin; that the district attorney was hypercritical and disdainful toward the defendant; that the latter's admission to the bar of another state was immaterial; that, when he offered to explain, the court ruled that it was a matter for his counsel to determine if deemed advisable, and that the court criticised the defendant's methods when passing sentence. These and other questions have been carefully considered, but, in view of what has been said, we think, if in any instance there was slight error, it was not such as to justify a reversal.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

79 Cal. App. 527

WOOLMAN v. HAMMOND et al. (Civ. 3129.)

(District Court of Appeal, Third District, California. Oct. 19, 1926.)

Appeal and error 🔑273(11).

Under Code Civ. Proc. § 648, exception stating that decision and judgment were not supported by evidence, without specifying particulars of insufficiency, is insufficient.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Claude Woolman against J. P. Hammond and others. Judgment for plaintiff, and defendant Hammond and Lee appeal. Affirmed.

Hamilton & Lindley, of San Diego, for appellants.

Joseph H. Egermayer and H. C. Liggett, both of San Diego, for respondent.

FINCH, P. J. The defendants Hammond and Lee prosecute this appeal from the judgment herein upon the judgment roll and a bill of exceptions.

Appellants' sole contention is that the evidence is insufficient to justify the decision and judgment, in that no consideration for their agreement, upon which the suit is based, was proved. The only specification of insufficiency of the evidence contained in the bill of exceptions is as follows:

"Appellant takes exception to the decision and judgment of the court herein, on the ground that the same are not supported by the evidence."

"No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more." Code Civ. Proc. § 648.

It is settled by a long line of decisions that such a specification as the one under consideration is insufficient. Gosliner v. Briones, 187 Cal. 557, 558, 204 P. 19; Williams v. Bullock Tractor Co., 186 Cal. 32, 39, 198 P. 780; Carter v. Canty, 181 Cal. 749, 752, 186 P. 346; Millar v. Millar, 175 Cal. 797, 799, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; Hawley v. Harrington, 152 Cal. 188, 189, 92 P. 177; Agalianos v. American Central Ins. Co., 62 Cal. App. 349, 364, 217 P. 107; Clarkson v. Moir, 53 Cal. App. 775, 776, 201 P. 474. It may be stated, further, that an examination of the evidence shows that there was a sufficient consideration for the agreement.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

---

79 Cal. App. 468

FLETCHER et al. v. SUPERIOR COURT OF SACRAMENTO COUNTY et al.
(Civ. 3204.)

(District Court of Appeal, Third District, California. Oct. 11, 1926.)

1. Wills 🔑418.

In proceeding for appointment of administrator, final judgment revoking probate of alleged will cannot be attacked on ground that some of legatees were not served with citation, where record was silent as to question of service, since it is presumed that court had all necessary parties before it.

2. Wills 🔑421—In proceeding for appointment of administrator, attack on final judgment revoking probate of alleged will held collateral.

In proceeding for appointment of administrator, attack on final judgment revoking probate of alleged will *held* collateral, notwithstanding that it relates to estate of deceased, since will and estate of deceased are separate and distinct.

3. Judgment 🔑497(1).

On collateral attack, judgment must be held valid, unless judgment roll shows it to be void.

4. Judgment 🔑495(1).

Every presumption and intendment is in favor of validity of judgment on collateral attack.

5. Judgment 🔑497(1).

On collateral attack, it will be presumed that court had jurisdiction, unless record affirmatively shows otherwise.

6. Judgment 🔑336, 403.

Only ways of attacking judgment are: Motion for new trial; appeal; motion for relief under Code Civ. Proc. § 473; and independent suit in equity.

7. Wills 🔑81.

Will must either stand or fall as a whole.

8. Executors and administrators 🔑20(8)—In proceeding for appointment of administrator, court has no jurisdiction to determine validity of alleged will, probate of which had been revoked in previous proceeding.

In proceeding for appointment of administrator, court has no jurisdiction to determine validity of alleged will, probate of which had been revoked in previous proceeding in which all parties were not served, regardless of agreement or consent of parties or their counsel.

9. Wills 🔑203.

Proceeding to probate will is in rem.

10. Prohibition 🔑5(3)—Writ held to lie to restrain further proceeding in partial distribution of estate under will after final judgment revoking its probate.

Writ of prohibition *held* to lie to restrain further proceeding in partial distribution of estate of deceased under will as to legatees alleged not to have been served in proceeding in which final judgment was entered revoking its probate.

11. Prohibition 🔑3(5)—Prohibition will not lie where aggrieved party has plain, speedy, and adequate remedy at law, but will lie if appeal, though possible, does not afford such remedy.

Prohibition will not lie where aggrieved party has plain, speedy, and adequate remedy at law, but will lie if appeal, though possible, does not afford such remedy and whether remedy by appeal is adequate is matter resting in sound discretion of court.

Application by Mary Fletcher and another for a writ of prohibition prayed to be directed to the Superior Court of Sacramento County and another to prevent further proceedings. Writ granted.

George A. Work, of Sacramento, for petitioners.

B. F. Van Dyke, Joseph W. Mento, and Evan J. Hughes, all of Sacramento, for respondents.

PLUMMER, J. The facts upon which this application is based are as follows: A writing, purporting to be the last will and testament of Maria De Cambra, deceased, was admitted to probate in the superior court of the county of Sacramento on the 28th day of August, 1922. On the 18th day of July, 1923, Josie Macedo, an heir at law of said deceased, filed a contest of said will, alleging undue influence, unsoundness of mind, and insufficient execution of the instrument. Subsequently the contest was tried before a jury, and a verdict entered in favor of the contestant upon a finding that the said Maria De Cambra was of unsound mind at the time of the execution of the instrument alleged to be her will. The judgment revoking the probate of said instrument alleged to be the will of said deceased was entered on the 4th day of March, 1924, notice of motion for a new trial was filed by the proponent, heard by the court, and motion for new trial denied on the 29th day of April, 1924. No appeal was taken, and judgment revoking the probate of said alleged will became final on the 29th day of May, 1924. Thereafter petitions for letters of administration were filed by the contestant, Josie Macedo, and subsequently thereto, and on the 18th day of September, 1924, one Manuel Cordoza filed a petition for letters of administration on said estate. On October 20, 1924, the petitions of Manuel Cordoza and Josie Macedo came on for hearing, and were heard together. Though stated in the briefs, but not appearing in the record at the date of the hearing, T. A. Farrell, as attorney for Josie Macedo, appeared in court, and stipulated that six of the legatees named in the instrument alleged to be the last will and testament of said deceased had not been served with citation. It appears that some twenty-four legatees and devisees were named in said instrument. This stipulation was not filed, was not entered in the minutes, and, as we have said, is not shown by the record presented upon this appeal. It further appears that the citation issued by the court upon filing the contest of the instrument theretofore admitted to probate as the last will and testament of Maria De Cambra, deceased, was lost; that there was no record of the return of the citation and the record is entirely silent as to who were and who were not served with citation in the contest ending in the revocation of the probate of the instrument filed as the last will and testament of said deceased. The matter of the hearing of the petitions for letters of administration herein referred to was submitted to the trial court on the 20th day of October, 1924, and on December 11, 1925, an order was filed purporting to appoint Frank De Cambra administrator with the will annexed of the estate of said deceased. This order appears to have been based on the theory that as to the six legatees who were said not to have been served with citation the will was still in full force and effect. The order of the court in this particular is as follows:

> "The court further finds that as to the said Josephine Cordoza, Manuel Cordoza, George De Cambra, Josephine Jacinto, Thelma Jacinto, and Loretta Jacinto, that this is a proper cause for the issuance of letters of administration with the will annexed."

The persons just named are the individuals stated by Attorney Farrell, in open court, not to have been served with citation in the original proceeding involving the validity of the instrument referred to, filed as the will of said Maria De Cambra, deceased. The order referred to also finds that the six persons herein mentioned were not served with citation. On the 22d day of January, 1926, two of the six persons alleged not to have been served filed a petition for partial distribution of the estate of said deceased. Said petitioners are named as legatees in the instrument, probate of which was revoked, but are not heirs of the deceased. Thereafter, after appropriate steps to that end had been taken, a motion was made before the said superior court and Hon. Peter J. Shields, as the judge thereof, to vacate the order of December 11, 1925, on the ground that it was void upon its face, that the court had no jurisdiction to make said order, and, also, to strike the petition for partial distribution from the files of said court for the reason that, inasmuch as the petitioners were not heirs of said deceased, and the probate of said will had been revoked, and the judgment revoking the probate of said will had become final, said petitioners were not entitled to share in the distribution of said estate of said deceased. This motion was denied. Thereupon the petitioners herein, heirs of and entitled to share in the distribution of the estate of said deceased as her heirs, unless the judgment revoking the probate of said alleged will is vacated in some appropriate proceeding, filed their petition for a writ of prohibition praying that the trial court be prohibited from further proceeding in the matters herein just referred to. The petitioners herein are not, and never have been, represented by Mr. Farrell in any matters pertaining to said estate, and the stipulation made by him in open court was made without their consent or knowledge and, apparently, in their absence. The effect of the stipulation will be dealt with later on.

[1] The record in the proceedings relating to the contest of the instrument filed and administered as the last will and testament of Maria De Cambra, deceased, appears to have been regular in every particular, save and except that the record is entirely silent as to the service of citation issued in the matter of said contest. In this proceeding we are not concerned with any question save that of jurisdiction, and whether the final judgment in the matter of the contest of the alleged will of said deceased can be attacked in a collateral proceeding in the manner and form here presented. So far as the record shows, no attempt has ever been made to directly attack the judgment revoking the probate of the alleged will of said deceased. The order made and entered on the 11th day of December, 1925, apparently made upon an oral stipulation that certain legatees had not been served with citation, constitutes the basis for the holding of the trial court that this is a proper case for the issuance of letters of administration with the will annexed of said deceased as to the six persons so orally named as not having been served with citation. The order directing the issuance of letters of administration with the will annexed does not specifically state, however, that it was made upon any stipulation. In this particular, the order reads: "And evidence both oral and documentary having been introduced and the matter submitted to the court for decision, the court finds," and then the court proceeded to recite the facts, which we have hereinbefore set forth, relative to the filing of the will, its admission to probate, the filing of a contest, the issuance of citation to show cause, the order that said citation was caused to be served upon the executor named in the will, and upon other devisees mentioned in said last will and testament, except Josephine Cordoza, Manuel Cordoza, George De Cambra, Josephine Jacinto, Thelma Jacinto, and Loretta Jacinto, and concluded its order as we have herein stated. It thus appears from the record that the court proceeded in the matter of the application for letters of administration to try the question of the validity of the final judgment in the matter of the contest of the instrument filed as the last will and testament of said deceased and to take oral and documentary testimony as to the service of citation upon certain persons named as legatees under the will of said deceased, and to make a finding that such persons had not been served with citation, and, also, as to them the revocation of the probate of said will was of no effect. What the oral testimony admitted by the court was does not appear from its order, but the briefs of counsel contain the recital that it was the oral statement of counsel for one of the persons interested in the estate of said deceased at the time the court was hearing the petitions for letters of administration.

We thus have before us, first, the record of the probate court in the trial of the contest of the validity of the alleged last will and testament of said deceased which is entirely silent as to who were and were not served with citation. The court had jurisdiction of the subject-matter, was a court of general jurisdiction, and, therefore, comes within the rule announced in 15 California Jurisprudence, p. 92, § 164:

> "That the proceedings of the courts of probate, within the jurisdiction conferred upon them by the laws, shall be construed in the same manner, and with like intendments; and that the records, orders, judgments, and decrees of the said probate courts shall have accorded to them like force and effect, and legal presumptions, as the records, orders, judgments and decrees of the superior courts."

See, also, Estate of Davis, 151 Cal. 325, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105.

[2-6] In this state the law is well settled that, where the record of a superior court is silent as to the question of service, the presumption is that the court hearing the cause had jurisdiction of both the subject-matter and the parties, and that the court had before it all the parties necessary to confer jurisdiction and to pronounce judgment. 34 C. J.

537, § 841. In support of this statement of the law we need only refer to the cases of Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; In re Eichhoff's Estate, 101 Cal. 600, 36 P. 11; also Eichhoff v. Eichhoff, 107 Cal. 42, 40 P. 24, 48 Am. St. Rep. 110, and the recent case of Hogan v. Superior Court (Cal. App.) 241 P. 584, in which latter case hearing by the Supreme Court after judgment in the District Court of Appeal was denied. The citations in the last case are exceedingly numerous, and need not be set forth herein, but they all support the following propositions of law there stated: A proceeding such as we are here considering is a collateral attack, and upon collateral attack a judgment must be held to be valid, unless the record, that is, the judgment roll, shows it to be void. In determining the question, we are restricted to the evidence afforded by the judgment roll. Every presumption and intendment is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat it. The record must show upon its face affirmatively that the court did not have jurisdiction; otherwise it will be presumed. The record is the judgment roll, and upon collateral attack is the only evidence that can be considered in determining the question of jurisdiction. Extrinsic evidence is wholly inadmissible, even though it might show that jurisdiction did not, in fact, exist. In the case at bar, it does not matter what kind of evidence the court permitted to be introduced upon the hearing of the petitions for letters of administration. It had no jurisdiction whatever to consider any evidence other than the judgment roll itself; that is, the records in the matter of the proceeding of the contest of the alleged last will and testament of Maria De Cambra, deceased. That record, as we have said, was entirely silent on the subject of service of the citation issued in the matter of that contest; hence the court had absolutely no jurisdiction in a collateral proceeding to take any evidence other than what was presented, and it was bound by the presumption that the court hearing the contest had jurisdiction, and that the necessary parties to warrant the entry of the judgment revoking the probate of the alleged last will and testament of said deceased were properly before it. In other words, the judgment in the will contest having become final, it is beyond the power of the trial court, in any collateral proceeding to take any evidence, or act upon any evidence, which would rebut the presumption of proper service, or of the fact of jurisdiction in the contest proceedings. Under the law there are just four ways to attack a judgment: (1) By motion for a new trial; (2) by an appeal; (3) by motion for relief made under the provisions of section 473, Code Civ. Proc.; (4) by an independent suit in equity. By the third and fourth methods which we have here referred to, the question of the validity or invalidity of the judgment, by reason of lack of service, may be brought in question. We are not here concerned with what questions may be raised upon motion for a new trial or considered upon appeal. In this case, no motion has been made for relief under the provisions of section 473, Code Civ. Proc., nor has any independent suit in equity been instituted or prosecuted seeking relief from the final judgment in the contest proceedings of the will of Maria De Cambra, deceased.

As we have said, the record in the contest proceedings being silent on the question of service and the judgment in that case having become final before the attempted appointment of an administrator with the will annexed of the estate of said deceased, the court in the matter of the petitions for letters of administration upon the estate of said deceased, being a collateral attack, was absolutely bound by the judgment in the contest proceedings, and, whether service of citation upon all persons named as legatees in the alleged will of said deceased was or was not had or made, the fact of service was absolutely established by the presumptions of law inhering in the final judgment that the court pronouncing it had jurisdiction, unless the contrary explicitly appears on the face of the record. Such presumptions can only be questioned upon a direct attack, irrespective of what the facts may be. As held by the cases cited and in the decisions to which we have referred, "a fact presumed is a fact adjudged," and therefore the question of service in the contest proceedings is just as completely established by presumption as though the court in that case had adjudged and set forth all the facts conclusively showing its jurisdiction and right to proceed.

[7] While not necessary to a decision in this proceeding, we here refer to the authorities which hold that a will must either stand or fall as a whole. The cases refer to instances of alleged undue influence and unsoundness of mind, and the principle is set forth that the will is either valid or void as to all of the legatees. See In re Freud, 73 Cal. 555, 15 P. 135; Estate of Dolbeer, 153 Cal. 652, 96 P. 266, 15 Ann. Cas. 207; Clements v. McGinn, 4 Cal. Unrep. 163, 33 P. 920; Croker v. Williamson, 208 N. Y. 480, 102 N. E. 588; Hines v. Hines, 243 Mo. 480, 147 S. W. 774.

That the proceeding here under consideration is a collateral attack is so well established that we deem it unnecessary to cite authorities. The mere fact that it relates to the estate of Maria De Cambra, deceased, does not in any particular change the character of the attack. See Estate of Davis, 151 Cal. 319, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105. The contest of the will was a distinct and separate proceeding distinctly provided for by the Codes. It had for its purpose the establishment of the status of the alleged last will and testament of Maria De Cambra, deceased, and had nothing to do with the administration of the estate of said deceased. The will of the deceased and the estate of the deceased are separate and distinct, and because the latter proceeding was entitled in the matter of the estate of the said named person, does not change what would otherwise be a collateral attack to a direct attack upon the judgment revoking the will of the deceased. In the Estate of Parsons (Cal. Sup.) 237 P. 744, the court upon this question reviews its holding in the Estate of Davis, supra, as follows:

> "An order admitting a will may be appealed from, or the admission of the instrument to probate may be contested, and the validity of the will attacked within one year after such probate, but an attack on the order, or a contest of the validity of the whole or a part of the will, is not a direct attack merely because made or instituted in some proceeding connected with the administration of the same estate."

In the case at bar, we have a proceeding purporting to be connected with the same estate, and it is in such proceeding that the attack is made upon the will. As we have hereinbefore set forth and under the decisions just referred to, it notwithstanding remains simply a collateral attack, subject to all the presumptions upholding the finality and conclusiveness of the judgment revoking the probate of the alleged last will and testament of said deceased.

[8] In this proceeding, had the record in the contest proceedings established the fact of nonservice of citation, the court possessed no jurisdiction to determine the validity or invalidity of the alleged will of said deceased. It would have found itself simply with an undecided contest before it, which contest should properly have been decided before further proceedings were had. Estate of Edwards, 154 Cal. 91, 97 P. 23. The agreement or consent of the parties cannot give the court the right to adjudicate upon any cause of action or subject-matter which the law withholds from its cognizance, and in such case the order or judgment of the court is void notwithstanding such consent. Consent may be given of the person but not of the subject-matter. 33 C. J. 1077, § 38; Freeman on Judgments (4th Ed.) par. 120; 15 Cal. Jur. 151, § 198; Munday v. Vail, 34 N. J. Law, 418; Seamster v. Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262. Much less can the stipulation of counsel representing one of the persons named as a legatee by Maria De Cambra, deceased, bind or affect the property rights or interests of the heirs of said deceased. Knowlton v. Mackenzie, 110 Cal. 187, 42 P. 580. We do not find anything in the case of Akley v. Bassett, 189 Cal. 625, 209 P. 576, nor in the cases therein cited, modifying or limiting the principles of law which we are setting forth in this opinion. It is not exactly clear just what facts appeared in the judgment roll of the case of Bassett v. Thornton, referred to in the case of Akley v. Bassett, but the reasonable inference from what is stated would be that the record showed simply service upon the minor named Josephine Akley, and, also, that the minor was under the age of 14 years; that thereupon the court made its order appointing a guardian ad litem for said minor and also for two other minors. This, of course, shows an invalid service, and the recital contained in the findings that service of summons had been regularly made was based upon evidence showing that such was not the case. This presents circumstances entirely dissimilar from those we are considering, nor is the following language found in the opinion applicable here. It is there stated:

> "But if the parties admit the facts which show that the judgment is void, or if they are established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where the judgment is void upon its face"—citing authorities.

The parties whose property rights were established by the judgment revoking the probate of the will of Maria De Cambra, deceased, were not parties stipulating that the judgment entered in that case was void. We do not think it necessary to further state that an attorney cannot stipulate away the property rights of persons whom he does not represent. If this cannot be done in a direct proceeding, it is evident that the court cannot acquire jurisdiction to act upon any such stipulation in a collateral proceeding. In the case at bar the court was not dealing with ordinary civil actions between parties where they might appear and stipulate as to matters involving their property rights, but the court was dealing with a proceeding in rem.

[9] That a proceeding looking to the probate of a will is a proceeding in rem and not inter partes is so well established that citation of authorities is unnecessary. It is also unnecessary for the purposes of this decision for us to either approve or disapprove the ruling in the case of Croker v. Williamson, 208 N. Y. 480, 102 N. E. 588, and authorities cited, in which it is held, under a statute similar to ours, that legatees and devisees are so united in interest that service upon one is a service upon all, and that failure to serve upon all constitutes only an irregularity, and does not affect the jurisdiction of the court to proceed. Nor do we need to follow the argument of counsel as to what constitutes jurisdiction to determine questions tendered either upon the proffer of a will for probate or a petition seeking the revocation of such probate, for the reasons that what we have heretofore said and the authorities cited establish beyond question in a collateral proceeding that the trial court in the matter of the con-

test of the alleged will of Maria De Cambra, deceased, had jurisdiction which cannot be questioned. Nor is it necessary for us to express any opinion as to the construction that should be given section 1328, Code Civ. Proc., relating to service of citation. In saying this, we are not overlooking the fact that under section 1312, Code Civ. Proc., where opposition is filed in the first instance to the probate of the will, service of the opposition is only required to be made upon the party petitioning for the probate of the will and residents of the county interested in the estate, while section 1328 goes further and directs the citation to be issued to the legatees and devisees named in the will and heirs residing in the state, so far as known to the petitioner. Nor do we express any opinion as to whether the words "so far as known to the petitioner," appearing in section 1328, supra, refers to legatees and devisees as well as to heirs, or only as to heirs. The construction that should be given to these sections is not really involved in this case, and, for that reason, although learnedly argued by counsel, is not attempted.

[10, 11] In view of what we have heretofore stated, there remains but one question for determination: Should the court exercise its discretion herein and issue a writ of prohibition as prayed for? As stated in Reclamation Dist. No. 108 v. Ash, 58 Cal. App. 238, 208 P. 394, a court of appeal "having once issued an alternative writ of prohibition, and thus signified its willingness to entertain the proceeding, * * * will not dismiss such proceeding merely because the subject-matter to which the writ pertains is solely of equitable cognizance and of which the Supreme Court has exclusive appellate jurisdiction, subject, * * * to the constitutional right of the latter court to transfer the cause * * * to a district court of appeal for hearing and decision." Section 1103, Code Civ. Proc., relating to the issuing of the writ of prohibition, reads: "It may be issued by any court * * * to an inferior tribunal * * * in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." A long list of cases might be cited where it is held prohibition will not issue, and a correspondingly long list of cases might be cited where the writ has been issued. The rule may be stated in general language as follows: If the party aggrieved by the act in excess of jurisdiction has a plain, speedy, and adequate remedy at law, prohibition will not lie, but, if an appeal lies, and yet does not afford the parties such a remedy, the court, in the exercise of its discretion, may grant the writ. In the following cases, notwithstanding the fact that an appeal would lie, the writ has been issued on the ground that an appeal afforded neither a speedy nor adequate remedy. Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am. St. Rep. 119; Glide v. Superior Court, 147 Cal. 21, 81 P. 225; Ophir Mining Co. v. Superior Court, 147 Cal. 467, 82 P. 70, 3 Ann. Cas. 340; Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 P. 845; Consolidated, etc., v. Superior Court, 189 Cal. 92, 207 P. 552; Craycroft v. Superior Court, 18 Cal. App. 781, 124 P. 1042. In the Glide Case a writ of prohibition was granted to prevent a superior court from proceeding to a trial in a case where the issue was whether certain lands were reclaimed, on the ground that the jurisdiction to determine this matter was vested exclusively in the supervisors. While an appeal would lie in that cause, the Supreme Court, however, held that the aggrieved party should not be put to the delay and expense of an appeal. In the concurring opinion in that case it is said:

> "The question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of this court upon the particular circumstances of each case."

In the case of Reclamation Dist., etc., v. Superior Court, 171 Cal. 672, 154 P. 845, the writ was granted to prevent the superior court from entertaining an application for an injunction to enjoin the trustees of a reclamation district from exercising certain functions in building levees. In one of the cases cited the writ was issued to prevent a superior court from trying a case to recover a sum of money less than $300, notwithstanding an appeal lay to the District Court of Appeal. In the Craycroft Case the question involved was the determination of the rights to certain school lands. The writ was issued notwithstanding the remedy by appeal might have been availed of by the aggrieved party.

A review of further authorities where the writ has been issued, and likewise a review of cases where the writ has been denied, would not aid materially in our decision herein further than to state that the determination as to whether a writ should or should not issue in any case is a matter of sound discretion, which must be determined by the particular facts of the case wherein the remedy is sought. If the facts are of such a nature that the remedy by appeal is not adequate, or is not, under the circumstances, speedy, or does not reasonably come within the purview of the definition of either of said terms, then the writ should issue. In the case at bar the settlement of the estate will, by this proceeding, unless restrained, be prolonged for a very considerable period of time. The record shows that the trial court denied the motion to dismiss the proceedings, which we hold should have been granted; that there are twenty-four legatees and devisees named in the alleged last will and testament of said deceased; that two of them have filed a petition for partial distribution; that the court is apparently proceeding upon the theory that the will is valid as to the petitioners for partial distribution, though it may be void as to others; that the court is proceeding with the distribution of an estate where, if upon the trial of the contest of the will the court did not have jurisdiction, the contest of the will would be open and undetermined; that the theory that a will can be void in part on the ground that the testator was of unsound mind, and yet valid as to others, is untenable; that, if distribution is granted in the matters now pending before the trial court, other petitions for a like cause may be filed by other persons named in said last will and testament as legatees and devisees, either separately or together, thus involving much litigation and many appeals—and this all in view of the fact that the intendment of the probate law is that estates should be speedily settled and the property distributed to the persons rightfully entitled to take. These reasons, without mentioning others involving expense and delay, we think sufficient to justify the court in the issuance of the writ restraining the trial court from further proceeding in the matter of the partial distribution of said estate to parties who are not heirs at law of the said Maria De Cambra, deceased on the ground that the court has no jurisdiction to entertain the same by reason of the finality of the judgment annulling and setting aside and vacating the probate of the instrument proffered as the last will and testament of said deceased. Let the writ issue as prayed for.

We concur: FINCH, P. J.; HART, J.

---

79 Cal. App. 525

In re EICHELBERGER et al.

HARRIS et al. v. EICHELBERGER et al.

(Civ. 5264.)

(District Court of Appeal, Second District, Division 1, California. Oct. 18, 1926.)

Infants ⚷19.

Evidence *held* to justify court's decision, acting upon petition to declare child free from custody of parents, under Juvenile Court Law, § 15, that child had not been abandoned by them.

Appeal from Superior Court, City and County of Los Angeles; Harry R. Archbald, Judge.

Proceeding under Juvenile Court Law, § 15, by Margaret Harris and another to have Celeste Eichelberger declared free from custody and control of her parents, Leona Eichelberger and Dewey Eichelberger. From judgment dismissing their petition, petitioners appeal. Affirmed.

John Hyland, of Los Angeles, for appellants.

Alfred W. Hare, of Santa Cruz, for respondents.

YORK, J. The above matter came on before the juvenile court on a petition of one Margaret Harris asking that the court find that Celeste Eichelberger, a person of the age of two years on the 8th day of September, 1924, be declared by the court to be free from custody and control of her parents, as provided in section 15 of an act of the Legislature of the state of California, entitled, "An act to be known as the Juvenile Court Law," approved June 5, 1915 (St. 1915, p. 1225), and acts amendatory thereto. The petition alleged that on the 20th of September, 1923, said child was given into the custody and control of the petitioner and her husband by the mother of said child, and alleged that the father of said child was then, and at the time of the signing of the petition still was, absent from the state; and alleged "that the mother of said child and her mother, Myrtle Bowers, had stated to petitioner that she could keep the child as her own, and that the father of said child had written to them stating that he consented to the same"; that the child was left in the care of the petitioner and her husband, Ralph Harris, by her parents without any provision for her support and without communication from said parents, with the intent on the part of said parents to abandon said person for a period of one year and more, to wit, from the 20th day of September, 1923, to the time of the filing of the petition; and further alleged that said minor was in the custody and control of the petitioner and her husband at the time of filing the petition.

After a full hearing had in due course, an order was entered by the court wherein it was recited that the action of the mother of the minor in refusing to consent to adoption rebutted "the idea of an intent to abandon"; also, that the action of the husband, after he was informed that the child was not with the mother, was in his opinion, "opposed to the idea of an intent to abandon." Thereupon, and for those stated reasons, the court found that there was no intent to abandon and made its order "that the petition should be and it is hereby denied and the petition is dismissed."

The evidence is quite sufficient to justify the court in deciding that the child had not been abandoned by the parents or left in the custody of petitioner with intent to abandon the child. While there is some evidence which might have been sufficient to sustain the contrary finding with respect to the child's mother, the record is wholly wanting in proof of abandonment on the part of the father. It is true that the parents were living apart, the mother in California and the father in the state of Missouri, but there is no evidence that he had deserted his wife or child. As soon as the father received information that the child had been placed with Mrs. Harris, he made known his objection thereto. Although the evidence indicates that thereafter the father did not contribute anything to the support of his wife or child, the evidence fails to establish that his separation from them was caused by any fault on his part, or that he was intending to abandon the child to strangers.

The judgment is affirmed.

I concur: CONREY, P. J.

---

79 Cal. App. 502

PEOPLE v. RHINEHART. (Cr. 1298.)*

(District Court of Appeal, First District, Division 1, California. Oct. 14, 1926.)

1. Criminal law ⚷511(2)—Testimony identifying defendant and accomplice as persons committing robbery held sufficient corroboration of accomplice to support conviction for conspiracy (Pen. Code, § 1111).

Testimony identifying defendant and R. as parties committing robbery established overt act in which defendant was party, tended to establish conspiracy between them to commit robbery, and sufficiently corroborated testimony of R., an accomplice, as required by Pen. Code, § 1111, to support conviction for conspiracy.

2. Criminal law ⚷823(4)—Instruction reciting that overt act was necessary to constitute offense of conspiracy held not prejudicial error, in view of instruction that overt act must be committed in pursuance of conspiracy.

In prosecution for conspiracy to rob, instruction that "in a case where on overt act is necessary to constitute the offense" conviction could not be had unless one or more overt acts were alleged and proved, though erroneous in use of quoted words, was not prejudicial or misleading, in view of instruction that jury must find overt act was committed in pursuance of conspiracy.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

William L. Rhinehart was convicted of conspiracy to commit robbery, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. Appellant Rhinehart, with three others, namely, Haughey, Robinson, and Gleason, was charged by indictment with the crime of conspiracy to commit a series of robberies, and, in separate counts, with the commission of five offenses of robbery. Appellant, with Haughey, were found guilty of the conspiracy charged, but as to the remaining charges against the former the jury disagreed. Appellant's motion for a new trial was denied, from which order and from the judgment he appeals. Appellant contends that the evidence was insufficient to support the verdict and that the trial court erred in its instructions to the jury.

[1] Two of the persons jointly charged with appellant and who were not tried, namely, Gleason and Robinson, were called as witnesses for the prosecution, and it is urged that they, according to their testimony, being accomplices, were not corroborated as provided by section 1111 of the Penal Code.

The count on which appellant was convicted charged a conspiracy to commit the offenses alleged in the remaining counts of the indictment, and, according to the testimony of the witnesses mentioned, they, with appellant and the fourth defendant, planned and carried out the series of robberies therein charged. Several witnesses testified to a series of robberies, but were unable to identify the appellant as one of their assailants, with the exception of the witness Harry Snyder, one of the persons whom appellant was charged with having conspired with his codefendants to rob, who identified both appellant and Robinson as the persons who on the date alleged in the indictment robbed the witness of a sum of money and other personal property. This testimony established an overt act in which appellant and Robinson were actors, tended to establish the fact of a conspiracy between these parties to commit the robbery (12 Corp. Jur. "Conspiracy," § 229, and cases cited; People v. Bentley, 75 Cal. 407, 17 P. 436), and was sufficient to corroborate the testimony of Robinson (People v. McLean, 84 Cal. 480, 24 P. 32; People v. Taylor, 70 Cal. App. 239, 232 P. 998; People v. Blunkall, 31 Cal. App. 778, 161 P. 997).

[2] The instruction of which appellant complains was as follows:

> "Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendants cannot be convicted unless one or more overt acts are expressly alleged in the indictment, nor unless one of the acts alleged is proved. You are instructed that the crime of conspiracy need not be proved by direct evidence, but may be proved by circumstantial evidence."

It is conceded by the prosecution that this instruction, by including therein the words, "in a case where an overt act is necessary to constitute the offense," did not correctly state the law. We do not think, however, that it can reasonably be said that the error was prejudicial, or that the jury was misled thereby, in view of the fact that the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 13, 1926; Curtis, J., dissenting.

jury was, with reference to the count on which appellant was convicted, instructed that before they might convict they must find that the overt act was committed in pursuance of a conspiracy to commit such crime, the instruction being as follows:

> "Before you can convict a defendant or defendants upon the first count of the indictment you must be satisfied from all the evidence in the case beyond all reasonable doubt that a crime was committed, that it was committed in pursuance of a conspiracy to commit said crime, and that the defendants whose names are set forth in the indictment, or a portion of them, were members of said conspiracy."

After an examination of the entire record we are satisfied that the evidence fully supports the verdict of the jury, and we find no error therein which in our opinion resulted in a miscarriage of justice.

The order and judgment are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

79 Cal. App. 499

PEOPLE v. RHINEHART. (Cr. 1275.)*

(District Court of Appeal, First District, Division 1, California. Oct. 14, 1926.)

1. Criminal law ⚷511(1).

In prosecution for murder, evidence *held* sufficient, under Pen. Code, § 1111, to corroborate accomplices.

2. Criminal law ⚷407(2) — **Admitting testimony that defendant, on hearing statements by accomplices read, stated that he had nothing to say, was proper.**

In prosecution for murder, admission of evidence that defendant, who had denied guilt few days previous, stated when written statements of accomplices were read to him that he had nothing to say, was not error.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

William L. Rhinehart was convicted of first degree murder, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco (Austin W. Arnold, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. The defendant was charged with the murder of Michael J. Brady, a police officer. The jury returned a verdict of murder in the first degree, life imprisonment being fixed as the punishment for the crime. A motion for a new trial was denied, from which order and from the judgment the defendant has appealed.

[1] The deceased at about the hour of 1 o'clock a. m. on October 1, 1924, near the intersection of Mason and California streets, in the city of San Francisco, received injuries from pistol shots fired by one of the occupants of a Ford touring car, from which he subsequently died, defendant and two others, namely, Haughey and Gleason, being charged by indictment with the crime. The latter and one Robinson were called as witnesses for the prosecution, and testified that on the occasion mentioned they with the defendant occupied the automobile and were engaged in carrying out a previous plan to rob one Carrington; that at the time of the injuries to the deceased the latter approached the car, which was being driven by defendant Rhinehart, ordered the driver to stop, and attempted to step upon the running board, whereupon defendant fired the shots which caused the officer's death.

Defendant urges as grounds for reversal that the testimony of these witnesses was not corroborated by evidence tending to connect him with the commission of the offense, and that the trial court erred in admitting evidence of certain statements made to defendant after his arrest and his reply thereto. Defendant admitted his acquaintance and frequent association with the witnesses, but denied that he was present at the time of the commission of the crime charged. The witness Robinson testified that defendant on the occasion of the shooting was wearing an overcoat owned and described by the witness. It was further testified by the owner of the automobile, who was acquainted with defendant and with Gleason and Robinson, that the car was borrowed by the latter at about 10:30 p. m. of September 30, 1924; that shortly before midnight on the same evening the witness saw the defendant with Gleason and Robinson seated therein; and that defendant was then wearing an overcoat similar to that described by Robinson. It was further shown that the bullets taken from the body of the deceased were of the same caliber and marked by imperfections existing in the barrel of a revolver found in the possession of the defendant at the time of his arrest.

In addition to the foregoing, evidence was adduced which tended to show that defendant, in company with one or more of his associates mentioned, had previously participated in a robbery perpetrated by methods described by Robinson and which were similar to those contemplated on the night of the murder. This testimony strongly tended to connect the defendant with the commission of the crime charged, and was sufficient within the provisions of section 1111 of the Penal Code to corroborate the witnesses Gleason and Robinson. People v. McLean, 84 Cal. 480, 24 P. 32; People v. Blunkall, 31 Cal. App. 778, 161 P. 997; People v. Taylor, 70 Cal. App. 239, 232 P. 998.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 13, 1926; Curtis, J., dissenting.

[2] Subsequent to the arrest of Gleason and Robinson statements in writing were made by them containing in substance the matters to which they testified at the trial. Shortly after the arrest of the defendant the statements mentioned were read to him. Defendant some days previously had denied his guilt, and on this occasion stated that he had nothing to say. Such testimony is received on the theory that a refusal to speak under circumstances which naturally call for denial is a fact which tends inferentially to show an admission of the truth of the accusation, its relevancy in view of the circumstances shown being in the first instance a question for the trial court. People v. Byrne, 160 Cal. 217, 116 P. 521. In the instant case the conclusion of the trial court that the conduct of the defendant, in view of the nature of the accusation, was a relevant fact finds reasonable support from the circumstances shown by the evidence, and its admission was not erroneous. People v. Shelest, 62 Cal. App. 213, 216 P. 389; People v. Graney, 48 Cal. App. 773, 192 P. 460; People v. Taylor, supra; People v. Egan (Cal. App.) 246 P. 337; People v. Swaile, 12 Cal. App. 192, 198, 107 P. 134.

No error appearing from the record, and the evidence being sufficient to sustain the verdict, the order and judgment appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 523

PEOPLE v. WRIGHT. (Cr. 1395.)*

(District Court of Appeal, Second District, Division 1, California. Oct. 18, 1926.)

1. Criminal law ⚷564(1).

Evidence *held* to show that sale of intoxicating liquor, in violation of Wright Act, occurred in San Bernardino county, though no direct proof thereof was made, in view of presumption under Code Civ. Proc. § 1963, subd. 15.

2. Criminal law ⚷304(6).

Courts take judicial notice of existence and local bounds of a city within state.

3. Criminal law ⚷323.

Where witnesses in prosecution in San Bernardino county referred to Ontario and to streets in Ontario, presumption is they intended to speak of city of Ontario.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

H. B. Wright was convicted of violating the Wright Act (St. 1921, p. 79), and he appeals. Affirmed.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

YORK, J. [1] The only question raised is whether or not the offense charged against the defendant was proved to have been committed in the county of San Bernardino, state of California. The evidence fails to disclose the use of the words San Bernardino or state of California by any of the witnesses in fixing the place where the sale of liquor was alleged to have occurred; but it does affirmatively appear from the evidence that the offense charged occurred at the home of defendant Wright, and that the home of the defendant Wright was at Ontario at the time of the commission of the offense charged, to wit, on or about the 13th day of January, 1926.

While there was gross carelessness on the part of the prosecution in failing to make direct proof that the offense was committed within the county of San Bernardino, there were certain circumstances proved which are sufficient to serve as proof of that fact. The alleged offense was committed in the presence of the witnesses Sampson and Griffith; the witness Orindorff being at that time on Wright's premises, but outside the house, and not where he could witness the delivery of the liquor or payment of the money. Orindorff testified that he (Orindorff) lived at Etiwanda, San Bernardino county, Cal.; that he was a deputy sheriff of San Bernardino county; that he was acting as deputy sheriff on the 13th day of January, 1926; that on the evening of that day, on A street, in Ontario, he met Sampson and Griffith, and, in Orindorff's automobile, went with them to the house of the defendant Wright. There is other evidence showing that, at the time and place last above mentioned, the transactions occurred whereby the alleged sale of intoxicating liquor was made by the defendant. There is also evidence that the liquor was taken to the chemist Hawkinson of Upland, Cal., and was analyzed by him on the 21st day of January.

[2, 3] Since the testimony shows that Orindorff was acting as deputy sheriff of San Bernardino county, Cal., at the time when the offense was committed, and that he was on Wright's premises, although not within the house when the sale was made, it is a necessary inference that he was so acting within the state of California, and therefore that the offense to which his testimony refers was committed within the state of California. It is a presumption of law (satisfactory, if uncontradicted) that official duty has been regularly performed. Code Civ. Proc. § 1963, subd. 15. Further, courts may take judicial cognizance of the existence and local bounds of a city within the state. People v. Mueller, 168

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 16, 1926.

Cal. 521, 524, 143 P. 748, L. R. A. 1915B, 788; People v. Christian, 48 Cal. App. 646, 649, 192 P. 182. The city of Ontario is within the county of San Bernardino. When the witness referred to Ontario, and to streets in Ontario, it will be presumed that they intended to speak of the city of Ontario. In re Marincovich, 48 Cal. App. 474, 192 P. 156.

There being no merit in the appeal, the judgment and order are affirmed.

I concur: CONREY, P. J.

---

79 Cal. App. 533

SILBERSCHMIDT v. MORAN et al.

(Civ. 5193.)

(District Court of Appeal, First District, Division 1, California. Oct. 22, 1926.)

1. Bills and notes 🔑186.

Indorsement of certificates of deposit to real estate agent to be used in effecting purchase of real property *held* supported by sufficient consideration.

2. Bills and notes 🔑359.

Plaintiff, receiving certificates of deposit from real estate broker in part payment of claim for money deposited with broker, *held* to have given a valuable consideration therefor, under Civ. Code, § 3106.

3. Bills and Notes 🔑537(6).

Question of good faith of plaintiff in receiving certificates of deposit, where evidence is conflicting, is one for jury.

4. Bills and notes 🔑337.

That plaintiff, receiving certificates of deposit from real estate broker in part payment of claim against him, suspected him of dishonesty, *held* not to show bad faith, affecting her standing as holder in due course.

5. Bills and notes 🔑525.

That transfer of certificates of deposit to plaintiff was induced by threats of attachment suit *held* not to show that such certificates were procured through menace, as affecting her standing as holder in due course.

6. Contracts 🔑95(4).

Threat of attachment suit is not duress.

7. Appeal and error 🔑1011(1).

Finding of fact by trial court on conflicting evidence will not be disturbed.

8. Costs 🔑32(1).

In action against indorser of certificates of deposit, plaintiff who was adjudged to be holder and owner of such certificates, though denied recovery for want of notice of dishonor, *held* entitled to recover costs.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by E. J. Silberschmidt against Thomas Moran and another, indorsers of certificates of deposit. From the judgment establishing plaintiff's right to the certificates involved, but denying recovery, the first-named defendant appeals. Affirmed.

Goudge, Robinson & Hughes, of Los Angeles, for appellant.

Rush M. Blodget and T. P. Menzies, Jr., both of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. Plaintiff claiming to be the holder in due course of four certain negotiable certificates of deposit issued by the State Bank of Merrill, Mich., payable to the defendant Thomas Moran, or order, each dated February 16, 1921, and each for $1,000, brought this action to recover the face thereof to wit: $4,000 with interest from defendants Thomas Moran and H. B. Eshleman as indorsers. The defendant Eshleman having absconded and not having been served with process the action proceeded against the defendant appellant Thomas Moran alone.

The defenses pleaded by the appellant were that there had been no notice of dishonor or protest; that plaintiff was not a holder in due course; that plaintiff had become possessed of the certificates without consideration and in bad faith and through menace and duress practiced upon H. B. Eshleman in whose hands the certificates of deposit had been placed by appellant to be used only in the purchase of certain real property in Los Angeles; and that the certificates of deposit had not been used for that purpose. The appellant asked for affirmative relief and to be adjudged the owner and entitled to the possession of the four certificates of deposit.

The court found that the instruments had not been protested as alleged and that plaintiff was not entitled to recover from defendant appellant as an indorser but did find that plaintiff was a holder in due course as against the affirmative defense of appellant, and that plaintiff was the owner of the certificates of deposit and entitled to their possession, and that she was entitled to recover costs. Judgment was made and entered by the court following these findings, and costs assessed against appellant. Thereafter defendant appellant duly moved for a new trial, and this having been denied, a bill of exceptions was prepared, and this appeal prosecuted from the judgment.

The following is a summary of the facts as shown by the evidence:

The defendant H. B. Eshleman was a real estate agent engaged in that business in Los Angeles under the name "H. B. Eshleman Realty Company," which was not a corporation and which was entirely owned by Eshleman, who signed as president.

The defendant appellant, Moran, who was the owner of the four certificates of deposit in question, was desirous of purchasing certain real property in Los Angeles, and for this purpose signed his name on the back of the certificates of deposit and left them, on February 24, 1921, with the H. B. Eshleman Realty Company in its escrow department according to certain escrow instructions. These instructions read, in part, as follows :

> "I hand you at this date four certificates of deposit on the State Bank of Merrill, Mich., for $1,000 each, and being numbered Nos. 5971, 5972, 5973, and 5974, respectively, all of which you are authorized to use in connection with your escrow No. 4180 when you can secure for me a title guaranty on the property and premises situate Nos. 1723 to 1725½ Ocean View avenue, in the city of Los Angeles, being a four-family flat building, according to the legal description thereof, which will show that the record title to said property is vested in myself, Thomas Moran, a single man, free from incumbrances except. * * *"

The Eshleman Company was never able to secure a deed for Moran of this property. The certificates of deposit were not used by Eshleman for the purpose for which they were placed in escrow, but were on the same day that they were received—February 24, 1921—indorsed by Eshleman and then delivered by him to the plaintiff, to whom Eshleman was at the time indebted in the sum of $5,093.35.

The indebtedness of Eshleman to the plaintiff arose from the following transaction. In October and November, 1920, the plaintiff had intrusted the Eshleman Realty Company in its escrow department with $5,000 to purchase certain real property, according to certain escrow instructions given by the plaintiff. These instructions were never carried out, and the plaintiff demanded the return of her money. By December 20, 1920, she began to suspect the good faith of the transaction and placed the case in the hands of her attorney. With her brother, Dr. I. W. Traverse, she called upon Eshleman a number of times and demanded the return of her money. On February 7, 1921, her attorney wrote Eshleman to the effect that the $5,000 placed in his hands by the plaintiff was a trust fund and that, from admissions which Eshleman himself had made to Dr. I. W. Traverse, Eshleman had been guilty of embezzlement—a very serious offense.

On February 23, 1921, plaintiff visited the office of Eshleman, demanded payment of the indebtedness with interest, and received from Eshleman a check for $5,093.35, drawn by Eshleman himself with instructions not to present it until the following day. This check was deposited by the plaintiff in the First National Bank of Los Angeles on February 23, 1921. The check was not honored on the 24th of February, 1921, payment thereof being refused by the bank upon which it was drawn, and, upon being advised of this fact, the plaintiff, her brother, Dr. I. W. Traverse, and her brother's wife went at once to the office of Eshleman, met him as he was coming from his office, confronted him with the information that the check which he had given them was dishonored, and demanded an explanation, and plaintiff told him that unless he settled this obligation at once she had given her attorney instructions to bring suit and attach his property immediately. Eshleman had the four certificates of deposit involved in this action in his hands, and he immediately turned them over to the plaintiff.

After receiving the certificates of deposit, the plaintiff, on February 24, 1921, took them to the First National Bank of Los Angeles, and, after indorsing them, deposited them to her account in that bank. The First National Bank forwarded the certificates of deposit to the Corn Exchange National Bank, Chicago.

On March 2, 1921, the defendant Eshleman absconded, and H. W. Nesbit, who was in charge of the escrow department of the Eshleman Company, wired to the State Bank of Merrill, Mich., to stop payment of the certificates of deposit, and payment was on that day stopped.

Appellant urges that the trial court erred (1) in finding that there was a consideration given to the appellant for signing and delivering the certificates of deposit to the defendant Eshleman; (2) in finding that the plaintiff paid full or any consideration for the certificates of deposit; (3) in finding that the plaintiff was a holder in due course and received the certificates of deposit in good faith; (4) in finding that it was untrue that the plaintiff procured the certificates of deposit through menace; (5) in concluding that the plaintiff was entitled to judgment that plaintiff was the holder and owner of the certificates of deposit; (6) in concluding that plaintiff was entitled to judgment for costs.

[1] The trial court found that the indorsement by Moran to Eshleman was for a consideration, namely, the "agreement and arrangement between defendant Eshleman and defendant Moran." The record shows that Eshleman Realty Company undertook to effect a purchase of certain real estate for defendant Moran, or, as appellant phrases it, "to deliver him a clear deed." This undertaking was sufficient consideration for the indorsement. Moran never expected to get back the certificates nor did he stipulate that they be returned.

[2] As to the second point urged by appellant, that the court erred in finding that the plaintiff paid full or any consideration for the certificates of deposit, it is sufficient to say that the evidence, a résumé of which has been given, shows that plaintiff paid a valuable consideration for the certificates.

> "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed

such whether the instrument is payable on demand or at a future time." Civil Code, § 3106.

Under the rule established in this state, a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser. Pezzoni v. Greenwell, 178 Cal. 652, 174 P. 60; Sackett v. Johnson, 54 Cal. 109; Russ, etc., v. Muscupiabe, 120 Cal. 532, 52 P. 995, 65 Am. St. Rep. 186; Robinson v. Smith, 14 Cal. 94; Naglee v. Lyman, 14 Cal. 450; Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318.

[3] It is conceded by appellant that Eshleman was indebted to respondent Mrs. Silberschmidt in the sum of $5,093.35. Eshleman had given her a check for that sum, which check was not honored by the bank. The subsequent loss or recovery of this dishonored check is immaterial. Appellant had threatened Eshleman with an attachment suit if he did not settle his obligation at once and told him that she would not sue him and attach his property if he settled with her. Surely either the pre-existing debt or the forbearance to sue is a valid consideration, and the certificates, being indorsed and delivered to respondent for a valid consideration, answers appellant's third claim that the evidence does not support the finding "that the plaintiff was a holder in due course and received the certificate of deposit in good faith." The question of good faith, where the evidence is conflicting, is one for the jury, or for the trial court in case a jury is waived (8 Corpus Juris, 1061), and the trial court has found for respondent on this issue.

[4] Counsel for appellant calls the attention of the court to many quotations from the evidence to indicate that Mrs. Silberschmidt was suspicious of Mr. Eshleman's honesty; this has been held not to impute bad faith.

Inasmuch as commercial paper circulates on the same plane as money, and hence may legitimately find its way into the hands of almost any one, it follows that the occupation or profession of the transferor is not of itself sufficient to put the purchaser on inquiry concerning the validity of the consideration or other defenses to the paper, or to mala fides on his part in taking it without inquiry. Even knowledge of the assignor's crookedness in business matters does not charge the purchaser with the duty of making inquiry. Setzer v. Deal, 135 N. C. 428, 47 S. E. 466; 8 Corpus Juris, 518.

[5] Appellant contends that menace and threats were used and that, therefore, the court erred in finding "that it was not true that the plaintiff procured the certificates of deposit through menace"—appellant's fourth assignment of error—and refers to a letter written by respondent's attorney to Eshleman in which the following appears:

> "I will state, as stated by me in a previous letter, that Mrs. Silberschmidt does not, nor do I, desire to do you any injustice, or to cause you any unnecessary inconvenience; but rest assured, Mr. Eshleman, that our patience is almost exhausted, and that, if it is necessary for us to take action, no halfway measures will be resorted to."

During this time Eshleman was in his letters insisting that he had done no wrong, and it nowhere appears in the record that Mrs. Silberschmidt or her attorney *knew* that he had.

At the trial the shortage of $40,000 and the absconding of Eshleman was proved, but this latter took place *after* the indorsement. Evidence was also offered as to Eshleman's state of mind—his worries, his mental condition. But there is nothing to show that Mrs. Silberschmidt knew anything about his health or the shortage, and it is clear that Eshleman was later fully advised of Mrs. Silberschmidt's intention, viz. to sue him and attach his property, if he did not return her money, and, if he did return it, she would not file the suit.

The trial court had before it all of the evidence, and it was the province of the trial court to determine whether Eshleman was intimidated by the letter of plaintiff's attorney and the demands made personally. The trial court had heard respondent testify:

> "I had told him that, unless he settled this obligation with me at once, I had given my attorney instructions to bring suit and attach his property." "I accept them (the certificates) as $4,000 cash payment, and told Eshleman I would not bring suit." "He (Eshleman) also had shown me where he had assets amounting to $165,000, and so, of course, I believed he had property which he could sell." "So I said I would accept them as cash payment for the $4,000, and, of course, in that case I will not sue you or attach any of your property."

[6, 7] The best that can be said in favor of appellant's contention is that there is a conflict in the evidence on the question of threats or menace. From the findings it is evident that the trial court believed that Eshleman feared only an attachment suit, and there is sufficient evidence to justify such a conclusion. Threat of an attachment suit is not duress. The rule is so well established that, where there is a conflict of evidence, the finding of the trial court will not be disturbed, that the citation of authority is unnecessary.

[8] The fifth and sixth assignments of error are without merit.

From the facts found by the court, respondent is entitled to judgment that she is the holder and owner of the certificates of deposit and to judgment for her costs.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

79 Cal. App. 506

PEOPLE v. ROBERTS. (Cr. 940.)*

(District Court of Appeal, Third District, California. Oct. 16, 1926.)

1. Criminal law ⚷1170½(2)—Where defendant testified that he would not strike wife, whom he was accused of killing, asking witnesses whether they had seen him strike wife was not prejudicial error, answers being in negative.

Where defendant, accused of killing wife, testified that he would not under any consideration strike wife, questioning witnesses as to whether they had ever seen him strike wife was not prejudicial error, especially in view of fact that answers were in negative.

2. Homicide ⚷174(1)—Failure of defendant, accused of killing wife, to call physician, and leaving her in dangerous condition were facts to be considered by jury.

Where defendant, accused of killing wife, claimed she took poison and that he administered antidote, his failure to call physician and his act in leaving her shortly afterward and staying away until notified of her death were facts to be considered by jury in determining whether defendant's account was true or untrue.

3. Homicide ⚷250.

Evidence *held* to sustain conviction of manslaughter.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

E. I. Roberts was convicted of manslaughter, and he appeals. Affirmed.

Puter & Quinn, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the offense of manslaughter upon an indictment charging that on or about the 30th day of January, 1926, in the county of Humboldt, the defendant feloniously and with premeditation and malice aforethought did kill and murder his wife, Dorothy Roberts. To the judgment of conviction, the defendant interposed a motion for a new trial. His motion being denied, this appeal is prosecuted from the order denying said motion and the judgment of conviction just referred to. It appears from the record that the defendant and the deceased were husband and wife, living in a small lumber camp some 15 miles from the town of Scotia, in the county of Humboldt. On the evening of January 30, the defendant returned to the small house or shack where he and his wife resided, accompanied by C. H. Foster and J. E. Elliott, arriving at his home at about 6 o'clock, p. m. It appears that Foster had been drinking for several days, and was sick when he arrived at the home of the defendant, and was shown to one of the rooms in the building by the defendant, and there lay down and went to sleep and remained in that condition until after the circumstances leading to the death of Dorothy Roberts had taken place. The testimony also indicates that Mrs. Roberts had been drinking, although she was up and about and was proceeding with the preparations for the evening meal. It may be here stated that the record shows that the deceased was possessed of a violent and uncontrollable temper, and during her fits of rage acted as though temporarily insane.

A short time after the defendant returned to his home, as herein stated, and during the preparation of the evening meal, the defendant, in handling some of the dishes, allowed one of them to slip from his hands. This apparently enraged the deceased and she immediately began an attack upon the defendant. A scuffle ensued, during which time the man Elliott, hereinbefore referred to, testified that he went out on the porch, that while he was there he heard blows; it sounded like striking with the fist or hand, which the witness illustrated by striking himself upon the chest. After this incident had occurred and the disturbance between the deceased and the defendant had quieted down, Elliott re-entered the house and went into the kitchen where the dinner was being prepared. It also appears that, during the period of time to which we have been referring, the defendant tried to induce Mrs. Roberts to go and lie down on a bed and let him prepare the evening meal. The witness Elliott states that Mrs. Roberts used very strong language toward her husband and rushed at him as though intending to strike him with her fists. A short time after the defendant and Elliott had sat down to eat the evening meal, according to the testimony of the defendant and Elliott, the deceased walked out of the back door and stood in front of a window and while there drank from a bottle containing lysol, came back into the room, and said good-bye to one of the children; that the defendant immediately took hold of Mrs. Roberts, held her down on the floor, and administered an antidote of milk and salt water; that the salt water and milk oozed back from the mouth, and they detected the odor of lysol. In one part of the testimony it is said that the deceased vomited, but a careful scrutiny of the testimony would lead to the conclusion that the deceased did not vomit, but that all the liquid that exuded from her mouth was the liquid antidote which the defendant and Elliott were endeavoring to administer. In a short time the deceased became quiet, and the defendant and Elliott picked her up and laid her upon a bed in an adjoining room.

After all this had occurred and the deceased had become quiet, the defendant, ac-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 13, 1926.

cording to his testimony, thinking that Mrs. Roberts was out of danger, took Mr. Foster down to a place named McKees, a mile and a half distant, in order that Foster might be taken to Scotia, where he could have medical treatment. McKees was simply a place where a pool hall and card rooms were maintained. The witness Elliott did not accompany the defendant to McKees, but remained at the home of the defendant. Some little time after the defendant had departed, the witness Elliott discovered that Mrs. Roberts was dead. His testimony is to the effect that he went into the room where she was lying several times, that at first she seemed to be breathing normally, but along shortly after 10 o'clock he discovered that she was dead. The witness Elliott then went down to McKees in search of the defendant, where the defendant was found playing a game of cards, and informed him of the death of Mrs. Roberts. We may here state that the testimony of the defendant is to the effect that the deceased had, on previous occasions, taken iodine with suicidal intent, and that, upon administering an antidote, she had recovered, and that he thought the antidote administered in this case had proved effective.

[1] The testimony of a neighbor who lived some 200 feet distant from the house occupied by the defendant and the deceased was to the effect that some time during the evening of January 30th she heard scuffling and some one or something fall. She described the noise as that which would be made by the falling of a chair. The testimony further shows that the defendant and the deceased had had considerable trouble at different times and in different places, but, in every instance, it is shown that the violent and ungovernable temper and jealous disposition of the deceased started the controversies. During the course of the trial, it appears that a number of the witnesses were questioned as to whether they had ever seen the defendant strike the deceased, but the answers to all these questions appear to be in the negative. It is urged upon this appeal that the asking of such questions constituted prejudicial error, but an examination of the record shows that the defendant himself, upon direct examination, testified that he would not, under any circumstances, strike his wife, and that the questions asked him upon cross-examination relative to striking his wife simply followed the line of the direct examination of the defendant. Had the defendant not been asked the question which opened the door, the prosecution would have been precluded from pursuing the line of cross-examination permitted by the trial court. The questions and answers which opened the door to which we refer are as follows:

"Q. Did you strike her upon the head with anything? A. No, sir.

"Q. Did you strike her with your fist? A. I did not.

"Q. Did you strike her with any kind of an instrument? A. No, sir.

"Q. A black-jack or a club or anything of that kind? A. No, sir.

"Q. Would you, under any circumstances, do such a thing? A. No, sir.

"Q. You thought a great deal of your wife, did you not? A. I certainly did."

As to the questions asked of other witnesses as to whether they had ever seen the defendant slap the deceased, it is sufficient to say that no objection appears to have been made to the introduction of such testimony. It may also be added here that the testimony of all of the witnesses who were asked such questions was to the effect that they had never seen anything of the kind. With these circumstances presented, the contention of the prosecution was that the deceased came to her death by blows administered upon the head of the deceased and not from lysol poisoning; that the lysol taken immediately after the administration of and receipt of the blows had taken no effect upon the system of the deceased by reason of the fact that the deceased's condition, and especially the stomach, was negative. On the part of the defendant it is contended that the deceased died of lysol poisoning, that no blows were administered by the defendant, and that the evidence in the case does not warrant the jury in finding the defendant guilty of manslaughter.

In determining this question, we shall follow the rule announced by this court in the case of People v. Bond, 13 Cal. App. 175, 109 P. 150:

> "It is, of course, well settled that 'if the evidence which bears against the defendant, considered by itself and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive'" (citing People v. Emerson, 130 Cal. 562, 62 P. 1069).

The same rule is announced in different language in People v. Glover, 141 Cal. 233, 74 P. 745, where the court says:

> "We cannot invade the province of the jury, and substitute our judgment for theirs, as to the sufficiency of their finding on controverted facts. There may, it is true, arise an exceptional case, where the testimony in behalf of the prosecution is so improbable and incredible that the court, convinced of its falsity or absolute insufficiency to warrant a verdict of guilty, would deal with it as a matter of law. This, however, must be an extreme case."

Following the rule just stated, we will briefly examine the evidence. The record shows that, shortly after the death of the deceased, she was taken to a nearby undertaking parlor where, in a short period of time, certain bruises upon her head made their appearance. There were four or five of these bruises. The undertaker who had charge of the remains injected an embalming fluid known as formaldehyde. His statement and that of another undertaker are to the effect that the injection of formaldehyde tends to bring out and disclose any bruises which exist upon the body. This testimony is contradicted by medical testimony to the effect that the bruises would appear in a short period of time, even though no formaldehyde or embalming fluid were injected in the body. The testimony of one of the physicians who examined the body of the deceased and performed the autopsy was to the effect that one side of the head of the deceased had received a number of blows, that one blow had slightly indented the skull, that the blows were such as could only be made by a soft instrument such as the hand and not by a hard instrument such as a piece of wood or metal, that these blows had not produced any lacerations upon the surface, but, upon removing the scalp and lay ing back the skin, the lacerations produced by the blows were observable, that these blows were sufficient to cause death, and that death resulted therefrom. The testimony of the physicians also was to the effect that the finger prints underneath the chin of the deceased indicated that she had been choked, and that death could have resulted as well from the choking.

H. A. Duffey, an analytical chemist of some years' experience, testified that he first made an examination of the stomach and brain of the deceased, that an examination of the system and brain demonstrated that the deceased had not died from lysol poisoning, that he afterwards examined the kidneys and other organs of the deceased, that there was no creosote poison in the brain of the deceased nor in the kidneys, that upon an examination of the stomach and brain of the deceased it was demonstrated that the deceased had come to her death from other causes than poisoning, that the poison so found in the stomach had been taken within such a short time preceding the death of Mrs. Roberts that it had not been taken up by the circulatory system and had had no effect other than that of burning a small spot in the stomach where the lysol was found, that, at the time the lysol was taken by the deceased, the stomach was in a negative condition, and therefore, the lysol poison was not distributed through the system. The testimony of Drs. Fleming and Wallace was also to the same effect. Dr. C. O. Falk testified that when a person dies from lysol poisoning and the body is embalmed with a fluid composed of formaldehyde as a base, that the organs, such as the brain, kidneys, liver, and heart would show no trace of the poisoning. This witness, however, testified upon the theory that death had been occasioned by lysol poisoning and not that the lysol poisoning had been found in the stomach without time being given for its absorption and distribution through the system. The analytical chemist further testified that the embalming fluid would not destroy the evidence of lysol poisoning, that creosol is a cyclo-hydro carbon, and the ring is not subject to oxidation. It can only be opened by boiling nitric or sulphuric acids. Aldehydes of the embalming fluid can have no effect on the creosol ring, and that where one dies from lysol poisoning the embalming fluid does not destroy the evidences of such poisoning.

One of the witnesses testified that the blows on the head were such as might have been made by a black-jack or some similar instrument, that three of the wounds above the skull showed no discoloration, that lower down on the jaw there was a hemorrhagic area, the three wounds on top of the head showed discolorations, but the tissues above it—the scalp —showed absolutely no discoloration, that the macerated condition under the scalp was caused by the severe blow before death, that the blows upon the skull were severe blows, they were severe enough to bruise the skull, that there was an interval between the blow over the eye and ear and the top of the head, that the blows on the top of the head would have shown hemorrhage, had the deceased lived long enough, but that her death took place before the hemorrhage could occur, that the blow over the eye was received at a previous period, that there was a decided interval between the blow on the jaw and the one over the eye, that the blows over the head occurred immediately before death. This is shown by the fact that no opportunity was allowed for hemorrhage; that the blow severe enough to bruise the skull would have caused hemorrhage, had she lived long enough thereafter for it to take place; that it was hard to determine the length of time between the blow over the eye and the ear and the time of the death, but that the blow on the side of the head occurred immediately before death, that there was an interval of perhaps a minute, that the blow was severe enough to dent the skull and would have produced a hemorrhage of the tissues.

There was also testimony to the effect that blows could be administered upon the head sufficient to cause death without leaving any immediate scar bruises or laceration upon the skin, and that such was the case in this instance.

As controvertive of the testimony to which we have referred, witnesses testified that, in their opinion, the deceased came to her death from lysol poisoning and not from the blows, that the lysol could not have been taken after the administration of the blows sufficient to cause death. The testimony of the witnesses for the prosecution, however, was to the effect that the lysol poison was taken immediately after the administration of the blows, and that the condition of the stomach and the fact that lysol was found only in the stomach led to the conclusion that the stomach and circulatory system of the deceased were in a negative condition and rendered so by the blows which immediately thereafter led to her death. The record also discloses some inconsistencies in the statement made by the defendant at the coroner's inquest and his testimony given upon the trial as to why he went down to McKees a short time after his wife had taken poison.

[2] It is undoubtedly true that the defendant was placed in a more or less unenviable light before the jury by reason of his actions in not calling in a physician to attend the deceased, in leaving her a short time after the occurrences which we have narrated, going down to McKees to take Mr. Foster, or for any other reason, and remaining there engaged in playing cards until notified of his wife's death, but such actions were actions to be considered by the jury in determining whether the defendant's account of the transaction was true or untrue, and whether he had or had not been instrumental in causing the death of his wife. It must be admitted that such actions would be deemed unnatural on the part of a husband who was solicitous as to the welfare of his wife. The natural thing to have done, if Foster needed medical attention, would have been for the defendant to have sent Elliott with Foster down to McKees and remained himself to look after the wife's welfare, instead of leaving her in charge of the witness named Elliott.

[3] The sufficiency of the evidence to sustain the verdict and justify the conclusion reached by the jury was presented to the trial court, the judge of which had the opportunity not only to weigh the testimony, but also to observe the demeanor of the witnesses while giving testimony and therefore was in a better position to determine the credibility that should be given the different witnesses than is the case with an appellate court examining the cold record. Whatever the actual facts may be, the testimony gleaned from the record and which we have set forth in substance herein precludes this court from interfering with the judgment on the ground that the evidence is insufficient.

The judgment and the order of the trial court are therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

79 Cal. App. 519

PEOPLE v. BROOKS. (Cr. 1362.)

(District Court of Appeal, Second District, Division 1, California. Oct. 18, 1926.)

1. Criminal law 🔑829(7).

Refusal of instruction with reference to weighing evidence of alibi testimony *held* not error, where question was covered by other instructions.

2. Criminal law 🔑1186(4).

Refusal of instruction relating to duty of juror to vote according to his individual judgment *held* not reversible error, where other instructions adequately advised jury concerning its duty, in view of Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Charles Burnell, Judge.

James Brooks was convicted of robbery, and he appeals. Affirmed.

Cantillon & Hamilton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for the People.

YORK, J. Appellant herein was convicted of the crime of robbery, and prosecutes this appeal from a judgment of conviction and order of the court denying motion for a new trial. The appellant does not contend that the evidence is insufficient to sustain the verdict and judgment, but claims that the evidence was such that the errors complained of were more prejudicial than they ordinarily would be.

[1] As to the refusal of the instruction requested in reference to weighing evidence of alibi testimony, the question is covered by at least three instructions given. The defendant was positively identified as being the negro on the car on the night of the robbery and being the negro who got off the car with the complaining witness and a white companion at Willowville near Long Beach a few minutes before the robbery. Although the complaining witness could not identify the defendant, yet the identification by the two witnesses who were on the car, of the defendant, at the same time when his mother and two other witnesses testified he was in Los Angeles at his own home, makes a sharp and positive conflict in the evidence, and the jury, to have convicted the defendant, must have found that his alibi witnesses were testifying falsely. The instruction refused was as follows:

> "The court instructs you that, while the prosecution must establish beyond a reasonable doubt the guilt of the defendant, it is not incumbent upon the defendant to prove an alibi beyond a reasonable doubt. Though the evidence offered to establish an alibi falls short of the weight of moral certainty as to the existence of the alibi, yet if it leaves in the minds of the jurors such a doubt or uncertainty that, taken by itself, they could not find for or against the alibi, they are bound to carry such doubt into the case of the prosecution and to arrange it there as an element of reasonable doubt beyond which the prosecution must establish guilt. The defendant is entitled as much to the benefit of such doubt as to any other doubt

raised by the evidence, and if its weight alone, or added to that of any other, be sufficient to reduce belief in the minds of the jury as to the defendant's guilt to a reasonable doubt, you must acquit him."

It will be noted that this instruction is incorrect at least in this, that it assumes an impossible condition, to wit, that the jury, under the evidence, "could not find for or against the alibi." In legal contemplation, every issue of fact is the subject of a finding or determination, to be made in accordance with the rules of decision.

The court instructed the jury that, if they were not convinced beyond a reasonable doubt of the guilt of the defendant, they should render a verdict of acquittal. The court also gave the following instruction to the jury:

"The court instructs you that to the information in this case the defendant has interposed his plea of 'not guilty,' which plea puts in issue every material allegation of the information and entitles the defendant to offer the defense known in law as an 'alibi'—that is, that this defendant was not at the place where the crime charged is alleged to have been committed at the time of its alleged commission, but at another place."

The court also instructed the jury:

"That, unless the identity of the defendant as the party or one of the parties participating in the offense charged in the information be proven beyond a reasonable doubt, you must find the defendant not guilty."

They were fully instructed also as to reasonable doubt. Also they were instructed:

"The court instructs you that the defendant, James Brooks, is the only person on trial before you for this alleged offense, and that, if you find from a consideration of all the evidence that it points as clearly to some other person or persons as having committed the crime in question as it does to the defendant, or if after a fair and full consideration of all the evidence the jury entertain a reasonable doubt as to whether the said defendant or some other person is the guilty party, then it is your duty to acquit this defendant."

The jury were also instructed as follows:

"The court instructs you that, if the evidence relating to any circumstance in this case is, in view of all the evidence, susceptible of two interpretations, one of which would point to the defendant's guilt and the other which would admit of his innocence, then it is your duty, in considering such evidence, to adopt that interpretation which would admit the defendant's innocence and reject that which would point to his guilt."

Assuming that the rejected instruction was correct—with the exception above stated—nevertheless we think that the rights of the defendant, concerning the subject-matter of that instruction, were sufficiently covered and protected by the foregoing instructions given to the jury. People v. Hovermale (Cal. App.) 243 P. 878; People v. Derwin (Cal. App.) 248 P. 1029.

[2] As to the second and third specifications of error, the defendant does not apparently offer them seriously, unless the court should find that error was committed in failing to properly instruct on the question of alibi. As to the second specification of error, the instruction is practically in the form requested by the defendant; that is, it was requested by defendant and "allowed as modified," and the record does not show what part was modified, or what change was made. As to the third specification of error, the rule is well established that the refusal of this instruction (relating to the duty of each individual juror to vote according to his individual judgment) would not, of itself, be sufficient to justify a reversal, where the other instructions adequately advise the jury concerning its duty. People v. Heath (Cal. App.) 248 P. 1027.

Under the authority of People v. Hovermale (Cal. App.) 243 P. 878, 881, 882, and People v. Visconti, 31 Cal. App. 169, 160 P. 410, 411, and People v. Heath, supra, and the inhibition contained in section 4½ of article 6 of the Constitution of this state, there exists no legal ground for reversal of the judgment. After an examination of the entire cause, including the evidence, the court is of the opinion that the errors complained of, if any errors there were, have not resulted in a miscarriage of justice.

Judgment and order affirmed.

I concur: CONREY, P. J.

80 Cal. App. 176

JOHNSTON REALTY CORPORATION v. SHOWALTER. (Civ. 4588.)

(District Court of Appeal, Second District, Division 1, California. Dec. 8, 1926.)

1. Judgment 🔑570(1)—Dismissal because of failure to serve and return summons is no bar to subsequent action (Code Civ. Proc. § 581a).

Dismissal of action to quiet title because summons had not been served and returned within three years after commencement of action, pursuant to Code Civ. Proc. § 581a, is no bar to subsequent action.

2. Evidence 🔑178(1½)—In action to quiet title, where plaintiff claimed that deed was lost, and introduced record showing deed conveying whole interest, grantor might testify that deed as executed conveyed but half interest.

Where plaintiff, seeking to quiet title, claimed that his deed was lost, and introduced record showing deed conveying whole interest, grantor might testify that deed which she signed conveyed but half interest.

3. Alteration of instruments 🔑29—Finding that deed was altered by forgery held sustained by evidence.

Evidence *held* to sustain findings that deed was altered by forgery with intent to deprive grantors of undivided one-half interest remaining in them and quieting title to such half interest; direct proof of identity of forger being unnecessary.

4. Limitation of actions 🔑37(2)—Action to quiet title, based on forgery, is not barred on ground that fraud was discovered more than three years before.

Where deed of half interest was altered to convey whole interest by forgery, right to

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

quiet title is not barred on ground that fraud was discovered more than three years prior; action not being based on fraud.

5. **Frauds, statute of** ⊶119(1)**—Action to quiet title, based on forged alteration of deed, is unaffected by statute.**

Statute of frauds has no application to action to quiet title, based on alteration of deed by forgery.

6. **Quieting title** ⊶29**—Action to quiet title, based on forged alteration of deed, is unaffected by laches.**

Doctrine of laches does not apply to action to quiet title, based on forged alteration of deed.

Appeal from Superior Court, Kern County; T N. Harvey, Judge.

Action to quiet title brought by the Johnston Realty Corporation against C. E. Showalter. Defendant prayed for judgment quieting his title to a one-half interest in the land. From the judgment, plaintiff appeals. Affirmed.

Grant Holcomb, of San Bernardino, for appellant.

E. W. Bartlett, of Colton, for respondent.

CONREY, P. J. The plaintiff brought this action to quiet its title as owner of all of a described quarter section of land in Kern county. By his answer the defendant denied plaintiff's ownership of said land. By a separate defense pleaded in his answer, the defendant claimed to be the owner of an undivided one-half interest in said parcel of land, and prayed for judgment quieting his title thereto. The judgment, from which plaintiff appeals, quiets title of the parties severally, giving to each an undivided one-half of the land. Plaintiff appeals.

The defendant alleged, and the court found it to be true, that on the 17th day of April, 1922, which was prior to the commencement of this action, one Ella Fouch, being then the owner of an undivided one-half interest in said real property, executed and delivered to the defendant a deed conveying to him her said half interest, which deed on the following day was duly recorded, "and that ever since said date defendant has been, and now is, the owner of an undivided one-half interest in and to said premises."

In said sparate defense the defendant particularly alleged that prior to July 11, 1912, H. E. Fouch was the sole owner in fee simple and in possession of said quarter section of land; that on said July 11, 1912, H. E. Fouch by grant deed conveyed to Julia S. Johnston an undivided one-half interest in said property; and that at no time did H. E. Fouch or his wife, Ella Fouch, convey to Julia S. Johnston, or to any other person, any other or greater interest in said real property. Concerning the last above statements of the answer, the court found that prior to the 11th day of July, 1912, H. E. Fouch was the sole owner in fee simple of an undivided one-half interest in and to said above-described premises, and that said H. E. Fouch at the same time held the title to, and was the legal owner of, the other undivided one-half interest in and to said premises, but that as to such other undivided one-half interest said H. E. Fouch held said title and ownership in trust for D. Johnston; that on said 11th day of July, 1912, the said H. E. Fouch and Ella Fouch, his wife, did convey by a certain grant deed to Julia S. Johnston, the wife of said D. Johnston, at the request of said D. Johnston, said undivided one-half interest in said real estate so held in trust by said H. E. Fouch, but at no time prior or subsequent to said date did said H. E. Fouch or his said wife jointly or severally convey to said Julia S. Johnston, or to any other person, any other or greater interest in said real estate.

In its findings of fact the court further found and declared, in accordance with allegations of the answer to the same effect, that between the 11th of July, 1912, and the 18th of September, 1915, said deed was changed and altered without the knowledge or consent of said grantors, H. E. Fouch and Ella Fouch, or either of them, so as to purport to convey unto Julia S. Johnston the entire title to the whole of said real estate; that such change and alteration was made for the purpose of procuring to Julia S. Johnston such entire title, and with the intent to defraud the said H. E. Fouch and Ella Fouch of an undivided one-half interest therein; that said deed as changed and altered purports to have been executed and acknowledged by H. E. Fouch and Ella Fouch, when in truth and in fact no deed in such changed and altered condition was ever executed and acknowledged by either said H. E. Fouch or Ella Fouch; that the said D. Johnston and Julia S. Johnston, on or about the 30th day of October, 1915, executed and acknowledged an instrument which purports to be a grant deed conveying to Nettie B. Johnston (their daughter) all of said real estate, which purported deed was recorded on October 10, 1916, at the request of D. Johnston; that said Nettie B. Johnston took said purported deed with full knowledge that said deed to Julia S. Johnston was altered and changed as hereinbefore alleged; that on or about the 4th day of December, 1920, one B. B. Johnson executed an instrument which purports to be a grant deed conveying to plaintiff all of said real estate, which purported deed was recorded on December, 8, 1920; that, at the time of the execution of the said instrument to the plaintiff, the said B. B. Johnson did not have any right, title, or interest in said real estate, and that the said Johnston Realty Corporation well knew that the said grantor had no interest whatever in and to said real property; that the Johnston Realty Corporation is composed of D. Johnston, Julia S. Johnston, Nettie B. Johnston, and B. B. Johnson, parties heretofore mentioned in said answer, and that said parties well knew that the only interest that they, or either of them, had or now have is the undivided one-half interest before mentioned in the answer. Then follows a finding of the fact which we first mentioned showing the conveyance on April 17, 1922, by Ella Fouch to the defendant of an undivided one-half interest in said real property. In October, 1913, H. E. Fouch had executed to Ella Fouch a grant deed of said land.

[1] Appellant claims that the court committed two errors in rulings upon evidence; first, in rejecting appellant's offer to introduce in evidence a judgment of dismissal entered in an action between the immediate grantors of plaintiff and defendant wherein the same land was in controversy and the same facts were in controversy as in the present action; and, second, in permitting Ella Fouch, defendant's grantor, to testify, over appellant's objection, that she signed a deed which only called for a half interest in the land. The dismissal of the former action was made pursuant to section 581a, Code of Civil Procedure, because the summons had not been served and returned within three years after commencement of the action. Such judgment of dismissal did not determine the action upon its merits, and could not operate as a bar to a subsequent action. If this is the rule, as the cases hold, on dismissal for want of prosecution when the plaintiff fails to appear at the time set for trial (Collins v. Ramish, 182 Cal. 360, 366, 367, 188 P. 550), it is even more clear that a dismissal for want of service or return of summons is not an adjudication of the cause on the merits, and is in no way a bar to a subsequent action.

[2] In considering appellant's point that the court erred in admitting the testimony of Ella Fouch that she never signed the deed in the form in which it was recorded, but only signed a deed for a half interest in the property, we observe that plaintiff had introduced in evidence, not the deed itself, but the record of it as found in the county recorder's office, showing a deed dated and acknowledged July 11, 1912, and not recorded until September 18, 1915. Afterwards, while Mrs. Fouch was testifying as a witness on behalf of the defendant, a certified copy of this deed as recorded was produced and exhibited to the witness, who then testified that she never signed such a deed, and that she never personally appeared before the notary and acknowledged the execution of such a deed. It is interesting to note at this point that the notary public who certified to the acknowledgment was the same D. Johnston whose wife was grantee in that deed, and that this D. Johnston testified that the deed to Julia S. Johnston was not recorded promptly, because "Mr. Fouch requested me not to put it on record." In the meantime, Mr. H. E. Fouch had died, prior to the trial of this action. We perceive no reason why Mrs. Fouch should not have been permitted to testify that she never signed a deed for all of that piece of land or made acknowledgment of the execution of such a deed. Since appellant was claiming, and its witnesses had given testimony tending to prove, that the original deed was lost, the testimony of Mrs. Fouch became the only possible evidence of the fact, if it was a fact, that the only deed ever signed by her did not purport to convey the whole property. On cross-examination, in explanation of her statement that she never joined in this recorded deed to Julia S. Johnston, she said: "The deed I signed called for an undivided half interest." The court did not err in overruling appellant's objections to her testimony upon this particular subject in her direct examination. Assuming, without deciding (see First National Bank v. Merrill, 167 Cal. 392, 139 P. 1066), that the acknowledgment before D. Johnston as notary was prima facie valid, notwithstanding his claim that he had paid the entire consideration for the land, we think that under the circumstances it would be a rank injustice to give unquestioned validity to the instrument by excluding such testimony as that given by Mrs. Fouch.

[3] We find no merit in the contention of appellant that the evidence was not sufficient to support the findings. If the testimony of Mrs. Fouch was true, the recorded instrument to which we have referred and which is an essential link in plaintiff's chain of title was a forgery or contained forged alterations. This being so, the circumstances in evidence were sufficient to sustain the court's finding that such alterations were made for the purpose of depriving the grantors of their undivided interest therein. It was not necessary that there be direct proof showing identity of the person who committed the forgery. It is a conceded fact that Julia S. Johnston paid no consideration for the conveyance. It was her husband, D. Johnston, who had paid whatever had been paid on account of that investment. The several deeds by which an interest in the property has passed to the plaintiff corporation are all voluntary conveyances, resting solely upon the original interest acquired by D. Johnston, and which under his direction is now vested in the plaintiff.

[4-6] It is claimed by appellant that the defendant's right to hold her interest in the land, as against the deed to Julia S. Johnston, is barred by the statute of limitations, because the alleged fraud was discovered by her more than three years prior to the com-

mencement of this action. But the defense herein, or the defendant's demand to have his title quieted against the plaintiff, is not based upon any allegation that Mrs. Fouch was fraudulently induced to execute a deed. Defendant's contention is that Mrs. Fouch never executed any deed conveying or purporting to convey to Mrs. Johnston Mrs. Fouch's one-half interest in the land. The fraudulent alteration was a thing apart from any act of Mrs. Fouch. It was neither more nor less than a forgery. Considered in that light, the alterations were no more effective than they would be if the entire instrument was forged. The statute of frauds has no application to these facts. The same is true of the doctrine of laches, invoked by appellant as a bar to defendant's claim of title.

We think that the findings herein support the judgment, and that the plaintiff, having obtained a decree quieting title to the half interest in the land which was conceded to it by defendant, has obtained all of the relief to which it is entitled on the record now before us.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

199 Cal. 538

In re O'CONNELL. (S. F. 11955.) *

(Supreme Court of California. Oct. 28, 1926.)

1. Courts ⚷487(1).

District Court of Appeal, upon petition, has power, in application for reinstatement of attorney after disbarment, to order transfer of cause to Supreme Court.

2. Courts ⚷488(1)—Supreme Court may treat application for reinstatement of attorney, after disbarment, when transferred to it from District Court of Appeal, as de novo proceeding.

Since District Courts of Appeal have original jurisdiction over applications for restoration to practice after disbarment, Supreme Court is not confined to errors appearing on face of opinion in such case, but may examine record both as to facts and law, treating trial as de novo.

3. Courts ⚷488(1)—Supreme Court's practice of considering only opinion of District Court of Appeal, when passing on petitions for hearing, held confined to cases not involving original jurisdiction of District Court of Appeal.

Practice in considering petitions for hearing by Supreme Court, after judgment in District Court of Appeal, that appellate court's opinion only would be considered, no reference to record being made, is confined to appeals required by Constitution to be taken to District Courts of Appeal, and has never been extended to original proceedings instituted in those courts.

4. Attorney and client ⚷61—Mere present good moral character held not sufficient qualification for reinstatement of disbarred attorney.

Mere present apparent good moral character, in face of unchanged attitude of attorney in reference to matters for which convicted of felony, *held* not sufficient qualification to reinstate disbarred attorney.

In Bank.

Application by Daniel O'Connell, formerly an attorney and counselor at law, for reinstatement after disbarment. Application denied.

See, also, 64 Cal. App. 673, 222 P. 625.

Daniel O'Connell, of San Francisco, in pro. per.

H. W. Glensor and Ernest Clewe, both of San Francisco (Warren Olney, Jr., of San Francisco, of counsel), for San Francisco Bar Ass'n.

WASTE, C. J. [1] The petitioner, Daniel O'Connell, was precluded from practicing as an attorney and counselor in the courts of the state by an order of this court made December 28, 1920. In re O'Connell, 184 Cal. 584, 588, 194 P. 1010. On April 28, 1924, he made application to the District Court of Appeal for the First District, Division 2, for reinstatement. His application was granted, but, before the judgment became final this court, on petition of the San Francisco Bar Association, transferred the cause here "for hearing and decision." That the court had power to order the transfer cannot be questioned. In re Wells, 174 Cal. 467, 473, 163 P. 657; In re McCowan, 175 Cal. 51, 170 P. 1100.

[2] It is the contention of the petitioner that, although the cause has been transferred here, this court cannot go behind the opinion of the District Court of Appeal, and must confine its consideration to any errors appearing on its face, and that this court is bound by the findings of fact, express or implied, made by the other court. The rule contended for by petitioner has no application to this case, for the District Courts of Appeal have original jurisdiction over applications for restoration to practice after disbarment. When such causes are transferred to this court it is immaterial that the opinion of the District Court of Appeal may not show any error upon its face, when considered without regard to the record.

[3] The practice established by our decisions, to the effect that, in considering petitions for hearing in this court, after judgment in the District Court of Appeal, we will consider only the opinion of that court and will not look into the record, is confined to appeals required by the Constitution to be taken to the District Court of Appeal, and has never been extended to original proceedings instituted in those courts. Rockridge Place Co. v. City Council, 178 Cal. 58, 60, 172 P. 1110. The willingness of this court to accept the opinion of the District Court of Appeal as a correct determination of the facts in another case (In re McCowan, 177 Cal. 93,

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 26, 1926.

104, 170 P. 1100), does not suffice to change the rule. The present application for restoration to practice, after disbarment, is now before this court in all respects as a de novo proceeding, and we may examine the entire record, both as to facts and the law, as fully as though it had been originally instituted here.

Daniel O'Connell, the applicant for reinstatement, was convicted, with other defendants, in the United States District Court for the Northern District of California, of the crime of having willfully engaged in a conspiracy to obstruct the recruiting or enlistment service of the United States when the nation was at war. Judgment and sentence to imprisonment for seven years in the United States penitentiary at McNeil Island was affirmed by the United States Supreme Court. O'Connell v. United States, 253 U. S. 142, 40 S. Ct. 444, 64 L. Ed. 827. A certified copy of the judgment was filed in this court, and, after due proceedings, the name of O'Connell was ordered stricken from the roll of attorneys. In re O'Connell, supra.

After serving for a time in the federal prison O'Connell returned to San Francisco and petitioned for reinstatement. His application was opposed by the San Francisco Bar Association, which filed an answer denying generally the alleged good behavior of the petitioner and his fitness to practice law. It also denied that petitioner is a person of good moral character. By stipulation of the parties the matter was referred to Mr. Justice Nourse, of the District Court of Appeal, sitting as a commissioner for the taking of testimony, which appears to have been largely directed to the question of the moral character of the applicant.

O'Connell is a man advanced in years, who has practiced law many years and has no other means of earning a livelihood. He was admitted to practice at the bar of the Supreme Court of the District of Columbia in 1886, and in the same year was constituted an attorney and counselor of the District Court of the United States for the District of Massachusetts. He is still on the list of attorneys in each court, and, according to the certificate of the respective clerks, is in good standing so far as those courts are concerned. O'Connell testified to his own good character, and presented a document from which it appeared that the signers, some 25 in number, "believed" O'Connell to be a person of good moral character and fit to practice law. It was signed by members of the bar of this state practicing in San Francisco and by public officials, all of whom have known the petitioner for many years. A number of the signers appeared before the commissioner and testified to O'Connell's present good moral character. Some of them admitted that when they signed the statement they were not aware of O'Connell's previous record of conviction and disbarment. Others said, in effect, that their testimony would have been the same if they had possessed such knowledge.

In support of the opposition to the reinstatement of petitioner it was shown that on July 7, 1897, O'Connell was convicted in the superior court of Middlesex county, Mass., on a charge of being accessory to the giving of a bribe to a municipal officer of the city of Lowell, with intent to influence the officer's vote on an official matter. The judgment of conviction was affirmed. Commonwealth v. Donovan et al., 170 Mass. 228, 49 N. E. 104. After the conviction, and on proof of the facts which led to it, and on the further grounds that he improperly appeared on both sides of the same litigation, and had used legal process in an abusive and oppressive manner, O'Connell was disbarred from the practice of law in the commonwealth. In re O'Connell, Petitioner, 174 Mass. 253, 262, 53 N. E. 1001, 54 N. E. 558. He came to California from Massachusetts, and on August 11, 1904, applied to this court and was admitted to the bar on production of his certificate from the Supreme Court of the District of Columbia. He did not disclose to the court the fact that he had been previously convicted of a crime and disbarred from practice in Massachusetts. Some time afterward the omission was called to the attention of the court. The Chief Justice demanded an explanation, and O'Connell appeared before him, but no steps were taken to revoke the license he had been granted, although the members of the court appear to have been divided on the question as to what should be done. In 1913 the conduct of O'Connell was the subject of investigation by the grievance committee of the San Francisco Bar Association, it being charged that he had received a large sum of money for certain clients interested in the bankrupt California Safe Deposit & Trust Company, and did not inform them that he had been paid, but retained all of it for his own use. The transaction was investigated by the grievance committee of the bar association, and was also the subject of inquiry in a proceeding in the superior court. O'Connell claimed he had received the money as a fee. The grievance committee advised that proceedings for disbarment be instituted against him, but the recommendation was rejected by the bar association. It thus appears that during practically his entire career as a member of the bar O'Connell's conduct has not been such as to justify a belief that it will be beyond reproach if he be permitted to resume the practice of the law.

[4] From this summary of the record it appears that the petitioner's application for restoration rests primarily upon his opinion of himself, and that of others, that he is now possessed of a good moral character and is fit to practice law. If that were the only evidence in the record to be given effect we

could, with entire propriety, hold it sufficient to support a favorable consideration of petitioner's application. But a present apparent good moral character is not the only qualification that recommends an attorney for readmission to the society and association of the legal profession.

> "When a member of the profession has been found lacking in the requisites which go to make him a helper to his clients and has been discovered to possess aims, views, and purposes which indicate a moral obliquity in him, and which might make his clients his victims, it is well that he were removed from the possibility of doing them harm. When he has been once disbarred, a mistaken charity should not restore him to his position. That restoration should only come when he has lived long enough after his disbarment in honorable intercourse with his fellow citizens to demonstrate that he is both tried and true." Application of Shepard, 35 Cal. App. 492, 501, 170 P. 442, 446.

The attitude of the petitioner here is not such as to convince this court that it should lift the ban of disbarment now placed upon him. Aside from his contention that he is now held in sufficient esteem in the estimation of his fellow men to warrant the assumption that he will in future show a due regard for the duties and responsibilities of his profession, he is here seeking to justify the conduct which led to his being charged with conspiracy, and for which he was convicted in the federal court, and which resulted in his disbarment here.

When O'Connell was before this court in the disbarment proceeding he stoutly maintained that the crime of which he was convicted did not involve moral turpitude. He is, in effect, making the same contention here. The criminality of the offense of which he was convicted was determined by the highest tribunal of the nation. Frohwerk v. United States, 249 U. S. 204, 209, 39 S. Ct. 249, 63 L. Ed. 561; O'Connell v. United States, supra. In ordering his name stricken from the roll of attorneys this court said (184 Cal. 587, 194 P. 1011):

> "That such conduct on his part would involve moral obliquity and constitute a base offense against his fellow men and his country entirely regardless of statute prohibiting it cannot, it seems to us, be seriously questioned. It is conduct closely akin to that constituting treason, than which, in the estimation of mankind generally, nothing could be more base. Moral turpitude has been defined by many authorities as 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' See In re Henry, 15 Idaho, 755, 758, 99 P. 1054, 1055, [21 L. R. A. (N. S.) 207]. In the Matter of Coffey, 123 Cal. 522, 56 P. 448, we approved the definition of turpitude given by Bouvier, viz., anything done 'contrary to justice, honesty, modesty or good morals.' We entertain no doubt that the offense with which the accused was charged and of which he was convicted comes within these definitions."

There can therefore be no question but that the moral obliquity of the petitioner was established by his conviction, which led to his disbarment. The record was conclusive evidence of the justice of the conviction, and laid on him a moral stigma that rests upon him until it be satisfactorily explained, or there is unmistakable evidence, by years of correct living and a proper attitude on the part of the convicted person, that it no longer exists. The explanation the petitioner here attempts to make is wholly unsatisfactory —in fact, it is no explanation. It amounts merely to an attempt to justify certain views held and advocated by O'Connell in relation to the Espionage Act (40 Stat. 217) and the Selective Service Law (U. S. Comp. St. §§ 2044a–2044k), which led to his conviction on the charge of conspiracy to obstruct the nation's efforts in time of war. He seeks to justify his position, and thereby admits that he committed the acts for which he was convicted. With the beliefs and opinions of the petitioner this court has nothing to do, except as it is to be anticipated that he is still prepared to utter them and to act on them under circumstances and in a manner calculated to lead others to violate and disregard existing laws. In view of petitioner's unchanged attitude, neither his attempted explanation of the conduct for which he was convicted nor the testimony as to his present good character affords sufficient evidence to support a favorable consideration of his present application to be reinstated to the practice of law.

The application is therefore denied.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

199 Cal. 556

In re IMPERIAL WATER CO. NO. 3.

IMPERIAL WATER CO. NO. 3 et al. v. HALL.

(L. A. 9271.)

(Supreme Court of California. Oct. 29, 1926.)

1. Appeal and error 🔑458(2)—Writ will not issue to restrain party from proceeding under judgment pending appeal, where no process or action of court below is involved.

Supersedeas will issue only to restrain court below or its officers from enforcing judgment pending appeal, and not to restrain or prevent a party from proceeding thereunder, where no process or action of court below is involved.

2. Appeal and error 🔑458(2)—Writ will not be granted to enjoin directors of dissolved corporation from distributing assets pending appeal from judgment for it, where lower court is not made respondent, and no application has been made thereto, process issued in, or other attempt made to execute judgment (Civ. Code, § 400).

Writ of supersedeas will not be granted to enjoin directors of dissolved corporation from distributing its assets, as directed by court, under Civ. Code, § 400, pending determination of appeal from a judgment for company, where lower court is not made respondent, and no application has been made thereto, process issued in, or other attempt made to execute judgment by, such court.

3. Appeal and error 🔑458(2)—Directors, acting as trustees for creditors and stockholders of dissolved corporation, are not court officers amenable to writ of supersedeas enjoining distribution of assets pending appeal from judgment for corporation (Civ. Code, § 400).

Directors of dissolved corporation, while acting as trustees for creditors and stockholders, under Civ. Code, § 400, are merely statutory liquidators, and not court officers amenable to writ of supersedeas enjoining distribution of assets pending appeal from judgment for corporation.

In Bank.

Application by the **Imperial Water Company** No. 3 for dissolution, opposed by Maude Hall. From an order of the superior court, Imperial county, dissolving the corporation and directing distribution of its assets, opponent appeals. On application by opponent for writ of supersedeas to T. M. Montgomery and others, directors of the corporation. Writ denied.

Jesse George, of San Diego, for opponent.

Leon R. Yankwich and Luther G. Brown, both of Los Angeles, for respondents.

PER CURIAM. Application for a writ of supersedeas. Petitioner, Maude Hall, has appealed to this court from an order of the superior court of Imperial county dissolving the respondent corporation, Imperial Water Company No. 3, and directing the distribution of its funds and property through its directors acting as trustees under the provisions of section 400 of the Civil Code. Petitioner had filed objections in writing to the application of said corporation for dissolution upon the ground that she had a valid and unsatisfied claim and demand against said corporation for a large sum of money as damages alleged to have been sustained to her farm lands by reason of seepage of water from irrigation canals of the respondent corporation and had commenced an action for the enforcement of said claim for damages, in which action a judgment had been rendered against petitioner in the main and wherein she had likewise prosecuted an appeal from an order denying a motion to set aside said judgment. The present application is to obtain a writ of supersedeas preventing the directors of said respondent corporation from distributing its assets in accordance with the order of dissolution until such time as petitioner's said appeal in her own case can be determined; the allegations of the petition being that the directors of the respondent corporation will distribute all of the funds and property of said corporation and that none thereof will be left for the payment of whatever claim the petitioner may eventually establish.

In view of the conclusion we have reached, we find it necessary to consider but one of the

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

respondents' contentions advanced in opposition to the issuance of a supersedeas. It is urged by respondents that the order dissolving the respondent corporation and directing the distribution of assets through its directors, as trustees, is a self-executing order for the enforcement of which no process of the lower court need be employed. Authorities are cited by respondents to the effect that supersedeas will not and should not issue under such circumstances. In our opinion this contention is meritorious.

[1] It has been repeatedly held by this court that a supersedeas will issue only to restrain the court below or its officers from proceeding to enforce a judgment pending appeal and that such writ is limited to restraining any action under the authority of the court upon the judgment appealed from; in other words, a writ of supersedeas will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been duly taken where no process of or action by the court below is involved.

In the case of Tyler v. Presley, 72 Cal. 290, 291, 13 P. 856, 857, it is declared:

> "What is a supersedeas? It is a writ issued to a ministerial officer, commanding him to supersede or desist from proceeding under another writ previously or subsequently issued to him. * * *
>
> "When the judgment is rendered, and no process is required to be issued for its enforcement, no supersedeas is allowed. In fact, there is no necessity for such a writ. There is nothing to stay or supersede. * * *"

Concerning the purpose and scope of a writ of supersedeas, Dulin v. Pac. W. & C. Co., 98 Cal. 304, 306, 308, 33 P. 123, 124, states that—

> "The writ of supersedeas is 'an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review.' * * * Originally it was a writ directed to an officer commanding him to desist from enforcing the execution of another writ, which he was about to execute, or which might come into his hands. In modern times the term is often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment. In this state the writ is frequently granted by this court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment.
>
> "Section 949 of the Code of Civil Procedure declares that in cases like the present the perfecting of an appeal 'stays proceedings in the court below upon the judgment or order appealed from,' thus creating a statutory supersedeas, or 'a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution is issued, a prohibition against the execution of the writ.' * * * If after such appeal the court below seeks to enforce its judgment, this court will grant a special order or writ restraining its action. The writ itself is directed to the court whose action is sought to be restrained, or to some one of its officers, and is limited to restraining any action upon the judgment appealed from. It cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment, nor can the writ be employed for any purpose upon persons not parties to the judgment. Its effect is merely to leave the parties to the judgment in the same position as they were prior to its entry, and to prevent the appellant from being prejudiced by its enforcement. There are many judgments, however, which are self-executing, or which have an intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. * * * And herein should be observed the distinction between the effect of an appeal from a judgment in staying further proceedings thereon, and its effect in depriving the judgment itself of any efficacy as evidence of the fact determined. The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character."

In Rose v. Mesmer, 131 Cal. 631, 633, 63 P. 1010, 1011, an appeal was taken from a judgment which adjudicated the rights of the parties to certain lands and the water appurtenant thereto and which further decreed that none of the parties to the suit had a right to maintain a certain dam then existing. Pending said appeal the respondents proceeded to remove the dam, whereupon application was made for a writ of supersedeas. In denying the writ it was said:

> "The petitioners have cited several cases in support of their motion wherein this court has restrained the superior court from enforcing the judgment appealed from, or set aside the proceedings taken by it therefor, upon the ground that by the appeal the power of the superior court to enforce its judgment was suspended until the determination of such appeal. But in each of these cases the superior court was itself seeking to enforce its judgment by some process issued thereon, or by proceedings instituted for the purpose of punishing the respondents for contempt in disregarding the judgment. It does not appear in the present case that the superior court is attempting to enforce its judgment, or that any process has been issued for that purpose. The statement in the petition that the respondents threatened to enforce the judgment 'by entering upon said land whereon said dam is situated, and removing the said dam,' does not indicate that the court is, in any respect, seeking to enforce its judgment. Whether the appeal herein has the effect to supersede the power of the court to enforce its judgment is not involved in the

present proceeding. It does not appear that any application has been made to that court for this purpose, and in the absence of any action by it we are not called upon to determine whether the appeal has such effect, or, if it has, that the court would disregard it.

"In Dulin v. Pacific, etc., Co., 98 Cal. 304 [33 P. 123], we had occasion to consider the function of a writ of supersedeas, and the power of this court to control the enforcement of a judgment of the superior court after an appeal therefrom had been taken. It was there held that the writ is directed to the court whose action is sought to be restrained, or to some officer of that court who may be about to enforce its judgment, and is limited to restraining any action under the authority of the court upon the judgment appealed from. * * *

"If the respondents have no right to remove the dam, their act in so doing may constitute a trespass for which the petitioners would have their remedy in the proper forum, but it is not within the jurisdiction of this court to issue an original injunction to prevent the commission of a trespass. The principles declared in Dulin's Case must control the rights of the parties in the present application."

This rule was again approved in Madera v. Raymond Granite Co., 138 Cal. 244, 246, 71 P. 112, wherein it is stated that—

"Section 949 of the Code of Civil Procedure provides that when an appeal is perfected it stays all proceedings 'in the court below upon the judgment or order appealed from.' If, notwithstanding such appeal, the court below attempts to enforce the judgment or order appealed from, this court will issue a writ of supersedeas to restrain such action. The writ is, however, directed to the court or to the officer thereof by whom it is seeking to enforce the judgment."

To the same effect are Wood v. Board of Fire Commissioners, 50 Cal. App. 594, 595, 195 P. 739; In re Graves, 62 Cal. App. 168, 169, 216 P. 386; and Lickley v. County Board of Education, 62 Cal. App. 527, 217 P. 133.

[2] In the instant case the issuance of a writ of supersedeas would have no other effect than to enjoin the respondent parties from acting under the judgment. It would not in any manner restrain the lower court from enforcing its judgment, for no application has been made thereto and no process has been issued therein or other attempt made by that court to execute said judgment. Moreover, said lower court has not been made a respondent herein. Under these circumstances, the following from Madera v. Raymond Granite Co., supra, would seem to be pertinent:

"It is not shown that the superior court is seeking to enforce its judgment, or that any application has been made to it for the purpose of enforcing the judgment, or that any proceedings whatever in reference to the judgment have been taken therein since the appeals were taken, nor is the superior court, or the judge thereof, made a respondent herein, or represented upon this application. We are therefore not called upon to determine whether the appeals had the effect to suspend the power of the court to enforce its judgment, nor can we assume, in the absence of any action by that court, that, if they did have such effect, the court would disregard it. Rose v. Mesmer, 131 Cal. 631 [63 P. 1010]."

[3] We cannot accede to petitioner's contention that the directors of the respondent corporation while acting as trustees pending distribution of the corporate assets are officers of the superior court, and therefore amenable as such to a writ of supersedeas. This point was decided adversely to petitioner's contention in the case of Holmes v. Camp, 186 App. Div. 675, 679, 175 N. Y. S. 349, 352, where, in considering a Missouri statute substantially the equivalent of section 400 of our Civil Code, the court declared:

"If the statutory trustees in dissolution were, like permanent receivers in dissolution, officers of the court, reliance might be had that the court would compel them to do their duty and continue the suit. But they are not officers of the court. They are mere statutory liquidators. Relfe v. Rundle, 103 U. S. 222, 225, 26 L. Ed. 337; Martyne v. American Union Fire Insurance Co., 216 N. Y. 183, 194, 110 N. E. 502."

We are in accord with the reasoning of the New York court and are of the opinion that the directors of a dissolved corporation while acting, under the provisions of section 400, Civil Code, as trustees for the creditors and stockholders of such dissolved corporation, are mere statutory liquidators and are not officers of the court. For this reason it cannot be successfully argued that an appellate court may direct a writ of supersedeas at such trustees as officers of the lower court.

In reaching the conclusion announced herein we are not to be understood as having considered or expressed any opinion touching the effect of the provisions of section 949, Code of Civil Procedure, upon the appeal herein. That question is not presented and we do not undertake to decide whether the appeal itself when perfected constituted a statutory supersedeas as provided for in said Code section. We have merely concluded that this is not a proper case for the issuance of a writ of supersedeas, for no attempt has been made by the court below or its officers to enforce or execute the judgment pending appeal. We find nothing in the authorities cited by petitioner opposed to the principles or conclusion stated herein.

For the foregoing reasons the petition is denied.

199 Cal. 523

In re WIECHERS' ESTATE.*

WIECHERS v. WIECHERS.

(S. F. 11635.)

(Supreme Court of California. Oct. 19, 1926.)

1. Evidence 🔑80(1).

In absence of showing of law of foreign state as to service of papers after entry of default in divorce action, its law will be presumed to be the same as that of state having instant case.

2. Judgment 🔑112.

Default confesses material facts in complaint, bars objection to relief which complaint shows plaintiff entitled to, and bars steps affecting his right of action, in view of Code Civ. Proc. §§ 650, 1014.

3. Judgment 🔑102.

If complaint is amended in matter of substance, if must be served on a defaulting defendant.

4. Courts 🔑35.

Burden of showing want of jurisdiction, under Code Civ. Proc. § 1963, subd. 16, requires clear and convincing proof.

5. Evidence 🔑82.

Long lapses of time greatly strengthen presumptions in favor of validity of judgments.

6. Evidence 🔑82.

Where record is silent, it will be presumed in favor of the judgment that what ought to have been done was rightly done.

7. Courts 🔑35.

Presumption in favor of jurisdiction is the same where service was by publication as where it was personal.

8. Evidence 🔑82.

Presumption in favor of validity applies to order vacating dismissal of action.

9. Judgment 🔑340.

Generally, court does not lose jurisdiction for all purposes by entry of judgment, jurisdiction being reserved by statute to set it aside for mistake and for other purposes.

10. Divorce 🔑139½.

Service of notice of motion to vacate dismissal of divorce action, under Code Civ. Proc. § 473, gives jurisdiction to vacate judgment on grounds stated in said statute.

11. Evidence 🔑80(1).

Where evidence does not show what constitutes service of notice of motion to vacate dismissal in divorce action in foreign state, its statutes will be presumed to be the same as those of state having instant case.

12. Divorce 🔑327.

Petitioner's denial that papers were served on her in divorce action in foreign state *held* not to require finding that no notice of motion to vacate dismissal of action was served, in view of Code Civ. Proc. §§ 415, 1010–1013.

13. Evidence 🔑87.

Presumptions declared by Code Civ. Proc. § 1963, while disputable, are evidence and will support finding, though there is contrary evidence.

14. Divorce 🔑327.

If vacating order of dismissal of divorce action prior to trial, instead of afterwards, was error in foreign state, it was a procedural error not affecting jurisdiction.

15. Executors and administrators 🔑314(12).

In petition for partial distribution, where issue was jurisdiction of court which granted deceased a divorce, admitting evidence that after the divorce wife inquired whether, if she procured a divorce, she could marry was harmless error.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Sophie Wiechers for partial distribution to her of the estate of Antone J. Wiechers, deceased, opposed by Birdie Wiechers. From an order denying her petition, petitioner appeals. Affirmed.

Lucius L. Solomons, of San Francisco, and Fred C. Peterson, of Oakland, for appellant.

Harrison & Harrison, Dunne, Brobeck, Phleger & Harrison, and Vincent W. Hallinan, all of San Francisco, for respondent.

FINCH, Justice pro tem. This is an appeal by petitioner, Sophie Wiechers, from the order denying her petition for partial distribution to her of the estate of the above-named Antone J. Wiechers, deceased.

The petitioner and Wiechers were married in the state of Ohio, June 25, 1903, and lived together in that state as husband and wife until July, 1908, when petitioner went to the home of her parents in the state of New York. December 24, 1908, Wiechers commenced an action for divorce against petitioner. Summons was duly served by publication. December 19, 1912, proof of publication of summons was filed and approved by the court. April 29, 1914, a minute entry of dismissal of the action was made as follows:

> "And now this action being duly called for trial, is dismissed without prejudice and without record at plaintiff's cost."

November 20, 1914, plaintiff moved the court for an order reinstating the cause on the ground that "the same was dismissed by mistake and inadvertence." On the same day an order granting the motion was made as follows:

> "On motion of plaintiff, and it appearing to the court that the cause herein was dismissed at the April term of this court, 1914, by mistake, this cause is hereby reinstated and leave given

---

*Rehearing denied November 15, 1926.

to try the issues and the entry dismissing this cause is hereby set aside."

December 1, 1914, a decree of divorce was entered on the ground that "the defendant has been guilty of gross neglect of duty for more than one year last past." The respondent herein, Birdie Wiechers, "first became acquainted with Mr. Wiechers in 1915" and "married him on June 23, 1915, in New York City." She thereafter "bore him 3 children." The date of Wiechers' death does not appear, but the original petition herein, filed April 27, 1921, alleges that "letters of administration in said estate were issued to John Hornridge on the 3d day of November, 1919." The value of the estate is about $52,000. The court found that the petitioner is not the surviving wife of decedent, that the divorce referred to herein is valid, that she "had due notice of the proceedings to revive the action of divorce referred to in said petition, and that the order of November 20, 1914, referred to in said petition, was made after due notice of the application therefor had been served upon said petitioner Sophie Wiechers."

[1-3] Appellant contends that the Ohio court was without jurisdiction to vacate the judgment of dismissal, because notice of the motion to vacate was not served on her. Respondent answers that such service of notice was not required, because the defendant had not appeared in the action, and was in default. Admittedly, there is no showing as to the Ohio law concerning the service of papers after a default has been entered; and therefore it must be presumed that the laws of that state relating to such service are the same as those of California. Section 650 of the Code of Civil Procedure provides:

> "No bill of exceptions, notice of appeal, or notice or paper, other than amendments to the pleadings or an amended pleading, need be served upon any party whose default has been duly entered, or who has not appeared in the action or proceeding."

Section 1014 provides:

> "After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail."

In Title Insurance, etc., Co. v. King, etc., Co., 162 Cal. 44, 46, 120 P. 1066, 1067, it is said:

> "A default cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered 'is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action.' 6 Ency. of Plead. and Prac. p. 126. He cannot thereafter, nor until such default is set aside in a proper proceeding, file pleadings, or move for a new trial, or demand notice of subsequent proceedings. 6 Ency. of Plead. and Prac. p. 127. 'A default confesses all the material facts in the complaint.' Rowe v. Cable M. W. Co., 10 Cal. 441."

Of course, "where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default." Cole v. Roebling Construction Co., 156 Cal. 443, 446, 105 P. 255, 257.

The necessity of service of such an amendment is recognized by the provisions of section 650 herein quoted. It is unnecessary, however, to decide whether, in a case such as the one under consideration, a defaulting defendant is entitled to notice, because the order from which the appeal is taken must be affirmed on other grounds.

[4-8] It is a disputable presumption "that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction." Code Civ. Proc. § 1963, subd. 16. In Collins v. Maude, 144 Cal. 289, 293, 77 P. 945, 946, it is said:

> "The burden of showing want of jurisdiction in the St. Louis court was on the defendant, and, in view of the presumptions which are indulged in support of judgments of courts of record, this burden requires clear and convincing proof of such want of jurisdiction." "Long lapses of time greatly strengthen the presumptions in favor of the validity of judgments." 34 C. J. 541. "Where the record is silent as to what was done, it will be presumed in favor of the judgment that what ought to have been done was not only done, but rightly done." Crouch v. H. L. Miller & Co., 169 Cal. 341, 344, 146 P. 880, 881. "The presumption is the same where service has been made by publication as where personal service has been had." McHatton v. Rhodes, 143 Cal. 275, 279, 76 P. 1036, 1038 (101 Am. St. Rep. 125).

The presumption in favor of validity applies to an order vacating the dismissal of an action. Gallette v. Justice Court of San Francisco (Cal. App.) 238 P. 133.

[9-13] The record in the divorce action is silent upon the question whether the defendant therein was served with notice of the motion to vacate the order of dismissal. The only testimony having any possible bearing upon the question is that of the petitioner as follows:

> "My residence is Buffalo, N. Y. * * * I have resided in Buffalo, N. Y., practically all my life, except when I was traveling with Mr. Wiechers. * * * He was my husband. He became such on June 24, 1903, in Cleveland, Ohio. * * *
>
> "Q. How long did you continue to live with your husband after this marriage? A. Until—I think it was 1909—1908 or 1909; we lived in Cincinnati and then I came home to visit my mother."

Witness never obtained a divorce from deceased. Deceased never obtained a divorce from witness to her knowledge. No papers were ever served upon the witnesses in any action for divorce. * * *

"Q. You did not go back to Cincinnati? A. No. After I came home Mr. Wiechers was not in Cincinnati long."

The evidence shows that, under the Statutes of Ohio, the terms of the court in which the divorce action was tried began on the first Mondays of January, April, July and October of each year; that an action may be dismissed "by the court, when the plaintiff fails to appear on the trial"; that, among other grounds, the court may "vacate or modify its own judgment or order, after the term at which it was made, * * * for mistake, neglect or omission of the clerk, or irregularity in obtaining the judgment or order"; that "proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action"; that proceedings to vacate or modify a judgment or order for mistake, neglect or omission of the clerk, or irregularity in obtaining the judgment or order "must be commenced within three years"; that the clerk's record of an action "shall be made up from the petition, the process, return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court"; and that "a complete record shall not be made * * * when an action has been dismissed without prejudice to a future action," unless the clerk be "paid therefor by the party questioning it."

Appellant contends that the court lost jurisdiction of the divorce action by the dismissal thereof and could reacquire jurisdiction only by service upon defendant of some character of process issued by the court in the proceeding, and not by service of the plaintiff's mere notice of the motion to vacate the order of dismissal. In support of this contention, appellant cites Bank of Montpelier v. Mullen, 7 Ohio N. P. (N. S.) 313, 331, where it is said:

> "We will end by briefly setting out what seems to us to be the successive steps when vacation of a judgment is sought by defendant after the term, for any reason other than these embraced in the first three sections of section 5354, Revised Statutes: First, the filing of a petition, containing an averment of a ground for vacation, and allegations suggesting a valid defense. * * * Summons should issue for the plaintiff to meet this application," etc.

But the ground upon which the dismissal was set aside in this case is embraced in the third "section of section 5354," and therefore is excluded from the operation of the rule stated in the case cited; besides, the Ohio statute quoted provides that in such a case application for relief "shall be by motion, upon reasonable notice to the adverse party." It is not generally true that a court loses jurisdiction for all purposes by entry of judgment in an action, but jurisdiction for certain purposes is reserved by statute, among such being that of setting a judgment aside for mistake. From the evidence introduced, it appears that the Ohio procedure for the setting aside of judgments on the ground of mistake is similar to that provided by section 473 of the Code of Civil Procedure of this state, but the time within which application for relief may be made is longer there than here. It would not be contended that service of notice by a party of his motion for relief, under section 473, is not sufficient to give a court jurisdiction to vacate a judgment on one of the grounds stated in that section. The evidence is not such as to compel the inference that the defendant in the divorce action was not a resident of Ohio from the time the action was dismissed until the order of dismissal was vacated. Her testimony to the effect that she had resided in New York "practically all" her life does not necessarily show that she did not reside in Ohio during part of her life, and the natural inference is that she lived with her husband for a considerable period in Ohio. She then went to the state of New York, but the evidence fails to show whether she thereafter continuously resided in that state. The evidence does not show what constitutes a service of notice under the Statutes of Ohio. Presuming that such statutes are the same as those of California, and the evidence not showing that the defendant in the divorce action was not a resident of Ohio in the year 1914, the defendant may have been duly served with notice of motion by mail, as provided by sections 1010 to 1013 of the Code of Civil Procedure.

> "In case of service by mail, the notice or other paper must be deposited in the post office, in a sealed envelope, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit." Code Civ. Proc. § 1013.

Proof of such service may be made by affidavit. Code Civ. Proc. § 415. Such proof of service would be no part of the clerk's record under the quoted provisions of the Ohio Statutes, and the appellant produced no evidence other than the clerk's record of the proceedings in the divorce action. In view of all the circumstances, it cannot be said that petitioner's mere statement that "no papers were ever served upon" her "in any action for divorce" is such "clear and convincing proof" as to require a finding, contrary to the presumption in favor of jurisdiction, that no legal service of notice of the motion was made upon her. The presumptions declared by the provisions of section 1963 of the Code of Civil Procedure, "while disputable, are in themselves evidence

* * * and will support a finding made in accordance with them, even though there be evidence to the contrary." People v. Siemsen, 153 Cal. 387, 390, 95 P. 863, 865.

[14] Appellant contends that "the record in the case shows affirmatively that the sufficiency of the plaintiff's cause of action was not determined on its merit before the order of dismissal was set aside. The evidence shows that the Statutes of Ohio provide that:

> "A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action."

In Braden v. Hoffman, 46 Ohio St. 639, 641, 22 N. E. 930, 931, it is said that the object of these provisions "is to preserve the liens and rights of parties under the original judgment, in case a similar judgment should be rendered upon the trial of the cause; * * * that when the court has decided that there is good ground to vacate, the judgment to vacate should be suspended until after the cause is tried." Jurisdiction to hear and determine the motion to vacate was acquired by service of notice upon the defendant in the action. If it was error to vacate the order of dismissal prior to the trial of the action, it was an error of procedure clearly within the jurisdiction so acquired. The Ohio cases relied upon by appellant were decided upon direct appeals where the court was not limited to the question of jurisdiction. It is, at least, doubtful whether the alleged error would have entitled the defendant to a reversal on a direct appeal. The Ohio Statutes provide (Gen. Code, § 11364):

> "In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed, or affected, by reason of such error or defect."

It does not appear in what manner the rights of the defendant in the action could have been affected by the entry of the order vacating the dismissal prior to the trial of the action, rather than after the cause was tried.

[15] It is urged that the court erred in admitting evidence to the effect that, some years after the entry of the decree of divorce, the petitioner inquired of a Catholic priest whether, if she procured a divorce, she could marry a certain man who was a Catholic. While respondent makes no attempt to justify the admission of such evidence, it does not appear that the appellant could have suffered any prejudice from its admission. It had no possible bearing upon the question of jurisdiction, the only issue before the court for determination, and the court could not have given it any weight in determining that question.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

---

199 Cal. 532

ASPEGREN & CO., Inc., v. SHERWOOD, SWAN & CO. (S. F. 11966.)*

(Supreme Court of California. Oct. 25, 1926.)

1. Appeal and error 🔑345(1), 347(1).

Under Code Civ. Proc. § 939, an appeal is timely if taken within 60 days after entry of judgment or within 30 days after entry of an order determining a seasonably instituted motion for new trial.

2. Appeal and error 🔑347(1).

As to a timely appeal, whenever findings are required judgment is not rendered until they are signed and filed, but whenever findings are waived or not required judgment is rendered when entered in minutes of court.

3. Appeal and error 🔑347(1).

Where findings were not only required but were expressly requested, judgment was not rendered under Code Civ. Proc. § 939, as to time for taking appeal, until findings were signed and filed.

4. Appeal and error 🔑337(2)—Appeal taken before signing and filing of requested findings is premature as taken before rendition of judgment, and does not come within statute prohibiting dismissal of appeal because taken after rendition of judgment (Code Civ. Proc. § 939).

Appeal taken subsequent to oral pronouncement of trial court's disposition of cause, but prior to signing and filing of requested findings, is premature as taken before rendition of judgment, and does not come within Code Civ. Proc. § 939, prohibiting dismissal of appeal on ground that it was taken after rendition of judgment.

5. Appeal and error 🔑882(21).

Participation by respondent without objection in settlement of transcript to be used on appeal, under Code Civ. Proc. § 953a, does not estop him from claiming that appeal was not taken within time prescribed by section 939.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Aspegren & Co., Inc., against Sherwood, Swan & Co. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal. Appeal dismissed.

See, also, 246 P. 1040.

Daniel N. Dougherty, of San Francisco, for appellant.

Harrison S. Robinson and Harry L. Price, both of Oakland, for respondent.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 22, 1926.

PER CURIAM. This is a motion to dismiss the appeal herein. The action was instituted by the plaintiff corporation to restrain the defendant company from retailing certain goods of the former below a specified price. Judgment was entered denying the injunctive relief prayed for and awarding costs to the defendant company. Plaintiff appealed.

Respondent's motion to dismiss is founded upon the claim that the purported appeal was not taken within the time prescribed in section 939 of the Code of Civil Procedure. The motion is supported by a certificate of the county clerk of the county of Alameda, wherein it appears that on January 11, 1926, the superior court of said county, upon the conclusion of the trial, pronounced that the relief sought was denied; that on January 21, 1926, a notice of appeal was filed by plaintiff; that findings of fact and conclusions of law were signed and filed by said court on February 8, 1926; that judgment was entered in accordance with the findings of fact and conclusions of law on February 8, 1926; and that on said last mentioned date a transcript, prepared under section 953a, Code of Civil Procedure, was settled and filed.

Section 939 of the Code of Civil Procedure reads:

> "An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this Code, or of any other Code, or under any other statute, within sixty days from the entry of said judgment or order. No appeal, however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry. If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

[1] The language of the Code section being clear and unequivocal on the point, it is unnecessary to refer to any of the numerous authorities holding that an appeal is timely if taken within 60 days after the entry of judgment or within 30 days after the entry of an order determining a seasonably instituted motion for a new trial.

As indicated by the above chronological history of the instant case, the appeal herein was taken subsequent to the oral pronouncement of the trial court's disposition of the cause but prior to the signing and filing of findings of fact and conclusions of law and prior to the entry of the judgment based thereon. It must be determined, therefore, whether such an appeal is timely within that provision of section 939, added in 1915 (Stats. 1915, p. 205), which declares that:

> "No appeal however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry."

To ascertain if the appeal herein was taken "after the rendition" of judgment, reference will be made to the authorities wherein that phrase has received interpretation.

In Crim v. Kessing, 89 Cal. 478, 488, 26 P. 1074, 1076 (23 Am. St. Rep. 491), which involved an action on a judgment, the court declared that:

> "Under the system of practice which prevailed in this state prior to the adoption of the codes in 1872, findings were not essential to the entry or validity of a judgment (Practice Act [St. 1851, p. 78] § 180); and under that system it was held that the entry in the clerk's minutes of the decision as announced by the court constituted the 'rendition of the judgment' (Gray v. Palmer, 28 Cal. 416; Genella v. Relyea, 32 Cal. 159). But under the provisions of the Code of Civil Procedure, whenever findings are required there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system."

The case of Brownell v. Superior Court, 157 Cal. 703, 706, 109 P. 91, 93, though concerned with the question whether an application to set aside a decree of partial distribution was made within the six months' period prescribed by section 473, Code of Civil Procedure, contains the following review of authorities:

> "A somewhat similar question has arisen in this and other states, where a statute provides that an appeal may be taken within a stated time 'after the rendition of the judgment.' In this state the former Practice Act prescribed a period of one year. In Gray v. Palmer, 28 Cal. 416, the judgment was pronounced on April 6, 1861. It was drawn up, signed by the judge, and filed on April 9, 1861, and was entered in the judgment book on June 17, 1861. An appeal taken on June 14, 1862, was held to be too late, on the ground that 'there was a rendition of the judgment as early, at least, as the 9th of April,' 1861, when the judgment was formulated, signed, and filed. In Peck v. Courtis, 31 Cal. 209, a final judgment in partition on confirmation of the report of referees was ordered on December 22, 1863, but it was not entered until July 25, 1864. An appeal was taken on July 8, 1865, less than one year after the entry but more than a year after the judgment was ordered. It was held that the order for judgment was equivalent to a rendition thereof and that the appeal was barred. Genella v. Relyea, 32 Cal. 159, was a case similar to Gray v. Palmer, 28 Cal. 416, and it was decided the same way, the court saying, however, that the time for taking an appeal began to run at the time judgment was ordered, citing Peck v. Courtis, 31 Cal. 209. Peck v. Courtis was followed in Wetherbee v. Dunn, 36 Cal. 252. In New York a writ of error could be taken within two years after the 'rendering of the judgment.' It was held in that state that the time began to run at the time the judgment was pro-

nounced and not from the time of its entry and that a writ sued out more than two years after the judgment was thus rendered was barred. Fleet v. Youngs, 11 Wend. (N. Y.) 522; Lee v. Tillotson, 4 Hill (N. Y.) 27. In Nevada, the same conclusion was reached, the court holding that an appeal could be taken after rendition and before entry. Cal. St. Co. v. Patterson, 1 Nev. 155; Kehoe v. Blethen, 10 Nev. 453. In Estate of Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146. * * * it was decided that a judgment is binding on the parties and privies as soon as it is rendered and before it is entered. In Crim v. Kessing, 89 Cal. 488, 26 P. 1074, 23 Am. St. Rep. 491, the following is laid down as the correct rule under the present Code: 'Under the provisions of the Code of Civil Procedure, whenever findings are required there can be no "rendition of the judgment" until they are made and filed with the clerk. Findings of fact, however, are required only "upon the trial of a question of fact," and they may in all instances be waived. Wherever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the "rendition of the judgment" in the same manner as it did under the former system.' See, also, Son Joaquin, etc., Co. v. West, 99 Cal. 347, 33 P. 928, First Nat. Bank v. Dusy, 110 Cal. 76, 42 P. 476, and Painter v. Painter, 113 Cal. 375, 45 P. 689, approving this rule."

The court in Brownell v. Superior Court, supra, then approves the rule as announced in Crim v. Kessing, supra, by stating that the signing and filing of findings, whenever required, "constitute the rendition of judgment."

In Brown v. Superior Court, 70 Cal. App. 732, 734, 234 P. 409, 410, which involved an application for a writ of mandate to compel the entry of a formal judgment in a certiorari proceeding, the rule again met with approval, the court in that case declaring:

> "No answer was filed in the certiorari proceeding and no issue of fact was tendered. Consequently no findings were required, and therefore the judgment was 'rendered' when the decision was announced by the court and spread upon its minutes. Crim v. Kessing, 89 Cal. 478, 488, 26 P. 1074, 23 Am. St. Rep. 491; Brownell v. Superior Court, 157 Cal. 703, 706, 707, 109 P. 91; Smith v. Ross, 57 Cal. App. 191, 207 P. 55."

[2] These several authorities indicate the rule to be that whenever findings are required the judgment is not rendered until they are signed and filed. But, whenever findings are waived or are not required the judgment is rendered when entered in the minutes of the court. With this rule we are in accord.

We find nothing in Takekawa v. Hole, 170 Cal. 323, 149 P. 593, cited by appellant, opposed to this statement of the rule. That case was concerned with an amendment to a judgment, and the court therein reiterated the equally well-settled rule that a "court may always amend the entered judgment to make it conform to the decision which the court actually rendered." As we read the case no attempt is made therein to determine when a judgment is "rendered."

[3, 4] In the instant case findings were not only required but were expressly requested by counsel for appellant. It follows, therefore, that judgment herein was not "rendered," under the rule as above announced, until findings of fact were signed and filed. As the appeal was taken prior to the signing and filing of such findings, and therefore before the "rendition of judgment," said appeal was premature and does not come within that provision of section 939, Code of Civil Procedure, which declares that:

> "No appeal, however, shall be dismissed on the ground that it was taken *after* the rendition of such judgment or order and before formal entry." (Italics added.)

Wixom v. Davis (Cal. Sup.) 246 P. 1041, 1042, is not opposed to this conclusion. In that case this court assumed jurisdiction of an appeal taken prior to the signing and filing of purported findings of fact. It is significant, however, that the court declared therein that "findings of fact were unnecessary, but the fact that they were made did not prejudice the plaintiff on this appeal. * * *" As findings were not required in that case, the judgment was rendered, under the rule, when entered in the minutes of the court, and the appeal therein having been taken subsequent to such entry in the minutes was therefore timely and not premature.

[5] In appellant's brief it is stated that:

> "Counsel for respondent participated without objection in the settlement of the transcript on February 8, 1926, to be used on this appeal, notice of which they had then had for 17 days. By such participation they are estopped from claiming that any substantial right of respondent has been affected by the filing of a notice of appeal on January 21, 1926, to which they made no objection during the settlement of the transcript on February 8th."

This contention is disposed of by what is said in Estate of Brewer, 156 Cal. 89, 90, 103 P. 486, 487:

> "The objection that an appeal has not been taken within the time limited by law goes to the jurisdiction of the appellate court. * * * There is, therefore, no force in the contention made by appellants that such objection was waived by the action of the respondent in indorsing upon the notice of appeal an admission of service. * * * Nor can the appellants rely upon the position that respondent is estopped by such admission from objecting to a consideration of the appeal. The acts of the parties cannot confer jurisdiction on the court in a case withheld by the law from its jurisdiction. Even if no objection were made, it would be the duty of the court, of its own motion, to dismiss the appeal. * * *"

The present appeal being premature and no other appeal herein having been seasonably taken, the motion is granted, and the appeal is dismissed.

79 Cal. App. 555

PEOPLE v. SIMPSON. (Cr. 1321.)

(District Court of Appeal, First District, Division 1. California. Oct. 26, 1926.)

1. Criminal law 🔑1151.

Action of trial court in disposing of motion for continuance is not subject to interference on appeal, unless abuse of discretion is shown.

2. Criminal law 🔑614(3)—Denial of application for second continuance to secure same witnesses held not an abuse of discretion, where defendant failed to show that proper efforts had been made to secure witnesses.

Where defendant had been granted continuance to secure witnesses, and affidavits supporting motion for second continuance to secure same witnesses did not show that proper efforts had been made to secure witnesses, or that witnesses could be secured, court did not abuse discretion in denying application.

3. Criminal law 🔑614(3).

Where second continuance is asked to secure same witness, rule requiring showing of diligence is applied with increasing rigidity.

4. Prostitution 🔑1.

To be guilty of "pimping" under St. 1911, p. 10, defendant must be a male, who, knowing one is a prostitute, knowingly derives his support partly or entirely from proceeds of her prostitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pimp.]

5. Prostitution 🔑4.

Evidence *held* to support conviction of pimping.

6. Criminal law 🔑507(7)—Female witness held not an accomplice of defendant in offense of pimping, requiring corroboration of her testimony (Pen. Code, § 1111, as amended by St. 1915, p. 760; St. 1911, p. 10).

In prosecution for pimping under St. 1911, p. 10, female witness, who was an employee of defendant *held* not an accomplice, requiring corroboration of her testimony, in view of Pen. Code, § 1111, as amended by St. 1915, p. 760, that witness could not be prosecuted for offense charged against defendant.

7. Criminal law 🔑1169(2)—Where S. had already testified that defendant, charged with pimping, had intercourse with her, admitting testimony that defendant had told witness that he intended to have intercourse with S. held not prejudicial error.

In prosecution for pimping, where S. had testified that she had had intercourse with defendant, and defendant had denied it on direct examination, admission of testimony in rebuttal that defendant had told witness that he intended to have intercourse with S. *held* not prejudicial error.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

A. P. Simpson was convicted of pimping, and he appeals. Affirmed.

N. Lindsay South, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

TYLER, P. J. Defendant was charged, tried and convicted of the crime of pimping, as defined by the statute (Stats. 1911, p. 10). A motion for a new trial was made and denied. This appeal is from the judgment and order. The evidence is of a sordid character, but it is unnecessary for a discussion of the case to review it extensively. Briefly stated, it discloses the following facts: Defendant operated in the city of Fresno what is designated in the record as a massage parlor. The establishment was frequented by male patrons, and the duties of the female attendants employed by defendant was to bathe and massage nude men. Sexual commerce was also indulged in. There is evidence to show that defendant was familiar with this fact, and that a charge of $5 was made for a bath, massage, and intercourse. There is also evidence to show that the female attendants operated under a percentage basis; the defendant receiving his share of the money derived from the enterprise.

[1-3] The grounds relied upon for a reversal of the judgment and order are: (1) That the court abused its discretion in not granting defendant's second motion for a continuance of the trial; (2) insufficiency of the evidence to bring the case within the provisions of the statute creating the offense; (3) that the conviction is based upon the uncorroborated testimony of an accomplice; (4) error of the trial court in failing to instruct the jury as a matter of law that a certain witness was an accomplice; (5) error in the admission of certain testimony. In support of the first ground urged for a reversal it is claimed that the trial court abused its discretion in not granting a continuance. Defendant was arraigned November 28, 1925, and his trial was set for December 6th following. Upon this last-named day he asked for, and was granted, a continuance on account of the absence of two witnesses, one of whom was Dorothy Dalton, a woman who had been employed by him as an attendant in his business. Defendant expected to prove by this witness, among other things, that sexual commerce was not practiced in the establishment, but that, on the contrary, defendant always insisted upon proper conduct on the part of the employees of the place. Upon the granting of the motion the court continued the trial until January 11, 1926. When the case was again called for hearing, defendant moved for a continuance upon the former ground, and filed affidavits in support of his motion. It appears therefrom that, after the first continuance was granted, defendant had located and interviewed Dorothy Dalton at a certain hotel in the city of Fresno, and he thereafter placed a subpœna in the hands of the sheriff, commanding her presence at the trial. No subsequent inquiry was made by him to ascertain if the witness had been served until January 6, 1926, when he was informed by the sheriff that service had not been had, for the reason that the witness had left the hotel. The facts recited in the affidavits indicated that the witness was at all times in the city of Fresno. In denying the motion for a second continuance, the trial court concluded that under all the circumstances defendant had not used reasonable diligence to locate the witnesses. The action of a trial court in disposing of a motion for a continuance is not subject to interference on appeal, except on a showing of abuse of discretion. No such showing is here made. Defendant had already been granted a continuance to secure the attendance of his witnesses, and the affidavits in support of his motion for the second continuance, except for the recital that a subpœna had been placed in the hands of the sheriff for service, contained nothing to indicate that any effort had been made to procure their attendance, or which would justify this court in holding that there was any abuse of discretion in the denial of the application. Nor was there any showing that the witnesses could be secured in the event that a continuance was granted. Motions of this character rest very much in the discretion of the trial court, and it is only in a plain case of the abuse of such discretion that this court will interfere. People v. Breen, 130 Cal. 72, 62 P. 408; People v. Sliger, 17 Cal. App. 464, 120 P. 40; People v. Chutnacut, 141 Cal. 682, 75 P. 340. The rule requiring a showing of diligence is applied with increasing rigidity, where a continuance is asked because of the absence of the same witness. People v. Leyshon, 108 Cal. 440, 41 P. 480; Ford v. Superior Court, 17 Cal. App. 1, 118 P. 96.

[4, 5] Equally without merit is the claim that the evidence is insufficient to bring the case within the contemplation of the act. The act, in so far as it relates to the facts of this case, provides, in substance, that any male person, who, knowing a female person to be a prostitute, shall derive support or maintenance in whole or in part from the earnings or proceeds of the prostitution shall be guilty of a felony. So much of the evidence as supports the judgment shows that defendant knew his attendants were prostitutes. He himself was bathed and had intercourse with at least two of them. He knew that they had intercourse with the visitors, and that the greater portion of the receipts, of which he received at least one-half, was derived from this sexual commerce. The elements necessary to constitute the offense are: (1) Defendant must be a male person; (2) he must have knowledge that a certain person is a prostitute; (3) there must be earnings from the prostitution; (4) the defendant must derive his support in whole or in part from such earnings, knowing them to have been the proceeds from prostitution. People v. Fuski, 49 Cal. App. 4, 192 P. 552.

[6, 7] The evidence brings the case squarely within this rule. The further claim that the witness Ruby Young, one of the employees of defendant, was an accomplice, and that defendant therefore could not be convicted upon her uncorroborated testimony is also without merit. Under the amendment to section 1111 of the Penal Code (St. 1915, p. 760), the rule requiring corroboration of the testimony of an accomplice, as specified therein, is limited to cases where there is evidence which, if true, classifies the witness as one liable to prosecution for the identical offense charged against the defendant on trial. People v. Brown, 61 Cal. App. 748, 216 P. 58. It is here manifest that the witness Ruby Young could not be prosecuted for the crime of pimping. The requested instruction was therefore properly refused. And, finally, appellant complains that the trial court erred in admitting certain testimony to show that defendant had told Ruby Young that he intended to have intercourse with Emma Scharton, another of his employees. The Scharton woman had testified on cross-examination that defendant had intercourse with her at the massage parlor operated by him. On his direct examination defendant denied this fact, or that he had ever made the statement attributed to him. The witness Ruby Young was called in rebuttal, and was asked to state whether or not defendant had made such a statement to her. We fail to see how this testimony was in any manner prejudicial to defendant. Aside from any question as to its relevancy as tending to show that defendant knew the character of the attendants, and that he was deriving support from the proceeds of their prostitution, the Scharton woman had already testified that defendant had had intercourse with her. There is no merit in the objection. No other questions are raised.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

79 Cal. App. 529

SAMUELS v. BARNET et al. (Civ. 5539.)*

(District Court of Appeal, First District, Division 2, California. Oct. 21, 1926.)

1. Fraudulent conveyances 🔑139.

Purported sale of secondhand automobile, not accompanied by an actual and continual change of possession, *held* presumably fraudulent, under Civ. Code, § 3440.

2. Automobiles 🔑19—Fraudulent conveyances 🔑299(9)—Evidence held to sustain finding of fraudulent transfer of automobile from client to attorney (Motor Vehicle Act, § 8; Civ. Code, § 3440).

Evidence showing transfer of secondhand automobile from client to attorney just after entry of judgment against client and without actual change of possession or compliance with Motor Vehicle Act (St. 1919, p. 199), § 8, *held* to sustain finding that transfer was fraudulent, in view of presumption under Civ. Code, § 3440.

3. Automobiles 🔑19—Motor Vehicle Act declaring transfers ineffective until transferee has received certificate of registration, etc., held not inapplicable to transfer of automobile from client to attorney (Motor Vehicle Act, § 8).

Motor Vehicle Act (St. 1919, p. 199), § 8, declaring that transfer of motor vehicle shall be ineffective for any purpose until transferee has received certificate of registration and has written his name on the face thereof, *held* not inapplicable to client's transfer of automobile to attorney on the theory that automobile bearing license plate of preceding year had not been licensed for the year in which the transfer was made.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action of replevin by Marcus L. Samuels against Frank Barnet and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Marcus L. Samuels, of San Francisco, in pro. per.

Edward R. Eliassen, of Oakland (C. Leonard Rosenberg, of Oakland, of counsel), for respondents.

NOURSE, J. Plaintiff sued the defendant as sheriff of Alameda county to recover possession of a certain automobile held by the defendant under a writ of attachment. The cause was tried before the court sitting without a jury and resulted in a judgment for the defendant, from which the plaintiff has appealed on a typewritten record.

The litigation grows out of the case of Bohlen v. Alameda Investment Company, which was tried in the superior court in Alameda county on December 12, 1921. That suit was commenced to recover moneys claimed to be due Bohlen for services rendered the investment company, but, in due course, the company filed a cross-complaint in which it claimed that Bohlen owed it $1,143.39 as balance due on the purchase of a certain 1920 model Nash touring car. Throughout these proceedings Bohlen was represented by Mr. Samuels, the plaintiff in this case, as his attorney and legal adviser. At about 2:30 or 2:45 p. m. of the day of the trial the court announced that it would render judgment in favor of the company for the amount claimed to be due from Bohlen, and soon thereafter Bohlen, Samuels, his attorney, and Robinson, a witness, went to the garage where the Nash car was stored and there Bohlen, at 3:15 p. m., delivered to Samuels a bill of sale of the car and an order upon the garage owner to deliver the car over to Samuels. On the same day an attachment duly issued in the Bohlen Case, by virtue of which the sheriff took the car into his possession. Thereafter judgment was duly entered against Bohlen, the car was sold to satisfy a part of the debt, and the execution was returned as otherwise unsatisfied.

At the trial of the case now under consideration the trial court found:

> "That, at the time of the trial of the said action, Marcus L. Samuels, plaintiff herein, was attorney for the plaintiff in the action of Louis C. Bohlen v. Alameda Investment Company, and acted as such attorney in the trial of that case, and was present in court when the aforementioned judgment was rendered, and had acted as the attorney for said Louis C. Bohlen for a period of 3 years or more, and that an attempt was made shortly after the conclusion of the trial of and the rendition of judgment in that case to transfer the said automobile from Louis C. Bohlen to Marcus L. Samuels, his attorney, plaintiff herein, but that such attempted transfer was in fraud of said Alameda Investment Company, judgment creditor, and was made or attempted to be made for the purpose and with the intent of hindering, delaying, and defrauding said Alameda Investment Company, judgment creditor of said Louis C. Bohlen, and is void and of no effect.
>
> "That it is also a fact that plaintiff did not comply with section 8 of the Motor Vehicle Act of the state of California (Statutes 1919, page 191), in that he did not, at any time, apply for or obtain a certificate of registration for the said automobile and for the purpose of causing himself to be registered as the owner of the said automobile, as required by law, and that there was no valid change of ownership or title to said automobile from the said Louis C. Bohlen to Marcus L. Samuels, plaintiff herein."

On this appeal the appellant urges two grounds for a reversal of the judgment: (1) That the evidence does not support the finding of fraud; and (2) that the provisions of section 8 of the Motor Vehicle Act are inapplicable.

[1] The purported sale of the automobile to the appellant was effected while he and Bohlen occupied the fiduciary relation of attorney and client. From appellant's testimony in this case, it appears that a judgment

---

*Hearing denied by Supreme Court December 20, 1926.

for over $1,100 had just been rendered against his client, that the car was valued at $2,073.65 and was taken by appellant for a debt of $1,000 claimed to be owing him from Bohlen. It also appears that Bohlen was without any other assets with which to satisfy the judgment against him. The purported sale, not having been accompanied by an "actual and continual change of possession," was presumably fraudulent as to creditors of Bohlen (section 3440, Civ. Code), and the burden was on appellant to overcome this presumption.

[2] The only evidence touching on this subject is found in the testimony of the appellant that he handed the garage keeper a written notice from Bohlen that he had sold the car and that it was to be delivered to appellant, that he got into the car, tried the brakes, and stood on the running board. Two days later he addressed a letter to the keeper of the garage inquiring as to the cost of washing the car and recharging the battery, if found necessary. The transaction was not followed by a change of the registration certificate, as required by section 8 of the Motor Vehicle Act, and the trial court might well have inferred from the facts proved that the entire transaction was in bad faith and for the purpose of working a fraud upon Bohlen's creditors. In face of the statutory presumption of fraud and the inferences which might properly have been drawn, we cannot say that the court's finding is not supported.

[3] Section 8 of the Motor Vehicle Act (Stats. 1919, pp. 191, 201), which requires the owner of a registered motor vehicle and the proposed transferee thereof to join in a statement of the transfer of the vehicle, provides:

> "Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

The appellant concedes that he made no effort to comply with this section. He now argues that the section is not applicable here because the purported transfer occurred in December, 1921, and Bohlen had not obtained a license or certificate of registration for that year. In this respect appellant is not supported by the record. The claim is based on the evidence that when the car was seized by the sheriff a license plate for the year 1920 was attached to it. This is not proof that the car was not licensed or registered for the year 1921.

The case is a simple one. The appellant bases his right of action on a purported transfer of a secondhand automobile, wherein he failed to meet the requirements of the statute. The section quoted provides that, unless these restrictions are followed, the "intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." The Legislature could scarcely have used words which would have been more expressive of the intention to declare that such transfers should not be effective for any purpose. Such being the case, the transfer could not be effective for the purpose of conferring upon appellant the right of possession necessary for the maintenance of this action.

Judgment affirmed.

I concur: STURTEVANT, J.

79 Cal. App. 541

PEOPLE v. HAUGHEY. (Cr. 1293.) *

(District Court of Appeal, First District, Division 1, California. Oct. 25, 1926.)

1. Conspiracy 🔑47—Robbery 🔑24(1).

Unexplained possession of stolen property, while insufficient to show guilt of robbery and of conspiracy to commit robbery, may be considered with other testimony.

2. Criminal law 🔑554.

Jury were not bound to believe defendant's unexplained possession of stolen pin in prosecution for robbery and conspiracy to commit robbery.

3. Criminal law 🔑511(6).

Unexplained possession of stolen pin was sufficient corroboration of testimony of accomplices in prosecution for conspiracy to commit robbery and for robbery.

4. Witnesses 🔑388(1), 392(1)—Police officer's writing, not signed by defendant nor assented to, held inadmissible to impeach him, and unnecessary as foundation for officer's impeaching testimony.

Police officer's writing, containing defendant's statements not signed by defendant nor its correctness assented to by him, was inadmissible for impeachment and unnecessary as foundation for police officer's impeaching testimony.

5. Criminal law 🔑1168(2)—Reading defendant's testimony given before grand jury, for impeachment, without producing transcript, held harmless error.

Reading defendant's testimony given before grand jury, for impeachment, without producing or showing transcript to witness, was harmless error, where defendant's counsel stipulated that it was correct transcript and had full opportunity to inspect it and to examine defendant with reference to testimony therein.

6. Criminal law 🔑516—Testimony not acknowledging guilt, though showing guilty intent, held not confession.

Testimony not being on reasonable construction acknowledgment of guilt, though tend-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court December 23, 1926.

ing to prove guilty intent, *held* not a confession, and its admission without showing voluntary character was not error.

7. Criminal law 🔑823(4)—Instruction that in conspiracy, "where overt act is necessary to constitute offense," it must be alleged and proved, held harmless error, in view of further instruction.

Instruction that on trial for conspiracy, "where overt act is necessary to constitute offense," overt act must be alleged and proved, erroneous in including phrase in quotation marks, was not prejudicial, where court instructed to acquit unless crime was committed in pursuance of conspiracy by all or some of defendants to commit it.

8. Conspiracy 🔑47—Robbery 🔑24(1).

Evidence *held* to sustain conviction of robbery and conspiracy to commit robbery.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Patrick Haughey was convicted of conspiracy to commit robbery and of robbery, and he appeals. Affirmed.

Vincent W. Hallinan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. Appellant was charged jointly with William L. Rhinehart and two others named Gleason and Robinson with the crime of conspiracy to commit a series of robberies, together with the commission of five separate offenses of robbery. Appellant and Rhinehart were found guilty of the offense first mentioned, the former being also convicted on three of the robbery counts. The jury disagreed as to his guilt on the remaining counts, and the trial court set aside the verdict on two of the robbery charges. A motion for a new trial was denied, from which order and from the judgment the appeal was taken.

[1-3] Appellant urges as grounds for reversal an insufficiency of the evidence to sustain the verdict and that the court erred in its rulings on objections to the admission of evidence and in its instructions to the jury.

Gleason and Robinson, who were offered as witnesses for the prosecution, testified in substance that they, with appellant and Rhinehart, planned the commission of a series of robberies which were perpetrated by them; that appellant's part therein was to telephone to prospective victims and ask for immediate delivery of illicit liquor to a fictitious person at a certain address; that upon compliance the other conspirators would force an entrance into the residence of their victim, or that such persons would be followed and robbed when the opportunity arose. Specific instances of such robberies were related by the witnesses. Several persons testified to the fact that they had been robbed by the methods described; one of the witnesses identified Rhinehart as one of his assailants, and testified that a certain stickpin, shown by the evidence to have been sold by appellant, was taken from the witness on the occasion of the robbery. At the trial appellant admitted his acquaintance with the other defendants and the sale by him of the pin, testifying that the sale was made at the request of Robinson, he not knowing that the pin had been stolen. While the possession of stolen property unexplained is not sufficient to show guilt, it is a circumstance tending to show guilt, and may be considered by the jury in connection with other testimony. People v. Wilson, 135 Cal. 331, 67 P. 322. In the instant case appellant attempted to explain his possession of the stolen pin. This testimony, however, the jury was not bound to believe, and if disbelieved, the fact of such possession tended strongly and was sufficient to corroborate the testimony of the accomplices mentioned. People v. McLean, 84 Cal. 480, 24 P. 32; People v. Blunkall, 31 Cal. App. 778, 161 P. 997; People v. Taylor, 70 Cal. App. 239, 232 P. 998.

[4] The prosecution sought to impeach the testimony of appellant by evidence of contradictory statements made following his arrest, and it is urged that the proper foundation therefor was not laid. It appears that the statements were taken down in writing by the impeaching witness, a police officer, who testified, not from the writing, but from his recollection of appellant's oral statements. It not appearing that the writing was signed by appellant or that he assented to its correctness, it was not admissible for the purpose of impeachment, nor, under the circumstances, was it incumbent upon the prosecution to produce or show the writing to the witness as the foundation therefor. People v. Glaze, 139 Cal. 154, 72 P. 965.

[5] The prosecution further offered and read for the same purpose a portion of the testimony given by appellant before the grand jury, to which the latter made the same objection. While the transcript containing this testimony was not shown the witness, it was stipulated by his counsel that it was a correct transcription of the proceedings had. It appears that full opportunity was granted to the latter to inspect the transcript and to examine appellant with reference to his testimony shown therein. While the ruling of the court in this connection was erroneous (People v. Ching Hing Chang, 74 Cal. 389, 16 P. 201; People v. Lee Chuck, 78 Cal. 322, 20 P. 719), as was said in view of the same situation in the case of People v. Talman, 26 Cal. App. 348, 352, 146 P. 1063, such ruling resulted in no prejudice to appellant.

[6] It is further contended that such state-

ments were part of a confession not shown to have been voluntary and were therefore not admissible. People v. Yeaton, 75 Cal. 415, 17 P. 544. The record does not show the fact; and we find no admission in the statements which reasonably can be construed as an acknowledgment of guilt. The facts stated, although tending to prove a guilty intent, were alone insufficient to constitute guilt of the charges in the indictment, and were properly admitted. People v. Fowler, 178 Cal. 657, 664, 174 P. 892.

[7] Appellant complains of the following instruction:

> "Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendants cannot be convicted unless one or more overt acts are expressly alleged in the indictment, nor unless one of the acts alleged is proved."

It is conceded by the Attorney General that the inclusion therein of the words, "in a case where an overt act is necessary to constitute the offense," was erroneous. The error, however, was not prejudicial, as the jury was fully instructed with reference to the conspiracy charged as follows:

> "Before you can convict the defendant or defendants upon the first count of the information you must be satisfied from all the evidence in the case and beyond all reasonable doubt that a crime has been committed, that it was committed in pursuance of a conspiracy to commit said crime and that the defendants whose names are set forth in the indictment, or a portion of them, were members of said conspiracy."

Appellant urges further objections to the admissibility of certain testimony, which objections are without merit and require no discussion.

[8] The evidence was sufficient to support the verdict, and, no prejudicial error appearing, the order and judgment are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PEOPLE v. ALLISON. (Cr. 934.)*

(District Court of Appeal, Third District, California. Oct. 23, 1926.)

Criminal law ⚷1159(4).

Appellate court cannot weigh testimony received at nisi prius to determine whether witness is telling truth, unless his testimony is inherently improbable.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 249 P. 881.

Donald McKisick and J. S. Daly, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. It is in the petition stated that, in our original examination of the record herein, we overlooked certain important and significant portions of the testimony of the alleged accomplice Speascock; that said testimony clearly showed that Speascock was an accomplice of the defendant in the commission of the crime of burglary of which the latter was convicted; that proper consideration of said testimony would have forced the conclusion upon this court that Speascock was such accomplice. The portion of Speascock's testimony thus referred to was: That he saw a party with a lantern on the right-hand side of the train to which the burglarized car was attached, and that that event occurred, to use Speascock's own language, "a little bit after we went down there—*when we was starting to get into the car.*" It is asserted in the petition that the language in italics involved an admission by Speascock that he did enter the burglarized car. Reading that language in connection with the rest of Speascock's testimony makes it very clear—indeed, obvious—that he was then referring to the open car into which the three men entered for the purpose of taking a sleep prior to the commission of the act of breaking into the car in which the hams were found and from which they were taken. And from the nature of Speascock's testimony, considered in its entirety, it is difficult for us to persuade ourselves that defendant's counsel themselves did not fully understand at the trial that Speascock, in making the statement, the language of which is herein put in italics, was then not referring to the burglarized car, but to the car which he and his two companions entered for the purpose of securing shelter and rest for the night. Speascock repeatedly asseverated that at no time did he enter the burglarized car; and, as pointed out in the original opinion, he as often declared that there was no previous agreement or understanding between him and the other parties to enter the car from which the hams were purloined for any purpose whatever. From this testimony and the connection in which he used the italicized language, it is as clear as any proposition can be made that he was not then referring to the burglarized car.

It may well be observed that, even if there was some doubt as to which of the two cars he then had in mind or intended to refer to, it would still be with the jury, in considering and passing upon the question whether he was an accomplice of Allison, to determine whether he referred to the car

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion of Supreme Court 253 P. 318.

the parties entered to take a sleep in or to the car that was subsequently entered with burglarious intent, he not having expressly withdrawn his repeated statement that he did not enter the latter car and had no agreement or understanding with his two companions to enter it with the purpose of committing a crime therein or for any purpose.

As is stated in the original opinion herein filed, it is to be conceded that the circumstances pointing to Speascock's connection with the scheme to commit the crime are very strong. We might, sitting as a jury and hearing the witnesses first hand, have reached an opposite conclusion to that of the jury, as evidenced by their verdict, as to the role Speascock played in the criminal transaction. But this court, in the very nature of the situation, cannot weigh testimony received at nisi prius to ascertain its probative value or force, or, which amounts to the same thing, determine whether any witness is or is not telling the truth, unless his testimony is intrinsically absurd or inherently improbable. If, therefore, there were or appear to be in Speascock's testimony inconsistencies or discrepancies, which, however, are not of a character to stamp it as inherently improbable and, therefore, unbelieveable, the duty of reconciling such inconsistencies or discrepancies or of accounting for them upon some reasonable hypothesis afforded by the entire testimony itself of the witness, is that of the jury. Speascock's testimony is not inherently improbable and is not such as to warrant the holding, as a matter of law, that it shows that he was an accomplice of Allison in the commission of the crime of which the latter stands convicted.

The petition for a rehearing is denied

We concur: FINCH, P. J.; PLUMMER, J.

79 Cal. App. 560

MARSH v. MARSH et al. (Civ. 3145.)

(District Court of Appeal, Third District, California. Oct. 26, 1926.)

1. Marriage 🔑50(1).

Evidence in suit by deceased's first wife to recover alleged community property of plaintiff and deceased from second wife of deceased *held* insufficient to support finding that first marriage had not been dissolved.

2. Marriage 🔑50(1).

Mere proof of prior marriage and continued life of both spouses is not sufficient to make case against second ceremonial marriage.

3. Marriage 🔑40(1, 11).

A marriage is presumed valid, and one attacking second marriage has burden of proof to show that neither spouse of first marriage has obtained a divorce.

4. Marriage 🔑40(10).

Presumption of validity of second marriage is not overcome by evidence of former spouse that no divorce papers had been served upon her and that she had not obtained divorce.

5. Marriage 🔑50(1).

Burden of proving that divorce had not been granted to either party of former marriage is substantial, and is not made by proof of facts from which mere inferences may be drawn.

6. Marriage 🔑40(9).

Presumption of continuance which ordinarily attaches when relation of husband and wife has been shown does not prevail against presumption of validity of second marriage.

7. Deeds 🔑109.

It is presumed that title passes according to terms of a conveyance.

8. Appeal and error 🔑1071(1).

If facts found support conclusion necessary to judgment, inconsistent conclusions stated in findings will be disregarded.

9. Marriage 🔑54.

Second wife, if not lawfully married, *held* entitled to compensation for services during husband's lifetime either in cash or by improvements upon real estate owned by her.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Clara Marsh against Mary E. Van Allen Marsh and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John T. Curtin, of Los Angeles, and J. Edward McCurdy, for appellant.

Smith & Breslin and Tanner, Odell & Taft and Hill & Morgan, all of Los Angeles, for respondent.

PLUMMER, J. Appellant began this action in the superior court of Los Angeles county against the defendants to recover certain property alleged to be the community property of the plaintiff and one Henry Marsh, deceased, and to set aside certain joint and several deeds executed in favor of the defendant Mary E. Van Allen Marsh and Henry Marsh, deceased, and also to recover a certain joint and several bank account standing in the names of said Mary E. Van Allen Marsh and Henry Marsh, deceased. The defendant Mary E. Van Allen Marsh had judgment, and the plaintiff appeals.

The record shows that on the 8th day of December, 1872, Henry Marsh, now deceased, and appellant, Clara Marsh, married in Chicago, in the state of Illinois; that one child, born on the 12th day of July, 1873, constituted the issue of said marriage. Thereafter, and some time during the year 1891, Henry Marsh and the appellant separated, and in 1897 Henry Marsh came to California. Thereafter, and on or about the 8th day of July, 1901, the said Henry Marsh intermarried with the respondent Mary E. Van Allen Marsh, with whom he lived in California until the time of his death, which occurred on the 2d day of August, 1923. At the time of the death of Henry Marsh the property described in the complaint and also in the answer stood of record in the names of Henry Marsh and respondent Mary E. Van Allen Marsh, as joint tenants with the right of survivorship.

The complaint alleges that all of this property was the community property of Henry Marsh and the appellant, and further alleges that the property was taken in the name of respondent through her menace, coercion, undue influence and fraud practiced upon said Henry Marsh. The respondent contends that the property in question is and has always been the separate property of the respondent; that the property was taken in her name as her sole and separate property. In 1922 the property was conveyed to a third person and by said third person reconveyed to respondent Mary E. Van Allen Marsh and Henry Marsh, as joint tenants with the right of survivorship, to the intent and purpose that the survivor might have the sole ownership thereof. Some time prior to the marriage of Henry Marsh and the respondent in 1901, a lot was purchased on what was then known as Third street and later changed to 103d street in the town of Sawtelle, county of Los Angeles, for the sum of $85, payable $10 cash, balance on installments. The testimony shows that the respondent paid these installments and the title to the property was taken in her name; that only $10 was paid prior to the marriage last referred to, and the balance paid in subsequent installments; that prior to the marriage last referred to the respondent gave to Henry Marsh, now deceased, the sum of $40, with which sufficient secondhand lumber was purchased to enable the deceased to build a small, two-room house. At the time of the purchase this property was of little value but was sold some years later for some $200 or $300. The respondent and Henry Marsh, after their marriage, moved into the said little house and lived there for some period of time. Out of the proceeds of the sale of this lot there was purchased for something less than $100 a lot on the corner of 110th street and Santa Monica boulevard, in the town of Sawtelle, title being taken in the name of the respondent. With a part of the proceeds of this sale, to wit, the sum of $75, an adjoining lot to the one just mentioned was purchased, title to which was also taken in the name of the respondent. It was after these transactions that the joint tenancy with the right of survivorship was created, as we have hereinbefore stated. The record shows that upon the Santa Monica boulevard property a small store building was erected and also some small cottages, which were rented. The record shows that the deceased, Henry Marsh, and respondent Mary E. Van Allen Marsh for some period of time, not exactly stated, conducted a small store on the Santa Monica property. About a year before the death of Henry Marsh the Santa Monica boulevard properties were sold for the sum of $14,000, $4,600 being paid in cash and the remainder, to wit, $9,400, was represented by a note and mortgage executed in favor of the said Henry Marsh and the respondent as joint tenants, with the right of survivorship. The money was placed in the bank in Sawtelle to the joint account of the deceased, Henry Marsh, and the respondent, and of this money there remained at the time of the trial the sum of $3,607.70. At the time of the sale of these last-mentioned properties there was purchased the real property described in the respondent's answer, the title to which was taken in the name of Henry Marsh, now deceased, and the respondent, as joint tenants with the right of survivorship.

The record shows some reference to $3,000 worth of Liberty bonds, but there is no evidence in the record of the present existence of these bonds, or how they were purchased, or what became of the money, and therefore need not be considered herein. It further appears from the record that at the time of the marriage of Henry Marsh and the respondent, Henry Marsh was receiving $6 a month as pension money and $8 per month as a fireman at a soldiers' home. The amount of this pension was increased from time to time, until at the date of his death he was receiving $50 per month. The respondent as employed as a dressmaker and was earning some money in that capacity, and it was in that capacity that the respondent earned the money which purchased the first lot and the lumber that went into the building erected thereon. The testimony of the respondent was to the effect that:

> "We just saved—I just saved and worked hard on everything to accumulate and add to what we did have, and we prospered right along with the town, as the town grew up, and now you see what Sawtelle is; that is why this property is as much as it is."

Where the money came from to erect whatever improvements there were on the Santa Monica boulevard property does not appear. It would seem, however, from a reading of the whole testimony that they were of inconsiderable value. No attempt appears to have been made to prove their value or to trace the source of the money going into the improvements, such as they were. It does appear, however, that the money which went into the original lot and transmuted through sale and purchase into the Santa Monica boulevard properties was earned by the respondent, title to which was at all times held in the name of the respondent, which would give rise to the presumption that it was her separate property, and we find nothing in the record which would rebut this presumption. There is testimony, however, which supports the conclusion that the original lot, title to which was taken in the name of the respondent, was bought as her property. The respondent testifies that immediately after her marriage to Henry Marsh they went down to Sawtelle to live in the little two-room house on the lot that she had bought; that the house was built on the lot after she had bought the same, and was built with lumber for which she had paid. This is sufficient to establish the ownership of the respondent, and, also, the ownership of the respondent to all lots which were bought and paid for out of the increased selling value of the first lot, title to the same being taken at all times in the name of the respondent. The record does not show that the earnings of the deceased Henry Marsh were in excess of the living expenses of the deceased and the respondent, but assuming that such earnings were in excess of the amount necessarily expended in the maintenance of the deceased and the respondent and that such excess, if any, went into the improvements upon the lots herein referred to, it does not follow that the title to the real estate so improved would be changed from its character as separate property belonging to the respondent to community property belonging to Henry Marsh and the appellant herein. It appears from the record that the respondent worked and saved; that she kept a home for the deceased during a period of more than 20 years; and if it be true that she was not the lawful wife of the deceased, she would nevertheless be entitled to compensation for her services, unless it be shown that the relations assumed by her were characterized by bad faith and illicit in their inception and continuance.

[1, 2] This brings us to a consideration of the testimony introduced by the appellant to

show the invalidity of the marriage of the deceased with respondent Mary E. Van Allen Marsh and the findings of the court made thereon and the facts which we have been setting forth. Upon the subject of the marriage of the deceased and the appellant and the question of divorce the record is as follows, the testimony being taken by way of deposition:

"Q. State when you were married to Henry Marsh. A. December 8, 1872.

"Q. If you state that you were married to Henry Marsh, state when and where you last saw him. A. At his place of business on Thirty-First street, Chicago, about January, 1891.

"Q. If you answer that you were married to Henry Marsh, state whether or not you ever received any papers of any kind or nature whatsoever of any divorce or annulment proceedings or divorce or annulment proceeds instituted in any court between Henry Marsh and Clara Marsh. A. I received no notice or papers of any kind.

"Q. If you state that you were married to Henry Marsh, state whether or not you have instituted any divorce proceedings or proceedings for divorce or annulment from your husband, Henry Marsh. A. No; I instituted no divorce proceedings of any kind."

The findings of the court are in substance as follows: That from the 8th day of December, 1872, up to and including the 2d day of August, 1923, the appellant Clara Marsh and Henry Marsh, deceased, were husband and wife, and that the marriage of the appellant to the deceased never was annulled and said persons were never divorced. The court then proceeded to find that the appellant and Henry Marsh, now deceased, did not acquire any community property; that none of the real property involved in this action was purchased with community funds. The court then proceeds to find in favor of the respondent concerning all the allegations in the plaintiff's complaint relative to good faith of the said Mary E. Van Allen Marsh and relative to her exercising any fraud or undue influence over him. It is further found that none of the property involved in this case was ever the community property of the said Henry Marsh or the community property of said Henry Marsh and the appellant Clara Marsh. The court further found that all the property involved in this action was the separate property of the defendant, and that at the time of the beginning of this action and for a long time prior thereto she had been the owner of the same and in possession of the same as her separate property.

It is upon the first finding of the trial court referred to herein that appellant bases her argument for a reversal, on the assumption that the earnings of Henry Marsh, as the husband of Clara Marsh, were community property and could not be transmuted into the separate property of the respondent by reason of section 172, Civil Code. The trial court having found upon sufficient testimony that the real estate involved and the proceeds thereof were at all times the separate property of the respondent, the question arises, How can the apparently inconsistent finding as to the existence of the marriage relation between the deceased and the plaintiff be held sufficient to reverse the judgment? In view of the solution of this problem, we have set forth herein the testimony upon which the trial court found the continuance of such marriage relation. This recital shows that the testimony was utterly insufficient to support any such finding and that any such conclusion finds no warrant in law. It has been held time and again by the Supreme Court of this state that mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a second ceremonial marriage—that there must be a further showing that the first marriage has not been set aside by judicial decree. Estate of Hughson, 173 Cal. 448, 160 P. 548; Estate of Harrington, 140 Cal. 244, 73 P. 1000; Maier v. Brock, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; Everett v. Standard Acc. Ins. Co. 45 Cal. App. 332, 187 P. 996.

In the latter case the evidence is almost identical with that introduced by the appellant in the case at bar. We quote from the opinion:

"In April, 1895, Everett and the plaintiff in this action were licensed to marry and a marriage ceremony was regularly performed. Thereafter and continuously until the death of decedent they lived together in San Bernardino county as husband and wife. Proof was offered on the part of the defendant that the deceased never obtained any divorce from Jennie B. Cowie [a former wife] in San Bernardino county and that Jennie B. Cowie never obtained a divorce from her husband or received any summons or other papers in relation to an action for divorce on the part of the husband."

The court in the Everett Case refers to the cases which we have cited, and then sets forth the law relative to this question as follows:

"There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement, perhaps, would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage [citing authorities]. The evidence offered by appellant on this branch of the case would not sustain a conviction of bigamy if decedent had been tried for that offense. The law presumes that he did not commit bigamy, that he did not commit perjury when he secured the license to marry respondent, and that he did not commit fraud when he procured the policy of insurance. The burden was on appellant to overcome these presumptions, and this it failed to do."

[3] No effort as made in the case at bar to show that the deceased, Henry Marsh, did not procure a divorce. A number of years elapsed between the separation of the plaintiff and Henry Marsh before the marriage of Henry Marsh to the respondent took place in the state of California. The testimony does show that Henry Marsh was in the state of California some little period of time before his marriage with respondent, yet the record is silent as to the county or counties in which he may have lived, and also the transcript is silent as to whether any search was made of the records in the counties where the deceased may have lived long enough to acquire a legal residence to ascertain whether any divorce proceedings had been instituted by him. In the case of Maier v. Brock, supra, relied upon by the Supreme Court in the Hughson Case, as reported in 17 Annotated Cases and the notes there collated, the inadequacy of the testimony to support the finding of the court in this case and the legal conclusion of the trial court, which characterizes the finding in this case, are distinctly and clearly made apparent. Among other things, it is there stated:

> "Whenever a marriage has been shown the law indulges the presumption that it is valid, and the burden is cast upon those who question its validity to show its invalidity by strong and persuasive evidence, leaving no room for reasonable doubt in the mind of the chancellor. And as has been said, 'This is a presumption of more than ordinary strength. It is one of the strongest known to the law.' "—citing a number of authorities supporting the statement.

And, further:

> "Nor, is the presumption overcome by mere proof of a prior marriage of the husband and that the first wife had not obtained a divorce, for the reason that the husband might have obtained a divorce and thus become free to contract the second marriage"—citing authorities.

The notes to this case also point out what proof is necessary to overcome this presumption, to wit, proof of the first marriage, proof that the party attacking the validity of the second marriage had not obtained a divorce, and that the records of the courts of the different counties where the deceased may have resided and acquired a legal residence disclose that the deceased had not instituted and prosecuted to conclusion any such action. The burden of proof is clearly cast by the authorities upon the party attacking the second marriage, even though it involves the proving of a negative.

[4, 5] As stated in Lewis v. Lewis, 60 Okl. 60, 158 P. 368, in order to overcome the presumption that a divorce has been granted where a previous marriage has been shown in a suit contesting the validity of a second marriage, the party attacking the presumption has the burden of proof that neither spouse has obtained a divorce. That the decisions are practically unanimous in support of the principles of law which we have herein stated appears from the case of Brokeshoulder v. Brokeshoulder, reported in 84 Okl. 249, 204 P. 284, 34 A. L. R. 441, and the notes thereto beginning on page 464. In Pittinger v. Pittinger, 28 Colo. 308, 64 P. 195, 89 Am. St. Rep. 193, we find the facts exactly parallel with the testimony in the case at bar. It is there said: The presumption of validity is not overcome by evidence of a former spouse that no papers in divorce proceedings had ever been served upon her, when it appeared that the husband in separating from his first wife believed her guilty of such conduct as would entitle him to a divorce and that six years elapsed before he contracted the second marriage, since it is not impossible that he may have instituted proceedings for a divorce and his first wife not have received them even though they were mailed to her. As we have said, the testimony here shows a period of 14 years between the separation between the plaintiff and the deceased and the marriage of the deceased with the respondent. In Coal Run Coal Co. v. Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89, we find this ruling upon similar testimony: The presumption of the validity of the second marriage is not overcome by proof that the first wife was living and had not obtained a divorce, since the husband might have obtained one. To the same effect is the case of Scott v. Scott, 25 Ky. Law Rep. 1356, 77 S. W. 1122. Other cases might be cited, but it is sufficient to say that the presumption is not overcome by testimony of one of the parties that such party has obtained no divorce and that no divorce papers, or summons, were ever served upon such party. It is further held that the burden of proving that a divorce has not been granted to either party of a former marriage is substantial and is not made by proof of facts from which mere inferences may be drawn.

[6] The presumption of continuance which ordinarily attaches when the relation of husband and wife has once been shown does not apply when the validity of a second marriage is called in question. In such instances the presumption as to the validity of the second marriage displaces the presumption as to the continuance of the first relation.

The insufficiency of the testimony to sustain the finding of the existence of the marriage relation between the appellant and Henry Marsh does not appear to have been called to the attention of the trial court, it having been apparently assumed that when the first marriage was proven all questions as to such relationship were necessarily foreclosed.

We have set forth the evidence and the law in relation to the prior marriage, not for the purpose of holding that this case should be decided as though the trial court had found in accordance with the presumption which many of the cases which we have cited hold that neither court nor jury possess the right to disregard, but for the purpose of holding that the relationship which existed between Henry Marsh and Mary E. Van Allen Marsh, the respondent, was not meretricious and that the finding of the court as to the separate character of the property involved and that the respondent is the owner thereof may be sustained.

[7-9] As set forth in 18 Cal. Jur. p. 409, § 482, there is another presumption which applies to this case, to wit: That title passes according to the terms of a conveyance. Again, it is said in Danziger v. Benson, 175 Cal. 565, 166 P. 313, if the facts found support the conclusion necessary to the judgment, inconsistent conclusions stated in the findings will be disregarded. This rule should apply with added force to a case where the inconsistent finding urged upon the attention of the court is wholly without support in the testimony. Again, as stated in the case of Valentine Fox, deceased, reported under the title of Wolf v. Fox, Adm'x, 178 Wis. 369, 190 N. W. 90, 31 A. L. R. 420: A woman who, in good faith, lives with a man under the mistaken belief caused by his fraud that she is his wife, may recover compensation from his estate for the value of the services rendered, and, as stated in Higgins v. Breen, 9 Mo. 497, a woman so living with a man may recover not only for her services as a housewife, but also for aid rendered to him in his business. Applying the holding in the Fox Case and in the cases cited and in the notes thereto found in A. L. R. supra, the respondent, if occupying only the relationship found by the court, would have been entitled to compensation for her services during the 20-odd years she and the deceased lived together as husband and wife, and if she can obtain compensation from his estate therefor, the conclusion is inescapable that the deceased had a legal right to make such compensation during his lifetime either in cash or by improvements upon the real estate found to be owned by the respondent and standing in her name. The testimony in the transcript to the effect that the respondent after her marriage with the deceased learned that the deceased had a former wife, we think, does not bear upon anything we have said, because the testimony stops there and does not show whether the respondent was informed as to the nonexistence of any divorce, and therefore had a right to rely upon the presumptions which we have herein set forth. The respondent's good faith, as we have stated, is explicitly found by the trial court. The testimony shows that the respondent alone of the parties to this action participated in and by her labors aided in securing and obtaining the property involved in this action, that her separate money went into the first purchase of the real estate in question, and therefore is equitably and justly entitled to the accumulations and proceeds thereof.

We think the judgment is just and that the law and the facts support the judgment of the trial court, and that it should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

80 Cal. App. 318

PEOPLE v. SALAS. (Cr. 1432.)*

(District Court of Appeal, Second District, Division 1, California. Dec. 16, 1926. Hearing Denied by Supreme Court Feb. 14, 1927.)

Indictment and information 🔑41(6)—Setting aside information for lack of proper commitment in not apprising ignorant defendant of constitutional rights held proper (Pen. Code, § 858).

Defendant ignorant of the English language, not having been informed of any of his constitutional rights by committing magistrate in violation of Pen. Code, § 858, and not having been represented by counsel at preliminary hearing or at any time until matter came up on motion to set aside the information, made before superior court, such omission amounted to denial of defendant's constitutional rights, and granting of motion to set aside information was not error.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

An information charging Manuel Salas with an offense was set aside upon motion, and the People of the State of California appeal. Affirmed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and William R. McKay, Dist. Atty., of Hanford, for the People.

J. C. C. Russell, of Hanford, for respondent.

YORK, J. The sole proposition involved in this appeal is as to whether or not the court committed error in granting a motion to set aside the information on the ground that the defendant had not been legally committed by a magistrate. The motion was

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court.

made on the sole ground that at the time of the preliminary examination the defendant, who was not represented by counsel, was not informed by the magistrate of any of his rights whatsoever, in violation of the requirements of section 858 of the Penal Code.

The defendant was a man unfamiliar with the English language and could speak and understand only the Spanish language. He was not represented by counsel at any stage of the proceedings, until the matter was up on this motion before the superior court. Without being informed of any of his rights by the magistrate, he was sworn and examined at the preliminary hearing. The committing magistrate having failed to instruct the defendant of his constitutional rights, the matter comes within the authority of the case of People v. Napthaly, 105 Cal. 643, 39 P. 30, where they say:

> "Our Constitution (article 1, § 13), guarantees the right of every person charged with crime, in any court whatever, 'to appear and defend in person and with counsel.'
>
> "In obedience to this constitutional guaranty section 858 of the Penal Code provides that, when a defendant is brought before a magistrate under arrest on a charge of having committed a public offense, the magistrate must at once inform him of the charge against him, and his right to the aid of counsel.
>
> "Section 659 [erroneously quoted in said decision; should have been 859] is as follows: 'He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty.'
>
> "Under section 8 of article 1 of the Constitution, 'offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment as may be prescribed by law.'
>
> "It will be observed that, under this provision of our Constitution, an offense can be prosecuted by information only after an examination and commitment by a magistrate.
>
> "Among the causes for setting aside an information is, 'that before the filing thereof the defendant had not been legally committed by a magistrate.' The necessity of such examination and commitment was recognized and upheld in People v. Wilson, 93 Cal. 377 [28 P. 1061], and in Ex parte Baker, 88 Cal. 84 [25 P. 966].
>
> "An examination which denied to defendant the right guaranteed him alike by the Constitution and statute, of being defended by counsel, was in no sense a legal examination.
>
> "It was a plain and palpable violation of a fundamental right of the defendant which rendered the commitment illegal.
>
> "It is said defendant is a lawyer, and there was no need of informing him of his right to have counsel or of continuing the case to permit him to procure such counsel. There is some evidence in the record tending to show that defendant was a lawyer. * * *
>
> "The court below erred in refusing to set aside the information; for which error the judgment and order appealed from should be reversed, and the court below directed to set aside the information against the defendant."

In the case at bar the superior court followed the ruling in the case of People v. Napthaly. The discussion of the case of People v. Napthaly in the case of People v. Caballero, 41 Cal. App. 146, 182 P. 321, and in the case of People v. Walsh (Cal. App.) 243 P. 31, show that all three of these cases were cases where the defendant either knew or was informed of his rights. The instant case is a more certain violation of the defendant's rights than any of the cases which we have found.

The order of the superior court setting aside the information is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

199 Cal. 545

HOY v. TORNICH. (S. F. 11290.)

(Supreme Court of California. Oct. 29, 1926.)

1. Automobiles 🔑244(7).

Where automobile driver, on level highway, struck 6 year old boy crossing highway, looking opposite way, evidence *held* to support recovery.

2. Negligence 🔑119(6).

Where evidence introduced by plaintiff shows contributory negligence, defense of contributory negligence is available, though not set up by defendant.

3. Trial 🔑296(4, 5)—Instruction on care child struck by automobile could assume others would use held not prejudicial error, in view of other instructions.

Instruction that child struck by automobile could assume that other persons using highway would exercise ordinary care, objected to because one himself negligent is not entitled to so assume, *held* not prejudicial error, in view of instruction that child could not recover if both parties were negligent and other instructions.

4. Automobiles 🔑227(4)—Doctrine of last clear chance held to apply, where automobile driver struck boy unaware of approach of car.

Where automobile driver, looking straight ahead, on level highway, struck 6 year old boy crossing highway, looking in opposite direction, and wholly unaware of approach of car, and for that reason unable to escape it, doctrine of last clear chance *held* to apply.

5. Appeal and error 🔑1066.

Instruction on last clear chance, omitting qualification that plaintiff must have been unable to escape, *held* not prejudicial, where plaintiff was unable to escape approaching car because wholly unaware of it.

6. Negligence 🔑85(2).

In determining reasonableness of child's conduct as regards negligence, his capacity, as well as his age, must be considered.

7. Trial 🔑295(2).

Instructions on degree of care expected from child struck by automobile, though containing inaccurate statements, when considered together, *held* not misleading.

8. Automobiles 🔑246(35)—Instruction that conduct of child struck by car should be judged by what child of similar years would "be likely to do" held not erroneous.

Instruction that conduct of child struck by automobile should be judged "by what child of similar age and understanding would be likely to do under like circumstances" *held* not erroneous, since "likely" as used was synonymous with "probable."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Likely; Probable.]

9. Damages 🔑216(7).

Instruction that plaintiff could recover for suffering "likely to be sustained" in future, followed by language if he is "reasonably certain" to endure mental suffering in future, *held* not prejudicial error.

10. Trial 🔑296(11).

Instruction that jury could award such amount as "you feel will reasonably compensate" plaintiff, not exceeding amount prayed for in complaint, *held* not erroneous, as authorizing jury to indulge in speculation and conjecture, in view of other instructions.

In Bank.

Appeal from Superior Court, Alameda County; Mortimer Smith, Judge.

Action by Hugo Eric Hoy, a minor, by Anthony G. Hoy, his guardian ad litem, against P. P. Tornich. From a judgment for plaintiff, defendant appeals. Affirmed.

Chickering & Gregory, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, and Philip M. Carey, of Oakland, for respondent.

FINCH, Justice pro tem. This is an appeal by the defendant from a judgment against him for damages alleged to have been caused by his negligent operation of an automobile. The answer denied that the defendant was negligent and, as a separate defense, alleged that the plaintiff's injuries were "proximately caused by the negligence of said Hugo Eric Hoy in this, that * * * said Hugo Eric Hoy carelessly and negligently ran directly in front of the said automobile * * * and * * * carelessly and negligently failed and neglected to avoid said accident and said injuries."

At a point on the highway between Livermore and Altamont, where the ground is level and the road straight, the defendant's automobile, a five-passenger Briscoe touring car, struck the plaintiff on the right side of the head, causing the injuries of which complaint is made. The paved part of the highway is 16 feet wide. The defendant was traveling easterly along the south half of the pavement and, immediately before striking the plaintiff, he met and passed a truck going in the opposite direction along the north half of the pavement. The plaintiff, who was then of the age of 6 years and 3 weeks, and three other children, were walking home from school in a westerly direction along the northerly half of the highway, near the pavement, but not upon it. The truck passed the children and the plaintiff thereupon turned to the left; his home being on the south side of the highway. When partly across the pavement he was struck by the defendant's automobile. The children's teacher had warned them against walking on the pavement except when it became necessary to cross it.

One of the children, a boy of the age of 10 years at the time of the accident, testified:

> "I was walking on the gravel. All of the four children were walking along there also. * * * There were no children hanging onto a truck. They had not touched a truck. I remember a truck that went by the place of the accident shortly before the accident happened. It was a milk truck. It was filled with large milk cans. The truck overtook us as we were going along there. * * *
>
> "Q. After the truck had passed by you did Hugo Hoy start to cross over onto the cement portion of the road? A. Yes.
>
> "Q. Did you see him right in front of you doing that? A. Yes. * * * I noticed his automobile coming from the direction of Livermore at the time the Hoy boy started to cross, and when I saw the automobile I called to Hugo. The first time I called he did not pay any attention to me. He did not give me any indication that he had heard me. I called to him again, and he turned his face around to look at me and stopped. * * * At the time I first shouted to Hugo Hoy I could plainly see the automobile which finally struck him. When Hugo Hoy stopped after I shouted at him the second time, he was in the middle of the highway. The automobile was about 25 feet away. * * * I saw the machine coming all the time. The truck did not interfere with my view of the machine at all. All the four children were right there in plain sight. * * *
>
> "Q. How far was it, do you think, when you

first saw it (defendant's automobile) coming, about? A. About 125 feet. * * * No one but Hugo stepped on the paved road. He went straight across the road. * * * From the time he stepped on the highway until he got hit by this automobile, Hugo did not look in the direction of Livermore at all. He was looking straight ahead as he was walking until I called out to him, when he turned around and looked at me, and he was still turned around looking towards me when the machine hit him. He was standing still. He had come to a stop. * * * I saw the automobile coming down the road on the right side. It did not swerve to the right nor to the left before the collision. It kept in a straight line, and then after the collision it swerved to the right."

A witness for defendant testified:

> "I was in company with Mr. Tornich on the day of this accident. I was sitting on the right-hand side of the machine. * * * As we passed the truck just about, I would not state as a statement of fact, but not more than 25 feet I spied the boy on the road coming towards the machine looking in the opposite way. It occurred to me that the boy was moving, but I could not tell whether he was moving because I could not see his feet. I called out, 'O, boy!' not to attract the driver, but to call the attention of the boy. Our machine at that time went to our right towards the fence. * * * I think the machine was going from 20 to 25 miles an hour. * * * When we passed the truck we were far over to our right, about 6 inches from the gravel. To the best of my knowledge this collision took place about 25 feet after we passed the truck."

The defendant testified:

> "My automobile did not strike the Hoy boy. * * * He ran on my machine. * * * When the accident happened it was about 3 o'clock. * * * Ordinarily, I drive about 20 or 25 miles an hour. That would be the speed I intended to continue. * * * I am sure I never went over 25 miles. * * * At the time the accident happened the road was clear and there was not much traffic. It was level. * * * The brakes were in perfect condition. * * * Going about 20 or 25 miles an hour, I can stop that machine in about 10 or 15 feet. It is a straight highway from Livermore to Altamont. * * * When I drive I look straight ahead. * * * As we came up to the scene of the accident, prior to the accident, we passed a truck coming in an opposite direction. * * * The truck was going about 10 or 15 miles an hour. * * * Before this accident I did not see school children walking along the road. * * * I passed the truck maybe a foot, no more, when the boy ran into my machine. * * * My partner that was on the seat said, 'See the boy,' and I looked out and the boy was going on the side, like that, and with his head jumped on my fender. * * * The space between the truck and my machine was about 3 or 4 feet. * * * The boy was going sideways facing the road. * * * If the boy had kept still I could have run past him, but he kept going and bumped into my machine. * * * When I first saw him he was not an inch from me. * * * When I first saw the boy opposite the front wheel, I grasped the machine and turned it as fast as I could on the right-hand side. I increased the speed and turned to my right. * * * Maybe the boy was hit before I turned. * * * I did not blow my horn. * * * I could not see nobody behind the truck. I looked in front of me. * * * There is no law to look to the left when you are driving a machine. * * * My partner saw the boy before I did * * * and called out to me; I turned my head to the left for the first time, and there was the boy. * * * I slowed up when I saw the big truck passing me. I was going 20 or 25. * * * I took my foot off the gas. The machine went very slowly. When I got to the end of the truck I put my foot on the gas again. * * * After I got to the truck, * * * I kept my eyes forward right on the path, so I did not look to the right or the left. * * * I looked straight ahead."

The plaintiff was rendered unconscious by the impact of the fender against the side of his head and remained in that condition for three days. The attending physician testified that in his opinion "there was a severe tearing, or laceration, of the brain tissue," and a fracture of the skull, and that the injury "is very likely to be permanent." Another physician, who examined the plaintiff about a week before the trial, which was commenced about 18 months after the accident, testified:

> That he found marked evidence of inco-ordination, or ataxia; that "arrested mental development * * * would be a natural sequence to an injury which resulted in a laceration of the brain. That kind of condition would be permanent. In a case like this, I do not think you can look for very much improvement. * * * In my opinion, this boy will never be able to obtain an education. It is also my opinion that he will either be a ward of the state or else he could do light work, a watchman, for instance, or doing chores around the house or some of those things."

Another physician, who was called as a witness by defendant, testified:

> That he found nothing to indicate a brain injury; that, while the plaintiff "might be considered as somewhat retarded, he would not be considered as feeble or demented, and there is no indication that he would not develop mentally"; that he "did not find any evidence of inco-ordination"; that in his opinion the ability of plaintiff "to make his way in the world after he is 21 years of age is that it will be good."

The plaintiff was out of school for about 2 months after the accident, but he attended school regularly after his return thereto until the time of the trial. His teacher testified:

> That he was the brightest pupil in his class prior to the injury; that "he was very quick to grasp his work," but that "he is not any further advanced to-day in his studies since coming back after the accident. No progress at all. I have worked with him alone, giving him special help, but it is without effect."

The jury awarded damages in the sum of $12,500.

[1, 2] The evidence is clearly sufficient to support the verdict and judgment. The defendant testified that he was looking straight ahead prior to the accident, except when he looked to the left as he approached the truck. Therefore he must have seen the children both before and after the truck had passed them, and since both machines were traveling much faster than the children, the period of time during which the truck obstructed his view of them must have been very brief. The divergence of the lateral boundary lines of the field of vision is such that if the defendant was looking directly ahead along the straight and narrow road he must have seen the children walking along the strip of gravel adjacent to the pavement. The testimony is to the effect:

> That the plaintiff did not run across the pavement. "He was walking. I could not say how fast. Not too fast and not too slow, just about right."

Taking into consideration the slowness of the plaintiff's movement across the pavement as compared with the speed of the truck, it is clear that the truck had gone forward a sufficient distance to afford the defendant an unobstructed view of the plaintiff before the latter arrived at the point where he was struck; that point being at least 9 or 10 feet from the place where he turned to cross the pavement. Viewed in the light of common experience, the defendant's own testimony shows that he was negligent. This is not a case of a child darting suddenly in front of a moving vehicle from a hidden place, but of running into a child on an open highway. If the plaintiff were of mature judgment and mental capacity, it would be inferred from the uncontradicted evidence, introduced by the plaintiff, that he was guilty of contributory negligence in attempting to cross the pavement without looking for approaching vehicles. Respondent contends that the defendant did not plead contributory negligence as a defense. But where the evidence introduced by the plaintiff shows that he has been guilty of contributory negligence, "the defense may be availed of, even though not set up by defendant." 19 Cal. Jur. 681. If it be conceded that the plaintiff was negligent, still it appears that the defendant had a clear chance to avoid the accident. The defendant testified that he could have stopped his machine "in about 10 or 15 feet" and that he was looking straight ahead. The evidence shows that the boy was standing on the pavement with his face turned away from the approaching machine. The only reasonable inference from the evidence is that he was unaware of the machine's approach. Looking straight ahead, the defendant must have seen the boy in the road and that his face was turned away from the defendant. By the exercise of ordinary care the defendant could have avoided the accident by turning to the right or by stopping his machine.

[3] The instructions are lengthy and contain many repetitions and a number of errors, several of them favorable to the defendant. Appellant contends that certain instructions given at the plaintiff's request are prejudicially erroneous. One of them states:

> That the plaintiff "had a right to assume that all other persons using the highway * * * would exercise ordinary care to prevent injury to others."

The objection is that one who is himself negligent is not entitled to so assume. 19 Cal. Jur. 596; Carroll v. Central Counties Gas Co. (Cal. App.) 240 P. 53. At defendant's request the court instructed the jury, without qualification:

> That the defendant "had a right to assume that persons upon the highway would exercise ordinary care, and that they would not negligently expose themselves to danger, and that they would exercise ordinary care to ascertain the approach of motor vehicles, and, before you hold that the defendant was negligent in this case, you must take into consideration these assumptions which defendant had a right to rely on."

In other instructions the court stated that the plaintiff could not recover if both parties were negligent, or if he "heedlessly ran in front of the automobile"; that, "even though plaintiff in this case was a minor, he cannot hold the defendant responsible for any result to which plaintiff's carelessness contributed"; and that it was the duty of the plaintiff to look in both directions for approaching machines. The instructions so given at defendant's request must be presumed to have removed any prejudicial effect of the instruction of which complaint is made. Another of such instructions reads as follows:

> "If you find from the evidence that the child was guilty of negligence in placing himself on the road, or in the path of the approaching automobile, but you further find that the defendant, Tornich, discovered the position of the child and after he discovered the danger of the child, he realized and was aware of said danger of the child, and had a clear opportunity by the exercise of ordinary care to stop his car thereafter, or otherwise prevent the accident, but was negligent in not doing so, then the injured child's negligence was not the proximate cause of the accident, but such later negligence of the defendant, if any, was the proximate cause of the injury to the child, and under such circumstances your verdict must be for the plaintiff, but the last act of negligence must be disassociated from and not co-operating with the contributory negligence of the injured party."

[4, 5] Appellant contends that the uncontradicted evidence shows that he did not see the plaintiff until the very moment of the accident and that, therefore, the doctrine of the last clear chance is inapplicable. In the discussion of a similar contention, in Wahlgren

v. Market Street Ry. Co., 132 Cal. 656, 665, 62 P. 308, 310, it is said:

> "We think counsel had a right to argue to the jury that the employees were interested witnesses, and, though they both testified that they did not see plaintiff before her injury, yet, there being no obstruction to the view, the conductor must have seen her from where he was at the switch before the car passed him, if he was looking for approaching pedestrians, as his testimony would seem to imply."

If the defendant in this case was looking straight ahead, as he testified that he was, he must have seen the plaintiff. The instruction omits the qualification that the plaintiff must have been in a position of danger from which he could not escape by the exercise of ordinary care. Darling v. Pacific Electric Ry. (Cal. Sup.) 242 P. 703, 706. The doctrine applies equally if the plaintiff be wholly unaware of the danger and for that reason unable to escape it. Darling v. Pacific Electric Ry., supra; Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36. The only reasonable inference from the evidence is that the plaintiff was wholly unaware of the danger and that it was apparent to the defendant that such was the fact. The defect in the instruction, therefore, cannot be considered prejudicial.

[6-10] At the plaintiff's request, the court instructed the jury that it was incumbent upon him to exercise "the care and prudence applying to children of the same age of plaintiff"; the "degree of care that would be expected from children of the same age, or which children of that age ordinarily exercise"; and that his conduct was to be judged "by what a child of similar years and understanding would be likely to do under like circumstances." In determining the reasonableness of a child's conduct, his capacity, as well as his age, must be considered. At defendant's request the court stated to the jury that "children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have," and, in the latter part of the same instruction, that it is their duty to exercise such "care to avoid danger as may reasonably and fairly be expected from persons of their age and capacity." Other instructions given at the plaintiff's request stated, in substance, that he was held to the exercise of such care as may reasonably be expected from persons of his age and capacity. The instructions must be considered together and it is not believed that the jury could have been misled by the inaccurate statements to be found in the instructions of both parties. Objection is made to the use of the word "likely" in one of the instructions quoted. In the sense in which the word was used it is synonymous with the word "probable." Children will likely do or probably do in a given case what they ordinarily do under similar circumstances. The court gave several instructions upon the measure of damages, among them the following:

> "One element of damage which you may consider, if your verdict is for the plaintiff, is the mental suffering and humiliation, if any, sustained, or with reasonable certainty *likely to be sustained* in the future by the plaintiff as a result of the injury suffered by him, and in this connection if you find for the plaintiff, and believe that he has suffered as a result of the alleged injury, mental suffering, humiliation, and is reasonably certain to endure mental suffering and humiliation in the future. then you are at liberty to make such amount as you *feel* will reasonably compensate him for such suffering and humiliation, if any, not exceeding the amount prayed for in the complaint."

Objection is made that there is no evidence of mental suffering and humiliation. A mere reference to the evidence herein quoted is deemed a sufficient answer to that contention. Exception is taken to the use of the words herein italicized. It must be conceded that such words are not well chosen, but, while in stating the elements to be considered in estimating damages to be awarded for future suffering, the phrase "likely to be sustained" by the plaintiff is used, in the latter part of the instruction, where the measure of damages is given, it is stated that if he "is *reasonably certain* to endure mental suffering and humiliation in the future" such amount as will reasonably compensate him therefor may be awarded. This latter statement of the law is correct. Wiley v. Young, 178 Cal. 681, 687, 174 P. 316. The word "feel" was doubtless used by the court and understood by the jury as meaning the same as the word "believe," and not as authorizing the jury to indulge in speculation and conjecture. Other instructions make the matter clear. At the defendant's request the court instructed the jury as follows:

> "If you should decide to find a verdict in favor of the plaintiff in this case, then in determining the amount of said verdict and assessment of damages, you are not to indulge in speculation, nor should you be swayed by sympathy or prejudice. You should be controlled wholly by the evidence and the law. * * * In making up your verdict, you can only find such actual damages as may be proved by the evidence."

Appellant complains of numerous other instructions given by the court. It would unduly lengthen this opinion to give specific consideration to them all. They have been carefully examined and it is believed that there is no prejudicial error in any of them.

While, as stated, there are errors disclosed by the record, a consideration of the whole case, including the extreme youth of the plaintiff, leads to the conclusion that the errors complained of have not resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

199 Cal. 577

HILLEN et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 12001.)*

(Supreme Court of California. Nov. 3, 1926.)

1. Master and servant ⚷403—Burden of proof rested on employer to show that compensation claimant was independent contractor and not employee (Workmen's Compensation Law, §§ 8 [a], 8 [b], 19[d] [1]).

Where compensation claimant was at time of injury actually performing services for defendant, burden of proof rested on latter to establish that claimant was an independent contractor, under Workmen's Compensation Law (St. 1917, p. 849), § 19(d) (1), and not an employee, under section 8 (a), by showing required in section 8 (b).

2. Master and servant ⚷417(7).

Whether relation of employer and employee existed under oral contract with compensation claimant to shingle houses *held* question of mixed law and fact.

3. Master and servant ⚷417(7)—Finding of Industrial Commission that relation of employer and employee existed between parties is binding on reviewing court.

Finding of Industrial Commission that relation of employer and employee existed between parties is binding on reviewing court, unless there is such entire absence of evidence in the record as to render finding unreasonable or in excess of powers of commission.

4. Master and servant ⚷367.

Workman, who is paid wages by piece or quantity, is within Workmen's Compensation Law as though he was paid by day.

5. Master and servant ⚷367.

In determining whether workman is independent contractor or an employee, right of control is important.

6. Master and servant ⚷405(2)—Evidence held to sustain finding that shingler of houses was employee and not "independent contractor."

Evidence *held* to sustain finding that shingler working for builder of houses was employee and not an "independent contractor," though he sometimes employed other shinglers to assist him who were not carried on pay roll of employer.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Frank M. Downing, claimant. Opposed by R. C. Hillen, employer, and the Ætna Life Insurance Company. To review an award of the Industrial Commission for claimant, employer and insurer bring certiorari. Award affirmed.

James M. Wallace and R. P. Wisecarver, both of San Francisco (Redman & Alexander, of San Francisco, of counsel), for petitioners.

Warren H. Pillsbury and G. C. Faulkner, both of San Francisco, for respondents.

WASTE, C. J. The petitioners sought and obtained a writ of certiorari to review a decision of the Industrial Accident Commission awarding Frank M. Downing compensation for injuries received while shingling a building; the sole question presented being whether or not Downing was an independent contractor or an employee of the petitioner Hillen. It was stipulated before the commission that, if Downing was in fact an employee of Hillen, the injury he received arose out of and in the course of his employment.

The facts are without conflict. Hillen was engaged in the business of building and selling homes in the city of Oakland. Downing was a shingler by trade. Some time before the accident in question he called on E. W. Urch, Hillen's superintendent, and, referring to the particular job, asked "if the shingling was let." It being customary in the building business to have shingling done "at so much per thousand," he left with Urch a card on which was written his name and telephone number and a notation which read "$1.25—thousand, 3 cents for ridges"; that being the price for which he was willing to lay the shingles. When the house was ready for shingling the superintendent sent for Downing and put him to work. After the first negotiations, which were as above related, Downing worked on a number of houses; he apparently being the only one doing any shingling for Hillen during that period. The arrangement under which he worked was, as testified to by Supt. Urch, "a mutual understanding when he would come on the job it would be $1.25 a thousand, and there was nothing further said about the agreement to shingle, and when each job was done the bill would be made per thousand, and I would O. K. it, send it to the office, and it would be paid." On the first jobs the superintendent watched Downing very closely until satisfied that he was a competent shingler. As Downing proved to be a careful workman, only occasional directions were given to him at that or any subsequent time, but the shingling was always under the watchful supervision of Hillen's superintendent or foreman. Hillen furnished the shingles, nails, and other materials required for shingling the houses, and all necessary ladders and other appliances for the work. His superintendent, or the foreman on the job, estimated and ordered the number of shingles required, and Downing put them on. Downing used his own shingler's hatchet, "snips" for cutting valley tin, and shingler's apron. For the purpose of "rushing" two or three jobs on which he worked Downing was directed by Urch to get other shinglers to assist him. Neither Hillen nor his superintendent had any part in the employment of the extra men. Downing col-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Modified and rehearing denied December 3, 1926.

lected the amount due for the shingling and paid them the same amount he was getting for his own work. Neither Downing nor the extra shinglers who worked with him were carried on Hillen's pay roll. Downing was not required to work any specified number of hours. When a house was finished he made out his bill "so many thousand shingles, so many feet of ridges. [Urch] would O. K. it, send it to the office, and [Downing] would get his check."

[1-3] By the terms of the Workmen's Compensation Law (St. 1917, p. 831) "every person in the service of an employer * * * under any appointment or contract of hire" is an employee. Section 8 (a). Any person rendering service for another, other than as an independent contractor, or as expressly excluded by the provisions of the act, is presumed to be an employee. Section 8 (b). It is admitted that Downing was at the time of his injury actually performing service for Hillen. Consequently the burden of proof rests upon Hillen to establish that Downing was an independent contractor. Section 19 (d) (1). It was therefore necessary for him to show that Downing was, within the definition of the term, a person rendering "service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Section 8 (b). Whether or not the relation of employer and employee existed in this case, under the oral contract entered into, is a question of mixed law and fact, to be proved like any other question. The finding of the commission, in effect, that the relation existed between Hillen and Downing, is binding on this court. Pacific G. & E. Co. v. Ind. Acc. Comm., 180 Cal. 497, 499, 181 P. 788. Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, the court is not empowered to set it aside. Eastman Co. v. Ind. Acc. Comm., 186 Cal. 587, 598, 200 P. 17. The award of the commission may be annulled only if there is no substantial evidence in support of its findings. Press Pub. Co. v. Ind. Acc. Comm., 190 Cal. 114, 124, 210 P. 820.

We are of the view that Downing did not contract to produce results through means and men chosen by himself, but that the arrangement was one by which he engaged to give his own personal services. The facts do not import an employment to do a job of shingling, but a contract to lay shingles at a price per thousand, instead of by the day. The evidence on the point is very clear. Downing testified that he sometimes got more and sometimes got less than $1.25 per thousand for shingling; that sometimes he worked by the day, getting $8 a day; that it is more advantageous to work at $1.25 a thousand; that he could not always get a job shingling by the day, and worked for Hillen at the rate per thousand because at that price he gained on his work, and Hillen gave him all his work to do. Hillen testified that he instructed his superintendent, Urch, to "let it [the shingling] out on a contract," which meant, he further testified, "nothing more than that he [was] to pay a certain rate per thousand." According to his testimony, also, it is "a custom to lay shingles by the thousand. Pretty near every builder and contractor does it that way; in fact, most of the good shinglers—that is the only way they will do it because they can make more money that way than they can by the straight day work."

[4-6] A workman who is paid wages by the piece or quantity comes within the provisions of the Workmen's Compensation Act the same as one who is paid by the day. Wages may be measured by time, by the piece, or by any other standard. McKinstry v. Guy Coal Co., 116 Kan. 192, 225 P. 743, and note in 38 A. L. R. 839. One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. Tuttle v. Emburg-Martin Lumber Co., 192 Mich. 385, 399, 158 N. W. 875, Ann. Cas. 1918C, 664. It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to act. Carleton v. Foundry, etc., Co., 199 Mich. 148, 152, 165 N. W. 816, 19 A. L. R. 1141. The evidence in this case fully supports the conclusion that Hillen, through his superintendent of construction, or foreman, could at any moment direct the details of the work done by Downing. On occasions that was done. Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control. Industrial Comm. v. Bonfils, 78 Colo. 306, 241 P. 735. The decision of the District Court of Appeal in Helmuth v. Ind. Acc. Comm., 59 Cal. App. 160, 210 P. 428, correctly applies the rule in this state. There is nothing in the record to indicate that Downing was not free at all times to discontinue the work without legal liability, and, as to the right of Hillen to discharge him at any time, he testified that if he was discharged the builder "would pay [him] for what [he] put on and that would be the end of it."

The award is affirmed.

We concur: SHENK, J.; RICHARDS, J.; FINLAYSON, J.; FINCH, Justice pro tem.

199 Cal. 562

WRIGHT v. BROADWAY DEPARTMENT STORE. (L. A. 7588.)*

(Supreme Court of California. Oct. 30, 1926.)

1. Witnesses ⟹388(1).

Truck driver's denial that just before killing child he was trying to steer with his knees, or was rolling cigarette, rendered admissible testimony in impeachment that he said, "I had my knees up this way, rolling cigarette."

2. Death ⟹64.

Testimony as to physical disability or ill health of father suing for death of minor daughter was admissible.

3. Death ⟹72—Admitting testimony that father suing for death of child had no property or money was reversible error.

Admitting testimony that father suing for death of minor daughter, under Code Civ. Proc. § 376, had no property or money was reversible error, though court instructed jury to consider merely the pecuniary loss, in view of Deering's General Laws, p. 3032.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action for death of minor brought by George Wright against the Broadway Department Store. Judgment for plaintiff, and defendant appeals. Reversed.

Kidd & Hardy, of Los Angeles (Carroll C. Roberts, of Los Angeles, of counsel), for appellant.

Robert G. Loucks, of Los Angeles (Abe L. Richman, of Los Angeles, of counsel), for respondent.

PER CURIAM. The following opinion, prepared by Mr. Presiding Justice Conrey of the District Court of Appeal of the Second Appellate District, Division 1, while sitting as a justice pro tempore of this court, is adopted as the opinion of the court:

This appeal comes before this court on rehearing after decision by the First District Court of Appeal, Division 2. The facts of the case were outlined in the opinion of that court as follows:

"Plaintiff sued for damages for the death of his minor daughter, alleged to have been caused by the negligence of an employee of the defendant in the operation of one of defendant's auto delivery trucks. The cause was tried before a jury, which rendered a verdict in favor of the plaintiff in the sum of $10,000. Defendant's motion for a new trial was denied, and from the judgment which followed the verdict it has appealed on the judgment roll and bill of exceptions.

"The facts of the case are without material conflict. They are that, as the defendant's employee, Stoops, was driving the auto truck northerly on Avenue 64 of the city of Los Angeles near the intersection of that avenue and Elgin street, he turned slightly to the right, planning to go easterly on Elgin street, but immediately found that he had mistaken the street, and then turned to his left, and proceeded across the intersection of these two streets. At that time another automobile was parked near the easterly curb of Avenue 64 at a point of about 100 feet northerly from the northeast intersection of the streets. As the defendant's truck was at a point approximately 10 feet south of the rear of this parked automobile, the daughter of plaintiff suddenly ran from a point about 3 feet in front of the parked automobile directly across the path of defendant's truck, which at that time was proceeding at a rate of about 18 or 20 miles an hour. Defendant's employee suddenly turned his course to the left in an effort to avoid striking the girl. As the girl reached the middle of the street, she hesitated slightly, and altered her course. She was struck by some portion of the right side of the truck, and the right rear wheel ran over her body, causing her death. The complaint charged negligence to the defendant in general terms, specifying merely the negligent and careless manner in which the truck was operated by defendant's employee at the time of the accident. The answer denied negligence on the part of the defendant, and as a special defense set up contributory negligence on the part of the deceased child, as well as on the part of her parents.

"It appears that the plaintiff had six children, of which the deceased child was next to the youngest; that he was employed by the board of education of the city of Los Angeles at a monthly salary of $165, upon which he supported himself, his wife, and the six children. The only item of special damage proved was for the funeral and burial expenses, amounting to $125. The deceased child was 8 years and 8 months of age at the time of her death. By reason of the provisions of the Compulsory Education Act (Deering's General Laws, Act 7487, p. 3032) every minor between the age of 8 and 16 years is required to attend a full-time school, and is not permitted to work for wages, excepting under certain conditions specified in that act applying to minors who are over the age of 14 years. The deceased child would have reached her majority at the age of 18 years, and, of course, during the time which she might be permitted to work and the time she would reach her majority her parents would be entitled to her earnings. These facts are all emphasized by the appellant in support of its claim that the verdict is excessive, it being the position of appellant that because of these facts the earning capacity of the deceased was pure guesswork on the part of the jury, and that, as there was no basis upon which this pecuniary loss to the respondent could have been determined, it follows, the appellant claims, that the award must have been dictated by the sympathies or prejudices of the jury."

[1] Criticism is made by appellant of the action of the trial court in admitting the testimony of the witness Spaulding, which purported to be in impeachment of the witness Stoops, who was the driver of appellant's auto truck at the time of the accident. The testimony of which complaint is made is as follows:

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 29, 1926.

"On or about the 9th or 10th of December, 1920, the second day I believe it was, it might have been the first day or during the first or second day I was on the wagon, I had a conversation with Mr. Stoops about the injury and killing of Isabelle, the daughter of Mr. Wright, the plaintiff. He said, 'I killed a little girl last July on Avenue 64.' I asked him the circumstances of it, and he said, 'I was going up Avenue 64, and I had my knees up this way, rolling a cigarette.' The witness' answer was as follows: 'And the damned little bitch ran out in front of me, and I ran over her and killed her.'"

The court immediately struck out that part of the answer which characterized the child, but denied defendant's motion to strike out the other parts of the answer. The ground of the motion was that no foundation had been laid for this impeachment testimony, and that the questions which had been put by defendant to the witness Stoops on his cross-examination did not correspond to the impeaching testimony so given by Spaulding. It is true that there was a material difference between the testimony of Spaulding and the foundation which had been sought to be laid in the interrogation of Stoops by defendant's counsel, who asked Stoops if he had stated to Spaulding "that as I approached approximately the line in the southerly side of Elgin street at the intersection of Avenue 64, that I was then and there making or rolling a cigarette, or that the steering wheel was guided by my knee." If there had been no further foundation for the above-stated testimony given by Spaulding, the court would have erred in overruling appellant's objections thereto. But there was a broader foundation, which had been established by the defendant. Following the cross-examination of Stoops in which he had denied the statement imputed to him "that as I approached approximately the line in the southerly side of Elgin street," etc., the defendant re-examined Stoops, and in the course of that re-examination Stoops said:

"I did not at any time state to Mr. Spaulding that my hair was turning gray on account of this accident, nor that just before this accident happened I was trying to steer with my knee or knees, or was rolling a cigarette."

The testimony given by Spaulding in impeachment of Stoops was within the scope of the testimony thus given by Stoops on re-examination. For this reason the court did not err in overruling defendant's objections to said testimony of Spaulding.

[2, 3] Appellant contends that the trial court erred in permittting the plaintiff to introduce testimony tending to establish the poverty of the plaintiff, his bad financial condition, and his poor health, and that all of this had the effect of greatly enhancing the amount of the verdict. It had been stipulated that the expectancy of life of the plaintiff was greater than the 9 years and 4 months which would have elapsed before the deceased daughter would have reached her majority, plus such additional time as the daughter might be presumed to have rendered services to the plaintiff if she had lived. The court held that, regardless of the stipulation, evidence of the present physical condition of the plaintiff was material as evidence tending to determine "the degree of his dependence." On this theory he was permitted to testify to certain facts tending to show ill health and physical disability, and was further allowed to testify that he had no property or money, and that his family was entirely dependent on his salary. The defendant made sufficient objections to this evidence at the time when it was offered. Afterwards defendant moved to strike from the testimony of the plaintiff "all of his testimony on the subject of his pecuniary condition at the present time"; also to strike out all the testimony relating to his earning capacity; also to strike out the testimony "relating to the physical infirmity, that is, his wooden leg * * * whatever it is, the artificial leg." These motions were made upon the ground that the evidence was incompetent, irrelevant, and immaterial, and prejudicial, in that it tended to inflame the minds of the jury and create sympathy for the plaintiff; and that none of these facts are proper elements or measure of damages in a case of this kind. Each of said motions was overruled. Apparently these motions and the rulings thereon were made in the absence of the jury.

The testimony relating to the physical disabilities or ill health of the plaintiff was admissible. Simoneau v. Pac. Electric Ry., 159 Cal. 494, 504, 115 P. 320. The testimony relating to plaintiff's poverty, that he had no property or money, was erroneously admitted. Such evidence is just as objectionble as would be evidence of defendant that the plaintiff was a rich man, or evidence of plaintiff that the defendant possessed great wealth. Such facts are unrelated to the cause of action. "It seems to be the rule, supported by a long line of decisions in this state and elsewhere, that evidence of the plaintiff's poverty is inadmissible in an action to recover damages for personal injuries." Steinberger v. Cal. Electric, etc., Co., 176 Cal. 386, 389, 168 P. 570, 572. The rule thus established has been applied not only in actions wherein the plaintiff sought to recover damages for injuries to himself, but also to actions brought by the heirs or personal representatives of a person (not being a minor) whose death has been caused by the wrongful act of another. There is no reason why the rule should not be equally applicable in an action like the present case, wherein, as permitted by the Code of Civil Procedure, § 376, the action is brought by a father on account of negligence of the defendant which resulted in the death of the plaintiff's minor child.

Respondent contends that, even if the court did err in admitting said evidence showing a condition of poverty of the plaintiff, the prejudicial quality of such evidence was neutralized by instructions 45 and 46 given by the court to the jury. The court instructed the jury that in assessing damages, while they might take into consideration the parent's occupation and position in life, and the parent's deprivation of the child's society, comfort, and protection, if such deprivation occurred, yet that these elements must be considered by the jury "only with a view of determining the pecuniary loss, present and prospective, thereby resulting to the plaintiff. The court can give you no more definite rule on this point other than to caution you not to attempt to estimate or allow for the pain and suffering of the parent from the bereavement, but only to consider the financial value of the loss, comfort, society and protection of the child." In the case of Ensign v. Southern Pac. Co., 193 Cal. 311, 223 P. 953, the plaintiff, as administrator of the estate of one Peter Carmine, had recovered damages for the death of said deceased which resulted from negligence of the defendant. This court held that the trial court erred in allowing the plaintiff to introduce evidence concerning the embarrassed financial condition of Peter Carmine between the time of the injury and the time of his death, and evidence that consequently he was unable to take certain treatments. The question then arose whether this very serious error was cured by a general instruction given by the court to the jury to the effect that the pecuniary circumstances of the plaintiff or the heirs of the deceased could not increase or diminish the amount of damages which the plaintiff was entitled to recover, if entitled to recover at all. In determining the question, this court said:

> "It cannot be said that by reason of the general instruction the minds of the jury recurred to this particular evidence and eliminated it from consideration. Where the element of sympathy enters into a case, the difficulty is that it is as likely to result in the giving of a verdict against the evidence of nonliability as it is to increase the verdict where a liability exists. Sympathy permeates the whole case and introduces an irrelevant factor which may result not only in the giving of an excessive verdict but a verdict where none would otherwise be given." Ensign v. Southern Pac. Co., 193 Cal. 311, 322, 223 P. 953, 957.

In the case now before us, the error of the court in the admission of evidence contributed to a miscarriage of justice, not only because the wrongfully admitted evidence probably affected the amount of damages awarded, but also because the evidence relating to the alleged negligence of defendant was so evenly balanced that in the absence of evidence improperly admitted, and which appealed to the sympathy of the jury, a contrary verdict might have been rendered.

The judgment is reversed.

---

79 Cal. App. 595

FAGIN v. SCHILLING. (Civ. 5425.)

(District Court of Appeal, First District, Division 2, California. March 31, 1926. On Rehearing, Nov. 3, 1926.)

1. Bills and notes 🔑351—Where plaintiff, subsequent to maturity, derived his title to trade acceptances from one who was not a holder in due course, but accommodation holder, acceptances were subject to same defenses as if suit had been brought by original holder (Civ. Code, § 3139).

In action on trade acceptances based on transaction whereby party to whom given left with defendant washing machines to be taken back if not sold in 30 days, where fact that such party had taken back the machines would have been a complete defense to an action on acceptances by him, same defense was available, in action by plaintiff who, subsequent to maturity, took title from one not a holder in due course, but merely accommodation holder, in view of Civ. Code, § 3139.

2. Appeal and error 🔑1122(2), 1177(8).

Reviewing court cannot make findings; and, where proper findings are lacking, cause must be sent back for a new trial.

Appeal from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Action by E. A. Fagin against Frank E. Schilling. Judgment for plaintiff, and defendant appeals. Reversed.

L. M. Hoefler, Finley Cook, and C. K. Bonestell, all of San Francisco, for appellant.

Hadsell, Sweet & Ingalls and Lewis N. Mitchell, all of San Francisco, for respondent.

NOURSE, J. Plaintiff sued upon three trade acceptances each dated May 22, 1922, each in the sum of $140, and payable in 60, 90 and 120 days, respectively. Judgment went for the plaintiff for $527.23, covering principal and interest and an allowance of $92.50 as attorney's fees. The defendant has appealed on the judgment roll and a bill of exceptions.

The papers in suit were drawn by the defendant to his own order and by him indorsed to the Cadillac Manufacturing Company, of which J. B. Vallen was the owner and manager. They were all delivered to Vallen as part of a transaction whereby Vallen left with the defendant three washing machines upon the condition that he would take them back if not sold within 30 days. Before their maturity Vallen indorsed and delivered these trade acceptances to G. C. Ringole, whose financial arrangements with Vallen are not made clear. After the date of their maturity, Vallen, with the consent of Ringole, assigned them to the plaintiff, to whom Ringole delivered them about a year later on the request of Vallen and without any consideration passing to Ringole from the plaintiff. In the meantime Vallen had received from the defendant the three washing machines for which the paper had been given and this was well known to Ringole when the transfer was made. The plaintiff was assistant manager and bookkeeper of the Cadillac Company and had all the means of knowledge, if he did not actually know, of the circumstances under which the acceptances were given and held. In his answer the defendant relied on two defenses—that there was a failure of consideration and that the plaintiff did not take through a holder in due course. The trial court found that the allegations of the answer were untrue and the correctness of that finding is the only question before us.

[1, 2] The evidence is undisputed that the acceptances were executed as part of the transaction involving the sale of the washing machines and that these had been returned to Vallen, who promised the appellant to cancel and return the paper. This all occurred while the acceptances were in the hands of Ringole, who held them, not as a bona fide purchaser, but merely as an accommodation for Vallen. That the consideration for the paper had failed was known to Vallen and Ringole before the transfer to the respondent was made, and the latter had all the means for obtaining the same knowledge.

That Ringole was not a bona fide purchaser of the acceptances appears from his own testimony and this stands without contradiction. He testified that he did not sell them to the respondent, "because I couldn't sell them"; that the sale was made directly by Vallen; and that he had merely delivered the acceptances to the respondent under Vallen's instructions. It thus appears that respondent derived his title from Vallen, who was not a holder in due course, and it follows that the acceptances were subject to the same defenses as if they were nonnegotiable. Section 3139, Civ. Code. In an action by Vallen upon these acceptances the fact that he had taken back the machines for which the acceptances had been given would have been a complete defense. Under the Code section cited the same defense was available against this respondent and upon the evidence in the record judgment should have gone for the appellant. We cannot, however, make findings in this court, and the cause must be sent back for a new trial.

Judgment reversed.

We concur: LANGDON, P. J.,; STURTEVANT, J.

On Rehearing.

PER CURIAM. The foregoing cause was heretofore heard by this court and by an order entered herein on March 31, 1926, the judgment of the trial court was reversed. Upon the petition of the respondent a rehearing was granted and the cause reargued. We are satisfied that the judgment should be reversed for the reasons given in our former opinion.

Judgment reversed.

---

79 Cal. App. 572

CUSHMAN et al. v. CLIFF HOUSE et al. (Civ. 5057.)

(District Court of Appeal, First District, Division 1, California. Oct. 27, 1926.)

1. Bailment ⚷31(3).

In action to recover value of personal property deposited in a checkroom, evidence *held* insufficient to support jury's implied finding that property was not deposited or that there was a redelivery to plaintiff.

2. Judgment ⚷199(1, 6).

Motion for judgment notwithstanding verdict must be made before entry of judgment on verdict, and, as condition to such motion, motion for directed verdict must be made at the trial, under Code Civ. Proc. § 629.

3. Trial ⚷260(1).

Refusing instructions was not error where instructions given covered in substance all included in them.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action to recover value of personal property by Helen H. Cushman and another against the Cliff House and others. From a judgment for defendants, and from order denying motion for judgment notwithstanding the verdict, plaintiffs appeal. Judgment reversed, and order denying motion for judgment notwithstanding the verdict affirmed.

Samuel M. Samter, of San Francisco, for appellants.

J. A. Gendotti, C. J. Houston, Harry I. Stafford, and Harry K. Wolff, all of San Francisco, for respondents.

CASHIN, J. An action to recover the value of personal property from defendants as bailees, the plaintiffs alleging in two counts: First, the violation of a contract of bailment

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by failure to redeliver on demand; and, second, a conversion of the property—these allegations being denied by defendants. The cause was tried by a jury and a verdict for the defendants returned. Following the entry of judgment thereon plaintiffs moved for judgment notwithstanding the verdict, and for a new trial, both motions being denied. Appeals were taken from the order denying the first motion and from the judgment, and are presented on the judgment roll with a bill of exceptions.

Appellants urge as grounds for reversal the denial of the motion first mentioned, the insufficiency of the evidence to sustain the verdict, rulings of the trial court on the admissibility of evidence, and the giving and refusing of certain instructions.

[1] Defendant Roberts at all the times mentioned in the complaint was the proprietor of a restaurant in the city of San Francisco known as the Cliff House; and defendant Landman, by agreement with the former, conducted a checkroom adjoining the restaurant, which was in charge of the latter's employee, whose duty it was to receive the hats and coats of the patrons of the restaurant, to give a check therefor as a means of identification, and to redeliver the article deposited on presentation of the check, no specific charge for the service being made.

It was alleged and testified by plaintiff, Helen H. Cushman, that on the evening of December 31, 1923, she, in company with her husband and others, visited the restaurant mentioned, where they spent the evening; that she deposited her coat—in the pockets of which were two pairs of gloves—in the checkroom, received from the attendant in charge a check therefor, and that later the check was presented and demand made for her property, which defendants failed to deliver. Her testimony was corroborated by the persons who accompanied her on this occasion. As shown by the testimony, a large number of persons were present, and it does not appear that the defendants or their employee were personally acquainted with said plaintiff, or that a means of identifying property deposited in the checkroom was provided other than the checks issued therefor. One of such checks was offered in evidence, and bore on its face the following: "54—Cliff House. Not responsible for lost articles unless claim is made before leaving." And on the reverse side: "Phone Pacific 8140. Pacific Auto Service, Fred L. Landman. Notify hat checker. Immediate service."

Defendants' denials of the allegations of the facts of the deposit and their failure to redeliver were unsupported by direct evidence. Witnesses, from whose testimony inferences supporting the defense were sought to be drawn, testified in substance that said plaintiff during the evening mentioned demanded the delivery of the property described, but was unable to produce a check therefor, and that later a check was tendered; that in the meantime plaintiff, with others who accompanied her, were admitted to the checkroom for the purpose of searching for the property; that there was kept therein a box of checks similar to the one admitted in evidence which were accessible to plaintiff and her companions; that it was stated by her when a check was subsequently tendered that it had been lost in the restaurant and later found by one of her party. Plaintiff denied the loss of the check, and testified to the identity of the check in evidence with the one received at the time of the alleged deposit. It further appears that the attendant was at times during the evening absent from the checkroom. The conclusion that the check presented, as testified by plaintiff, was surreptitiously taken from the box of checks in the checkroom, would be a pure conjecture unsupported by any fact other than the opportunity afforded for doing so. This evidence, with testimony that one of those in company with plaintiff temporarily lost a check in his possession, was the extent of the evidence adduced for the defense, and was insufficient to support the implied finding of the jury that the property described was not deposited as alleged, or that there was a redelivery thereof to plaintiff.

[2] The motion for judgment notwithstanding the verdict followed the entry of judgment thereon and was presented with the motion for a new trial.

Section 629 of the Code of Civil Procedure provides as follows:

> "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.
>
> "A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on motion for new trial or the appellate court on appeal from the judgment may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the order denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

The Legislature in enacting the section adopted in substance the provisions of similar statutes of Minnesota (General Statutes, Supplement 1917, § 7998), and North Dakota (Revised Codes 1905, § 7044; Laws 1901, c. 63). Its provisions manifestly require, in accordance with the general rule (33 Corp. Jur. "Judgments," § 117, p. 1187; 14 Standard Ency. of Proc. "Judgments," p. 968), that the motion for judgment notwithstanding the verdict be made before the entry of judgment thereon, and that as a condition to such motion a motion for a directed verdict be made at the trial, such being the interpretation given its provisions by the decisions of the states mentioned. Sayer v. Harris Produce Co., 84 Minn. 216, 87 N. W. 617; Knight v. Martin, 124 Minn. 191, 144 N. W. 941; Funkley v. Ridgway, 158 Minn. 265, 197 N. W. 280; Landis Machine Co. v. Konantz Saddlery Co., 17 N. D. 310, 116 N. W. 333; Gross v. Miller, 51 N. D. 755, 200 N. W. 1012.

In view of our construction of the section and the fact that no motion for a directed verdict was made at the trial, or for judgment notwithstanding the verdict until after the entry of judgment thereon, the latter motion was properly denied.

[3] An examination of the record discloses no error in the rulings of the trial court on the admissibility of the evidence, and the instructions given covered in substance all that was included in those offered by appellants and refused.

It being our conclusion that the evidence was insufficient to support the verdict for defendants, the judgment entered thereon is reversed; and for the reasons stated the order denying the motion for judgment notwithstanding the verdict is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

79 Cal. App. 621

WATSON v. FISHER. (Civ. 5567.)*

(District Court of Appeal, First District, Division 2, California. Nov. 5, 1926.)

1. Specific performance 🔑28(2).

Written contract to convey real property will not be enforced in equity unless it contains all material terms, expressed in a sufficiently definite manner.

2. Evidence 🔑455—Parol evidence is inadmissible to show private understandings of parties as to meaning of words used in writing.

When words of doubtful meaning are used in a writing, parol testimony is admissible to show common meaning of words used, but not to show private understandings of parties as to meaning of such words.

3. Evidence 🔑455.

In suit on contract to convey lot abutting on lake, parol evidence to show that lake meant the main body of water of the lake *held* inadmissible.

Appeal from Superior Court, San Bernardino County; G. R. Freeman, Judge.

Suit by Phœbe A. Watson against John H. Fisher. Judgment for plaintiff, and defendant appeals. Reversed.

Leonard, Surr & Hellyer, of San Bernardino, for appellant.

A. Heber Winder, of Riverside, for respondent.

NOURSE, J. Plaintiff sued for specific performance of a written contract to convey real property. From the judgment in plaintiff's favor, the defendant has appealed on the judgment roll and a bill of exceptions.

Plaintiff owned an undivided one-fifth interest in a tract of land in Bear valley, San Bernardino county, adjoining Bear Valley lake and known as the North Estate land. On July 30, 1918, plaintiff agreed, in writing, to convey to one Waterman her entire interest in said land with the condition expressed in the agreement that Waterman would convey to plaintiff "a one-acre lot, abutting on Bear Valley lake and always having access to the margin of said lake and forming a part of the real property hereinbefore described." It was further agreed that, if the lot tendered to plaintiff was not satisfactory to her, Waterman would pay her the sum of $500. On August 7, 1918, plaintiff conveyed her interest in the property to Waterman in accordance with this agreement, and on October 20, 1919, Waterman conveyed to defendant, who expressly assumed Waterman's obligation to convey the one-acre lot to plaintiff. Thereafter defendant subdivided the property into lots and on May 25, 1922, tendered to plaintiff a deed of a lot which, it is agreed, met the conditions of the contract as to area and frontage. The plaintiff refused to accept the deed because the lot was located on North bay, an inlet of Big Bear lake, and did not abut the deep water of the lake, as she desired. Defendant then tendered her the sum of $500, which she also refused.

Big Bear lake is an artificial lake in Bear valley in which the water is held by a dam of about 72 feet in height. It is irregular in shape and some of the indentations in the shore line have been given special names, such as Metcalf bay and North bay. When water is drawn for the reservoir for summer irrigation, the water line naturally recedes, and, to meet this condition, the defendant acquired from the owners of the reservoir the right to cross the uncovered land to gain access to the water. This right was passed on to the purchasers of the adjoining lots and was contained in the deed tendered to the plaintiff. The land purchased by the defendant is located on what is called a peninsula projecting into the Big Bear lake and bounded on the east by Metcalf bay and on the west by North bay.

The whole controversy between the parties is this: The plaintiff claims that, before executing the written agreement with Waterman, she had a private understanding with him that the lot which was to be conveyed to her was to abut on the deep water of the

*Hearing denied by Supreme Court January 3, 1927.

lake proper, whereas the lot tendered to her by the defendant abuts on North bay where the water is more shallow and not so easy of access from the lot when the level of the lake is lowered in times of summer irrigation. The defendant contends that this tender was in strict accord with the terms of the written covenant which he assumed from Waterman without knowledge of the private understanding of the parties—that the lot tendered is a part of the property conveyed by the plaintiff, abuts the lake, and has access to the margin thereof, and that it is of the stipulated area and frontage.

To prove her case, the respondent was required to produce oral testimony of the oral negotiations had between Waterman and herself prior to the execution of the contract and which were not embodied in the writing. This testimony was received over the objections of the appellant and is assigned as the main ground for a reversal of the judgment. If the admission of this testimony was error, it is apparent that the error was prejudicial to the appellant because the trial court found in accordance with the testimony and based its judgment on that finding.

[1] It is a settled rule of law that a written contract to convey real property will not be enforced by a court of equity unless the writing contains all the material terms expressed in a sufficiently definite manner. Buckmaster v. Bertram, 186 Cal. 673, 676, 200 P. 610; Allman v. Rich (Cal. App.) 245 P. 439, 441; Wood v. Anderson (Cal. Sup.) 249 P. 862. From this it follows that, if the writing is so indefinite and uncertain in its terms that it requires incompetent testimony to make it certain, it is not such a contract as may be specifically enforced.

[2, 3] The rule regarding the admission of parol testimony covering the prior negotiations and understandings of the parties to a written contract is also well settled. When words of a doubtful meaning are used in a writing, parol testimony is admissible to show the common meaning of the words used, but it is not admissible to show the private understandings of the parties as to the meaning of such words. This rule is aptly stated by Mr. Justice Holmes in Goode v. Riley, 153 Mass. 585, 586, 28 N. E. 228, as follows:

> "You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. * * * It would open too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church. * * * An artificial construction cannot be given to plain words by express agreement. * * *"

The application of this rule to the present case is apparent. The writing used the term "Bear Valley lake." All the evidence, without conflict, showed that this was the commonly accepted name applied to all the waters of the lake impounded by the dam, including North bay, Metcalf bay and all other similar inlets. The trial court found that the term, "as used in said contract," meant the main body of waters impounded by the dam and not North bay, Metcalf bay, or any other bay or inlet. By this finding, the trial court has read into the written contract the words "main body" of the waters of the lake and has declared a contract different from that executed by the parties.

The testimony of the private negotiations of the parties not having been admissible, the trial court was limited in its findings to the evidence which was properly before it and this, we have seen, unmistakably required a finding that the term Bear Valley lake referred to the whole body of water. Appellant having made a tender in accord with the obligation of his contract and this tender having been refused, the respondent was not entitled to a specific performance of the contract.

Judgment reversed.

We concur: STURTEVANT, J.; CABANISS, Presiding Justice pro tem.

79 Cal. App. 605

PEOPLE v. WALLACH. (Cr. 1398.) *

(District Court of Appeal, Second District, Division 1, California. Nov. 4, 1926.)

1. Indictment and information 🔑2(2).

Prosecutions for felonies in this state are governed, so far as mode thereof is concerned, by Const. Cal. art. 1, § 8, and not by Const. U. S. Amend. 5, which relates only to proceedings in courts of United States.

2. Criminal law 🔑1186(4)—Judgment of conviction may be based on amended indictment, notwithstanding any error in pleading or procedure not resulting in miscarriage of justice (Pen. Code, § 1008; Const. art. 6, § 4½).

Though Pen. Code, § 1008, does not authorize conviction of a defendant under an indictment which does not charge a public offense, or one changed by court so that it no longer charges offense as returned by grand jury, judgment of conviction may be based on an amended indictment, notwithstanding any error as to pleading or procedure, unless such error resulted in miscarriage of justice, in view of Const. art. 6, § 4½.

3. Indictment and information 🔑159(2)—Conviction for burglary on indictment amended to eliminate charge of former conviction held not for offense different than that originally charged (Pen. Code, §§ 667, 668, 1008, 1093, 1158).

Under Pen. Code, § 1008, amendment of indictment for burglary charging former conviction in another state to bring case within sec-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 4, 1926. Hearing denied by Supreme Court January 3, 1927.

tions 667, 668, to eliminate charge of prior offense *held* not to make it charge a different offense but only to affect severity of punishment, hence conviction will be sustained, in view of sections 1093, 1158.

4. Burglary 🔑41(1).

Evidence *held* to sustain conviction for burglary.

5. Criminal law 🔑829(9).

Refusal of instructions on presumption of innocence and weight to be given evidence of opportunity *held* not prejudicial, in view of instructions given.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Louis Wallach was convicted of burglary, and he appeals. Affirmed.

William M. Morse, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, of San Francisco, for the People.

CONREY, P. J. The indictment, as presented by the grand jury, accused the defendant "of the crime of burglary, a felony (with a prior conviction of an offense punishable by imprisonment in the state prison of California, committed in the state of New York, to wit, burglary)," and then alleged in direct terms the conviction of defendant in the Supreme Court of the state of New York of the crime of burglary, and his imprisonment therefor, and that thereafter in the county of Los Angeles, Cal., the defendant did willfully, etc. (here stating certain acts constituting the crime of burglary); the defendant being then and there armed with a deadly weapon, to wit, a revolver.

At the trial of this action and before the jury was impaneled or sworn, on motion of the district attorney, and after counsel for defendant had stipulated that the motion might be granted, the court struck out from the indictment that portion thereof which alleged the prior conviction of the defendant of the crime of burglary in the state of New York. Appellant now contends that the indictment as so changed was no longer an indictment of the grand jury, and that there was no instrument before the court charging appellant with any offense for which he could be tried.

By section 1008 of the Penal Code it is provided:

> That an indictment or information may be amended at any time after plea, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. "An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

The argument presented by counsel for appellant is to some extent based upon decisions of the federal courts, in cases arising in those courts, wherein the decisions against the power of the court to allow amendments to indictments without the concurrence of the grand jury were based upon the Fifth Amendment of the Constitution of the United States. These decisions may be at once eliminated from consideration, for the reason that the Fifth Amendment and, indeed, all of the first 10 amendments of that Constitution, are not concerned with state action. So far as they relate to judicial affairs, they deal only with proceedings in the courts of the United States. People v. Wilson, 26 Cal. App. 336, 146 P. 1048; Minneapolis, etc., Co. v. Bombolis, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505.

[1, 2] Prosecutions for felonies in this state are governed, so far as the mode of prosecution is concerned, by the Constitution of the state, which in section 8 of article I provides for prosecutions either by information or by indictment. The Penal Code, in conformity with the Constitution, outlines the procedure of prosecution by indictment, as well as by information, and allows the amendment of indictments in the manner indicated by section 1008 of the Penal Code, to which we have before referred. It may be conceded that the Code does not attempt and constitutionally is not permitted to authorize the conviction of a defendant under an indictment which does not charge a public offense, and does not allow such conviction upon an indictment changed by the court so that it no longer charges the offense which was charged against the defendant in the indictment as returned by the grand jury. Subject to these limitations, however, a judgment of conviction may be based upon an indictment which has been amended by the court. A conviction under such an amended indictment, not violating any provision of the Constitution of the state, will be sustained, notwithstanding any error as to any matter of pleading, or any error as to any matter of procedure, unless it is made to appear that the error complained of resulted in a miscarriage of justice. Const. Cal., art. 6, § 4½.

The indictment as amended clearly charges the commission by the defendant of the crime of burglary. But the defendant claims, not only that there is not remaining a statement of facts sufficient to constitute a public offense, but also that the indictment when amended was no longer an indictment of the grand jury. If this last contention be correct, it must be for the reason that the amendment had the effect of changing the offense charged. This would be so only if the fact of former conviction, as originally alleged in the indictment, is an essential part of the offense, in the sense that burglary committed by one who has suffered a former conviction of burglary is an offense different in character from burglary committed by one who has not suffered such former conviction.

[3] The inclusion in the charge of the allegation that the defendant had been convicted of burglary in New York was for the evident purpose of bringing the case within the terms of sections 667 and 668 of the Penal Code. Under those sections, if the defendant is convicted of a crime in this state and it is alleged and proved that he had already been convicted of an offense punishable by imprisonment in the state prison, and had served a term therefor in a penal institution, or that he had been convicted in another state of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, then the defendant, upon conviction of the second crime, would be punishable by imprisonment in the state prison for the maximum period for which he might have been sentenced if such offense had been his first offense. Under such circumstances the fact of the former conviction does not change the definition or character of the second offense. It affects only the severity of the punishment.

> "The object had in view in charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining the punishment to be imposed in case of conviction, as is clearly shown by sections 666 and 667 of the Penal Code." People v. Thomas, 110 Cal. 41, 42 P. 456.

Our view of the question is made yet more clear by section 1158 of the Penal Code, which requires that the jury, if they find a verdict of guilty "of the offense with which he is charged," must separately find whether or not the defendant has suffered the alleged previous conviction, and also, by section 1093 of the Penal Code, which provides that in cases where the indictment or information charges a previous conviction, and the defendant has confessed the same, the clerk, in reading the indictment or information at the trial, shall "omit therefrom all that relates to such previous conviction." Manifestly the Code would not have so provided if the charge of a previous conviction was, in legal contemplation, a part of the description of the offense for which the defendant is presently on trial.

[4] There is no merit in appellant's contention that the evidence is not sufficient to connect him with the alleged burglary. The witness Egnew, a watchman, unlocked a door and went into the place while the burglars were in the building. The affair occurred on a Sunday morning. Egnew saw the intruders, and his testimony directly identified the defendant as one of them. Without discussing other circumstances shown in evidence, this is sufficient to sustain the verdict as against the stated objection.

It only remains to consider the alleged errors in certain instructions given, and in the refusal of instructions requested by the defendant. The criticisms of instructions given relate to the instructions numbered 3, 5, and 1 in the clerk's transcript. In the absence of anything to indicate prejudicial error in either of these instructions, we deem it unnecessary to determine whether they were precisely correct in every detail.

[5] The complaint of appellant concerning instructions requested by him, and refused by the court, refers only to his instructions numbered 14 and 21. No. 14 relates to the presumption of innocence and the doctrine of reasonable doubt. No. 21 states the rule that evidence tending to prove opportunity for the commission of the offense does not, in itself, warrant the jury in finding the defendant guilty. Since the court instructed the jury very completely upon the burden of proof resting upon the prosecutor, and the presumption of innocence, and the right of the defendant to an acquittal if there remains any reasonable doubt of his guilt, we are satisfied that he was not prejudiced or injured in any respect by the failure of the court to give those particular instructions in the form requested by him.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

79 Cal. App. 626

ANNEN v. ANNEN. (Civ. 4589.)

(District Court of Appeal, Second District, Division 1, California. Nov. 5, 1926.)

1. Appeal and error ⚿1011(1).

Trial court's findings of fact based on conflicting evidence will not be disturbed on appeal.

2. Divorce ⚿27(18).

Wife's conduct towards husband, in urging her objections to his conduct with another woman, *held* not to constitute cruel or inhuman treatment entitling him to divorce.

3. Divorce ⚿130.

Evidence *held* insufficient to sustain finding that husband had suffered grievous bodily injury entitling him to divorce for cruelty.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for separate maintenance by Louise E. Annen against William B. Annen, who cross-complained for divorce. From an interlocutory judgment of divorce, entered in favor of cross-complainant, both parties appeal. Reversed.

Perry F. Backus, of Los Angeles, for appellant.

R. E. Wedekind and Nat B. Browne, both of Los Angeles, for respondent.

CONREY, P. J. Plaintiff brought this action to obtain a decree of separate maintenance. Defendant, by cross-complaint, de-

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

manded a decree of divorce. From an interlocutory judgment of divorce entered in favor of the cross-complainant, the plaintiff and cross-defendant appeals.

In her complaint plaintiff charged the defendant with sundry acts of extreme cruelty, and that he had committed adultery. Defendant denied those charges. In his cross-complaint he charged that the plaintiff was guilty of acts constituting the offense of extreme cruelty, which had caused the cross-complainant grievous bodily injury, mental suffering, etc. By supplemental complaint, the plaintiff charged against the defendant the commission of an additional act of adultery.

The principal ground of appeal, as presented by appellant's counsel, is found in his claim that the findings of the court are not supported by the evidence. The findings recite that evidence was introduced on the supplemental complaint only and the cross-complaint. This is incorrect, for the record plainly shows that evidence was introduced also upon the issues tendered in the original complaint.

[1, 2] The allegations in the supplemental complaint charging adultery were found to be untrue. Since both of the implicated persons denied their guilt and the evidence to the contrary was not entirely conclusive, the court's finding must be sustained. The findings of fact on the issues relating to the alleged cruelty of appellant toward the respondent are so far without support in the evidence that they fail to sustain respondent's right of action. Apparently, there is no evidence in the record which can justify the finding that on May 6, 1922, or at any time, appellant told respondent that she was going to wait until respondent was asleep some night and then was going to kill him. The testimony of the parties and of the several witnesses leaves no room for doubt that the quarrels between the husband and wife arose out of his intimacy with another woman and the wife's objections to that intimacy and association. Assuming, in accordance with the determination of the trial court, that the husband had not committed adultery with Mrs. Ross, yet his association with her was so frequent and was conducted in such a manner that appellant was justified in believing that her complaints were well founded. This being so, appellant's conduct toward respondent, in urging her complaints and objections, did not constitute cruel or inhuman treatment. In view of the respondent's conduct in relation to Mrs. Ross, it would be absurd to say that appellant's conduct was anything more than a natural reaction against her husband's misconduct.

[3] The finding of the court that the cross-complainant had suffered grievous bodily injury is wholly without support in the evidence. It may be said with equal confidence that there is no evidence of mental anguish, suffering, or distress of cross-complainant resulting from any cruel or inhuman treatment of the cross-defendant. The only hint of mental suffering shown in the evidence of cross-complainant came in connection with some testimony that Mrs. Annen had visited the place of employment of her husband and made some complaints about his association with other women, and that the fact of her having made those statements was communicated to Mr. Annen. Being asked if this caused him mental suffering, defendant replied:

> "It did in a way; I was uneasy because I was afraid I would lose my position on that account."

This is not substantial evidence of "grievous mental suffering"—when everything else in the record shows that respondent maintained a cheerfulness of spirit quite inconsistent with such suffering.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

---

79 Cal. App. 601

FOREST LAWN MEMORIAL PARK ASS'N v. DE JARNETTE et al. (Civ. 3141.)

(District Court of Appeal, Third District, California. Nov. 3, 1926.)

1. Cemeteries ⚷5.

Rule of cemetery corporation limiting interments to persons of Caucasian race *held* valid.

2. Cemeteries ⚷15 — Cemetery corporation, selling lot to negro without knowledge of fact, held entitled to have contract canceled as for mistake of fact (Civ. Code, §§ 1577, 1689, 3406, 3407).

Where cemetery corporation, having rule limiting interments to persons of Caucasian race, contracted to sell lot to one not known to be a negro, *held*, cancellation of contract as for mistake of fact was warranted, in view of Civ. Code, §§ 1577, 1689, 3406, 3407).

3. Cemeteries ⚷15 — Cemetery corporation's rule limiting interments to Caucasians held part of contract for sale of lot to negro.

Cemetery corporation's rule limiting interment to Caucasians *held* part of contract for sale of cemetery lot to negro, in view of provision therein that premises were to be conveyed and accepted by purchaser subject to rules and regulations.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by the Forest Lawn Memorial Park Association and another against Mrs. C. S. De Jarnette and husband. From a judgment for plaintiffs, the defendant named appeals. Affirmed.

Willis O. Tyler, of Los Angeles, for appellant.

Kemp, Mitchell, Silberberg & Davis, of Los Angeles, for respondents.

FINCH, P. J. The defendant Mrs. C. S. De Jarnette, who will be referred to as the defendant, has appealed on the judgment roll alone from the judgment herein in favor of the plaintiffs.

The Forest Lawn Memorial Park Association is a cemetery corporation. The defendant is of the negro race. November 26, 1921, the association and the defendant entered into an executory contract by the terms of which the former agreed to sell to the latter one of its cemetry lots "for interment purposes only." The contract contained the following provisions:

> "Said premises to be conveyed to and accepted by the purchaser subject to the rules and regulations now in force and such as may hereafter be adopted governing said Memorial Park and its care funds. * * * This agreement shall not be assigned by purchaser without the written consent of seller thereto. * * * It is expressly agreed that this contract contains and embodies all the terms and conditions to be performed by the parties hereto; that any promise, representation, or agreement not embodied herein is expressly waived unless reduced to writing and signed by an officer of the seller and attached to this agreement."

The court found that, at the time the contract was executed and at all times since, the association had in force and effect a rule "that no interment of any body or the ashes of any body other than that of a human being of the Caucasian race should be permitted in the said Forest Lawn Memorial Park"; that the defendant, at the time the contract was executed, did not have actual knowledge of the existence of such rule, "but that the defendant did have constructive knowledge" thereof "by reason of the matters set forth in the contract"; that the association "had no knowledge that the said defendant was a negro or that she was not of the Caucasian race" and "would not have entered into the said contract had it been advised as to the truth, or had it known that the said defendant was of the negro race; that the plaintiff did not discover that the defendant belonged to the negro race and was not of the Caucasian race until the 23d day of November, 1922, and that immediately thereafter the plaintiffs notified the defendant that they elected to cancel said contract of November 26, 1921, and tendered to the defendant in gold coin of the United States all the moneys which she had theretofore paid to them, or either of them," with interest thereon, "but said defendant refused to accept the same, and the plaintiffs thereupon paid the same into this court for the use of the defendant; that the said defendant * * * demanded that she be allowed to make an interment of a member of her family in the said lot, the said body so proposed to be interred being the body of a negro; * * * that, if the said defendant is allowed to bury the body of a person of the negro race in the said plot, the said action will cause great and irreparable damage to the plaintiffs and their property by depreciating the same and causing the owners of lots of land which have been purchased for burial purposes to cancel their said contracts and will depreciate the value of the property belonging to the plaintiff to an extent which cannot be estimated and which is incapable of estimation"; that the contract "was entered into by the parties thereto by mutual mistake of fact and that said contract would not have been signed by either party thereto had the facts been known with reference to the rules and regulations governing the said Forest Lawn Memorial Park and had the facts been known by the plaintiff of the nationality and race to which the defendant belonged; * * * that the consent of the plaintiff, Forest Lawn Memorial Park Association, was obtained and given to the said contract by the said mistake of fact." Judgment was entered on the findings, canceling the contract, and directing the clerk to pay to the defendant the money deposited in court for her by the plaintiffs.

[1] The rule limiting interments to persons of the Caucasian race is valid. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115.

[2] Appellant's main contention is that the mistake found by the court was not mutual, but that one party was mistaken as to one fact and the other as to another fact, and that therefore the plaintiffs were not entitled to a rescission. It is clear that the mistake of the plaintiff was one of fact and a material one. "Where a contract in writing is executed by only one of the parties, under a mistake as to a fact which is of the essence of the contract, the mistake constitutes a ground for a court of equity to rescind and cancel the apparent contract as written, and to place the parties in statu quo." 9 C. J. 1167; 4 R. C. L. 506; Elliott on Contracts, § 112. The same rule is statutory in this state. Civ. Code, §§ 1577, 1689, 3406, 3407. "It is not necessary that a mistake of fact should be mutual. * * * Nor is it true * * * that a contract cannot be set aside for the mistake of one of the parties unless the contract was induced and the mistake arose from the fraud of the other party." Moore v. Copp, 119 Cal. 429, 436, 51 P. 630, 633; National Bank of California v. Miner, 167 Cal. 532, 535, 140 P. 27; Palace Hardware Co. v. Smith, 134 Cal. 381, 384, 66 P. 474, 476; Goodrich v. Lathrop, 94 Cal. 56, 29 P. 329, 28 Am. St. Rep. 91. A different rule applies to a mistake of law. Civ. Code. § 1578.

[3] Appellant contends that she had a right to rely upon the provision that—

"This contract contains and embodies all the terms and conditions to be performed by the parties hereto."

The answer is that one of the terms of the contract provides:

> "Said premises to be conveyed to and accepted by the purchaser subject to the rules and regulations now in force and such as may hereafter be adopted."

By such reference the rules and regulations were made a part of the contract. 6 Cal. Jur. 320.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

79 Cal. App. 632

MAGOON et al. v. HEATH et al. (Civ. 5255.)*

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1926.)

1. Mandamus 🔑174—In proceeding to compel calling election to recall city trustees, failure to find that petition for election was signed by required number of voters held not ground for reversal.

In action for mandamus to compel calling of election to recall four city trustees, failure to find that petition for election was signed by required number of voters *held* not ground for reversal, in view of stipulation as to votes cast and number of signers of petition, nor was number of votes cast determined by multiplying number of candidates for particular office by number of votes received by each.

2. Municipal corporations 🔑124(5).

St. 1911, Extra Sess. p. 128, providing for recall of elective officers of cities and towns, should be construed liberally.

3. Municipal corporations 🔑154—Officer elected at special recall election held subject to recall (St. Extra Sess. 1911, p. 128).

"Last general election" at which such officer was voted for in St. 1911, Extra Sess. p. 128, providing for recall of city and town officers, means last general election for that office and not for individual occupying that office; hence fact that officer was elected at a special recall election did not preclude his recall.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last General Election.]

4. Municipal corporations 🔑159(1)—Certificate of city clerk to petition for recall of officers held sufficient (Stats. Extra Session, 1911, p. 128).

City clerk's statement in certificate to petition for recall of city officers under St. 1911, Extra Sess. p. 128, that he had examined petition and compared signatures with original registrations and found same sufficient, *held* sufficient compliance with provisions requiring clerk to show "result of said examination" in his certificate.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition by James H. Magoon and others for writ of mandate to compel Louis Heath and others, as Trustees of the City of Hermosa Beach, to call a special election responsive to a petition for a recall of four of the city trustees. The superior court issued a peremptory writ, and the defendants appeal. Affirmed.

Hewitt, Ford & Crump and Collamer A. Bridge, all of Los Angeles, for appellants and respondents.

Kimball Fletcher, of Los Angeles, for respondents and petitioners.

THOMPSON, J. This action was instituted in the superior court seeking a writ of mandate to compel the board of trustees of the city of Hermosa Beach to call a special election responsive to a petition for a recall of four of the city trustees. A trial was had and a peremptory writ was issued, directed to the trustees, commanding them to call a special election forthwith. From that judgment the defendants appealed and urge four grounds for its reversal.

The first position advanced by appellants is that the court did not find and there is no evidence to show that the recall petition was signed by qualified voters equal in number to at least 25 per cent. of the entire vote cast within the city, for all candidates for the office which the incumbent sought to be removed occupies, as required by "An act to provide for the recall of elective officers of incorporated cities and towns." Stats. Extra Session 1911, p. 128. The judgment recites, and appellants concede, that it was stipulated at the trial that of the four trustees sought to be recalled, two (Louis Heath and Morris Woodland) were elected at the general municipal election held in 1924 "and that the total vote cast for the office of members of the said board of trustees at said election was 1113," and that another member (Frederick Piner) "was elected a member" at a special recall election held May 22, 1923, "and that the total votes cast at said election was 764," and that the last of the four trustees (Frank M. Bravender) was elected at the general municipal election held April 10, 1922, "and that the total vote cast at said election was 695," and further that on April 7, 1925, the petition was filed with the city clerk of Hermosa Beach to which there were appended "at least 280 valid signatures of qualified voters of said city."

[1] To sustain their contention, appellants urge that the entire vote cast means that number which would be arrived at by multiplying the number of candidates for the particular office by the number of votes received by each. It appears, however, from the stipulation entered into by counsel that this ob-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court January 3, 1927.

jection cannot now be raised. They have stipulated to the entire vote cast at each election and that the petition was signed by at least 280 qualified electors, which number is more than the 25 per cent. required by the statute even when the largest vote is considered. While there is no finding upon the stipulation, none is necessary. Gregory v. Gregory, 102 Cal. 50, 36 P. 364; Taylor v. C. P. R. R. Co., 67 Cal. 615, 8 P. 436; and Continental Building, etc., Association v. Woolf, 12 Cal. App. 725, 108 P. 729.

[2, 3] The second point urged by appellants is that Frederick Piner, having been elected at a special recall election and not at a regular municipal election, is not subject to recall, and that inasmuch as the petition names all of the four trustees, it may not be severed and therefore is ineffectual for any purpose. In support of their position attention is called to that provision in the act providing for the recall of elective officers of incorporated cities and towns, as follows:

> "The petition shall be signed by qualified voters equal in number to at least twenty-five per cent. of the entire vote cast within such city or town for all candidates for the office which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for."

And appellants cite in support of their construction of that provision the case of Robinson v. Anderson, 26 Cal. App. 644, 147 P. 1182. The point here involved was not necessary to that decision, although the court did use language, construing this provision, to mean "that the election referred to is the regular municipal election preceding the date of the attempted recall at which the officers sought to be recalled were voted for. While the language used is not entirely clear, it would seem to be within the reason and intent of the statute that the proportion of signatures required which would set in motion the recall should be based on the vote cast at the regular election at which the officer was elected, rather than at a subsequent election for other trustee offices not including that which the officer in question occupies." We cannot give our assent to this construction. The recall has been largely adopted as a fundamental part of our present governmental system, and the statute should receive a liberal construction so as to promote the purposes for which it was enacted. Conn. v. City Council, 17 Cal. App. 705, 121 P. 714, 719; Worth v. Downey (Cal. App.) 241 P. 96. We think it is clear that the intent of the Legislature in providing for 25 per cent. of the entire vote cast was to give some assurance that there was a substantial demand for the removal of an elective officer before the recall might be invoked, and in providing that it should be the last general municipal election we think it is apparent that they had in mind that in the rapidly growing incorporated cities and towns the vote cast at the last regular municipal election might be considerably larger than at previous regular municipal elections and that the phrase "at which such officer was voted for," in the act, is meant to designate the office and not the individual who may occupy that office. This construction would appear to be in keeping with the intent and purpose of the act providing for the recall of elective officers and is in harmony with the provisions of section 1 of the act, as follows, that, "The holder of any elective office of any incorporated city or town may be removed or recalled at any time by the electors; provided, he has held his office at least six months," whether such officer has been elected at a regular municipal election or at a special recall election.

[4] The third point urged by appellants is that the certificate of the city clerk attached to the petition is insufficient. The material portion of said certificate is:

> "I have examined the same (the petition) and compared the signatures with the original registrations and find that the same is sufficient."

Their attack is based upon the provision of the statute that the clerk "shall attach to said petition his certificate showing the result of said examination." This same point was directly raised in Good v. Common Council, 5 Cal. App. 265, 90 P. 44, and what is said there, we think, is decisive of this question. It is there said that for the clerk to say that the petition is sufficient is equivalent to saying that it was signed by the requisite number of qualified electors and reciting the number required. The case of Davenport v. City of Los Angeles, 146 Cal. 508, 80 P. 684, is not in point for the reason that there the question involved was whether or not the names might be compared with the "duplicate affidavits of registration" and not with the "great register," and it was held necessary to compare the signatures on the petitions with the signatures on the great register instead of with the duplicate affidavits of registration.

This disposes of the fourth proposition urged by appellants, that the law does not enjoin upon the trustees the duty of calling an election except upon being presented with a duly certified recall petition, for the reason that, from what has been said, a duly certified recall petition was presented to the trustees, and it was therefore the duty of the trustees to call the election.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

79 Cal. App. 612

PEOPLE v. KELLER. (Cr. 1338.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1926.)

1. Embezzlement ⟹35.

Where information charged embezzlement of money, proof showing embezzlement of money accomplished by drawing of check on bank, where such money was deposited, *held* not at fatal variance.

2. Criminal law ⟹112(4)—Venue in prosecution for embezzlement of money by drawing check on bank, where money was deposited, held properly laid in county where bank was located (Pen. Code, §§ 781, 786).

Venue in prosecution for embezzlement of money by drawing check on bank, where such money was deposited, *held* properly laid in county where bank was located, in view of Pen. Code, §§ 781, 786, notwithstanding instrumentalities employed by defendant to bring about payment of money by such bank were set in motion by him in another county.

3. Criminal law ⟹112(4)—That defendant was not present in county when bank paid embezzled money on check held not to prevent prosecution there.

In prosecution for embezzlement of money by drawing check on bank in which it was deposited, that defendant was not present in county where bank was located when it paid money on the check *held* not to prevent prosecution in such county, where withdrawal of money from bank was done by hand of an innocent agent.

4. Embezzlement ⟹11(1).

Proof of demand and refusal *held* not essential to consummation and establishment of embezzlement, where proof established fraudulent and felonious conversion of money.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Fred W. Keller was convicted of embezzlement, and he appeals. Affirmed.

T. T. Clark, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. Immediately prior to his appointment to the office of Associate Justice of the Supreme Court of this state, the opinion which follows was begun but not completed by Hon. Frank G. Finlayson, then Presiding Justice of this division of the District Court of Appeal.

Defendant was convicted in the superior court for Orange county upon an information charging him with the embezzlement of certain money, the property of the California Industrial Finance Corporation. He was found guilty of the embezzlement of $150, and now appeals from the judgment and from an order denying his motion for a new trial.

Briefly, the outstanding facts, in so far as they are material in the illumination of the points to be discussed, run thus: Defendant was vice president and general manager of the California Industrial Finance Corporation—hereafter for brevity referred to as the Finance Corporation. That corporation had its principal place of business in the city of Los Angeles. On October 10, 1923, defendant, in the course of his employment as such vice president and general manager, opened an account on behalf of his principal with the First National Bank of Santa Ana—a banking institution doing business at the city of Santa Ana, in Orange county, and hereafter for brevity referred to as the Santa Ana Bank. At the same time defendant placed on general deposit with that bank the sum of $1,000, the property of the Finance Corporation. The assistant cashier of the bank testified that the account ran in the name of the "California Industrial Finance Corporation, Incorporated, F. W. Keller, V. P.," and that checks drawn against the account were to be honored only when signed by defendant as vice president of the Finance Corporation. On October 13, 1923, defendant drew a check on the Santa Ana Bank payable to the order of one Joseph Bixler, a resident of Los Angeles. This check was signed by defendant as follows: "California Industrial Finance Corp., F. W. Keller, V. P." It was for the embezzlement of the money represented by this instrument that defendant was convicted. The signing of the check and its delivery to the payee took place in Los Angeles county. The sum called for by this negotiable instrument was applied to defendant's personal use, the check having been given by defendant to Bixler in payment of a debt owing by the former to the latter. Bixler indorsed the check and deposited it with a Los Angeles bank. In due course of business, the instrument was forwarded by a Los Angeles bank to the Santa Ana Bank for payment, and was there honored and paid by the drawee bank to the forwarding bank on October 17, 1923. Thereupon, the Santa Ana Bank charged the account of the Finance Corporation with the amount of the check.

The principal points raised by the appellant are (1) that there is a fatal variance in the proof, in that the information charges the embezzlement of money and the evidence shows the embezzlement of a check, and (2) that the crime, if any was committed, was perpetrated in Los Angeles county, and not in Orange county, where the venue was laid.

[1] We are satisfied that the proof shows an embezzlement of money, as alleged in the information. It, of course, is conceded by the Attorney General, as indeed it must be, that

---

the money of the Finance Corporation, which appellant placed on general deposit with the Santa Ana Bank, was, while on deposit, the property of that bank, and that during its deposit the relation between the bank and the depositor, appellant's principal, was that of debtor and creditor. When, however, the money was paid on the check to the forwarding bank, it became, for an instant of time at least, however short, the property of the depositor—the Finance Corporation. The acceptance of the check by the Santa Ana Bank, the surrender of the instrument to it, the payment of the money to the forwarding bank, and the entry of the transaction upon the books of the Santa Ana Bank constituted a segregation or separation of the amount of dollars expressed in the check from the general mass of money in the bank as the portion owing by it to appellant's principal. At the very moment the money represented by the check was thus separated from the general mass of money in the Santa Ana Bank, the title to the funds so segregated passed from the bank to appellant's principal, at least for an instant of time. Bartley v. State, 53 Neb. 310, 73 N. W. 744.

Appellant, when he drew the check and delivered it to Bixler, must have intended that the $150 which the instrument represented would be paid by the Santa Ana Bank to some one—to Bixler himself, as the payee, or to some agent duly authorized by Bixler to collect it, or to some indorsee or assignee of the instrument. In other words, appellant unquestionably intended to and did use innocent agents as the instrumentalities through which to effect the payment of his principal's money, in satisfaction of a personal debt owing by him, to the payee named in the check. When, therefore, the money was paid on the check by the Santa Ana Bank to the forwarding bank, there was a conversion to appellant's use of money which, at that instant, lawfully belonged to the Finance Corporation. Without doubt, if appellant, in person, had withdrawn from his principal's account with the Santa Ana Bank the sum of $150 in actual cash, and then had paid it to Bixler in satisfaction of a personal obligation, the proof would have been sufficient to sustain a charge of embezzling the money. As we view it, the legal effect of the transaction, as it actually occurred, is not materially different. The practical result was that when the $150 was paid by the Santa Ana Bank appellant's principal had its account with that bank decreased by the amount of the check, and it was just as much a conversion of that $150 by appellant as it would have been had he gone to the bank himself, withdrawn the money, and paid it to Bixler. It has been held, under circumstances analogous to those disclosed here, that an embezzlement of money is accomplished by the drawing of a check upon the bank where such money is deposited. Bartley v. State, supra; State v. Mispagel, 207 Mo. 557, 106 S. W. 513; State v. Krug, 12 Wash. 288, 41 P. 126; State v. Hoshor, 26 Wash. 643, 67 P. 386; Territory v. Meyer, 3 Ariz. 199, 24 P. 183; Ex parte Hedley, 31 Cal. 108. For these reasons, the first point raised by appellant must be resolved against him.

[2] There is no merit in appellant's claim that the venue was improperly laid in Orange county. It is true that the instrumentalities employed by appellant to bring about the payment of the money by the Santa Ana Bank were set in motion by him in Los Angeles county. And it, doubtless, is true that, when delivering the check to Bixler at Los Angeles, he then and there fully intended that the sum of money represented by the check should be misappropriatd in the manner already described. But, at that time, appellant did not have possession of the money. His fraudulent and felonious intent was not coupled with possession. At the time when he drew the check, the money was on deposit with and was the property of the Santa Ana Bank, between whom and appellant's principal the relation of debtor and creditor existed. It is not necessary to decide whether appellant could have been prosecuted in Los Angeles county for the embezzlement of the money. It is clear that if that offense may be deemed to have been commenced in Los Angeles county, its consummation was effected in Orange county when the money was paid on the check by the Santa Ana Bank. Under such circumstances, the prosecution was properly begun in Orange county. Section 786 of the Penal Code provides:

> "When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former."

To the same effect is the more general provision of the law contained in section 781 of the Penal Code, which reads as follows:

> "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

[3] It makes no difference that appellant was not present in person in Orange county when the Santa Ana Bank paid the money on the check. The withdrawal of the money from the bank was done by the hand of an innocent agent, but it was the mind of appellant which caused that hand to reach out and to receive the proceeds of the check. It is well settled that one who causes a crime to be committed through the instrumentality of an innocent agent is the principal in the

crime and punishable accordingly, although he was not present at the time and place of the offense. State v. Barnett, 15 Or. 77, 14 P. 737; State v. Mispagel, supra; 16 Corp. Jur. 124. "In judgment of the law," says the court in State v. Barnett, "he who procures the act to be done is present at its commission, and will not be permitted to deny that he personally committed it at the place where it was done. In such case the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been personally present."

[4] There is no merit in the contention that embezzlement of the money could not take place without a demand for its return having been previously made by the Finance Corporation. It is true that a demand, followed by a refusal, is sometimes indispensable evidence of embezzlement; but it is the fraudulent and felonious conversion of the money or other property which constitutes the offense, and that may often be proved without a demand. Proof of demand and refusal is not essential to the consummation and establishment of embezzlement where, as here, there is other proof sufficient to establish the fraudulent and felonious conversion of the money. People v. Hatch, 163 Cal. 368, 125 P. 907; People v. Crane, 34 Cal. App. 599, 168 P. 377.

Complaint is made of certain instructions given by the court and of the rejection of others requested by appellant. It would serve no useful purpose to give to these assignments particular notice. It is enough to say that we have taken the pains carefully to examine all of them, and have found nothing in the record that is detrimental to appellant's substantial rights.

The judgment and the order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

79 Cal. App. 618

PARKER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

(Civ. 5414.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1926.)

1. Appearance 🔑9(2).

Petitioner who appeared only for limited purpose of objecting to court's jurisdiction in contempt proceeding *held* not to have waived right to make such objection.

2. Contempt 🔑44—Court of particular county held without jurisdiction to punish for contempt of order of court of concurrent jurisdiction in another county.

Where superior court of K. county ordered defendant to pay certain monthly amount for support of his minor child, court of concurrent jurisdiction in another county *held*, in view of Code Civ. Proc. § 416, without jurisdiction to punish for contempt of such order.

Application for writ of prohibition by Lawrence E. Parker against the Superior Court in and for Los Angeles County to prevent hearing of contempt proceeding. Writ granted.

Fred C. Bigby, of Los Angeles, for plaintiff.

Clark & McCall, of Alhambra, for defendant.

CRAIG, J. An action was instituted in the superior court of Kern county by Dorothy M. Parker against Lawrence E. Parker, and after being duly prosecuted an order was made by the terms of which the defendant was required to pay the plaintiff each month $25 for the support of the minor child of the parties during its minority. Thereafter a proceeding was begun in the superior court of Los Angeles county by the filing of a complaint and affidavit, each of which alleged the making of the above-mentioned order by the superior court of Kern county, the failure of Lawrence E. Parker to make any payments to Dorothy M. Parker thereunder, and the continuance of the minority of the child of the parties. In addition to these facts the affidavit alleged Parker's failure to make payments was a willful and contemptuous refusal to obey the order of the court. Upon the filing of the complaint and affidavit, the superior court of Los Angeles County issued an order to show cause directed to Parker, and requiring him to appear before it and show cause, if any he might have, why he should not be punished for contempt. In obedience to this order he appeared in the last-named court, but objected to its proceeding or taking any action against him on the ground that it had no jurisdiction to hear or determine the cause. Notwithstanding his objections, the court, so it is alleged in the petition now presented to this court, threatens to proceed, and will, unless restrained, determine the matter and the issue presented by the complaint and affidavit filed in the Los Angeles superior court, to wit, the alleged contempt of Lawrence E. Parker for having failed and having refused to obey the order of the superior court of Kern county.

It is urged in support of the claim that the superior court of Los Angeles county has jurisdiction to proceed in this matter; that since section 416 of the Code of Civil Procedure provides that jurisdiction is acquired by the service of summons, such jurisdiction was obtained when Parker was served with summons, in this instance; that the court having acquired jurisdiction, the action being one in personam, the court is deemed to have control of all subsequent proceedings; and that under such circumstances, even though the whole matter is within the jurisdiction of the superior court of Kern county, there is no objection to a subsequent action in another jurisdiction.

[1, 2] We think the section of the Code and cases cited by respondent to the effect that jurisdiction is acquired by the service of summons are inapplicable to the facts of this controversy. Of course, the service of summons gives jurisdiction if the parties and subject-matter are so circumstanced that the court may have jurisdiction; but if for any reason the court issuing the summons can have no jurisdiction of the property, as where suit is instituted to quiet title to land situated in another county, the service of summons would obviously have no effect upon the matter of the court's jurisdiction. Nor would the service of summons in an action in personam give the court jurisdiction so that one who was not subject thereto would be prevented from declining to have his cause tried in that court. It is too plain for argument that otherwise there would be no opportunity for an objection to the court's lack of jurisdiction to be raised or considered. In the instant case the petitioner appeared only for the limited purpose of objecting to the court's jurisdiction, and therefore cannot be said to have waived his right to make such objection. The superior court of Kern county has full power to punish for contempts of its orders. Having such power, it is not within the province of another court of concurrent jurisdiction to interfere. This elementary principle was stated in Otis v. Superior Court, 148 Cal. 129, 130, 82 P. 853, as follows:

> "Every court is the exclusive judge of its own contempts, and its judgment is subject to review only upon the point of jurisdiction."

The same principle is stated in Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am. St. Rep. 119, although the subject being dealt with was not one of contempt. If the superior court of Los Angeles county has authority to punish for contempt of the order of the superior court of Kern county, it also has authority to relieve from such contempt, or to modify the order. These are matters exclusively within the province of the court which tried the case and still retains jurisdiction of such subsequent proceedings as may be required.

This is really an abortive attempt to institute an action. Until the affidavit and complaint were filed there was no proceeding in the superior court of Los Angeles county. The complaint contains no material facts in addition to those stated in the affidavit. The whole proceeding is really nothing more than would be necessary to bring the defendant to account before the superior court of Kern county in an effort to compel him, under contempt proceedings, to obey the judgment of that court. The filing of the complaint in Los Angeles county adds nothing to the proceeding by way of giving it the quality of a suit at law. It is nothing more than a citation of the superior court of Los Angeles county to enforce the judgment of the superior court of Kern county. The entire matter is within the exclusive jurisdiction of the latter county.

The peremptory writ of prohibition will issue.

We concur: WORKS, P. J.; THOMPSON, J.

---

79 Cal. App. 576

PEOPLE v. VIETS et al. (Cr. 942.) *

(District Court of Appeal, Third District, California. Oct. 29, 1926.)

1. Criminal law 🔑510.

Pen. Code, § 1111, imperatively requires independent evidence corroborating accomplice's testimony, on which proof of charge is primarily predicated, to sustain conviction.

2. Criminal law 🔑511(2)—Evidence slightly tending to implicate defendant in commission of crime sufficiently corroborates accomplice.

Evidence corroborating accomplice's testimony need not be sufficient to establish guilt, some testimony tending, at least slightly, to implicate defendant in commission of crime charged being sufficient.

3. Criminal law 🔑511(1).

In trial for grand larceny of turkeys, evidence independent of accomplice's testimony *held* sufficient corroboration thereof.

4. Criminal law 🔑511(4)—Opportunity to commit crime and unexplained possession of stolen property may be sufficient, together with proof of corpus delicti, to support conviction.

Neither mere opportunity to commit larceny, unless excluding all reasonable opportunity for its commission by another, nor unexplained possession of stolen property, is sufficient to justify conviction, but, taken together with full proof of corpus delicti, may be regarded on appeal as amply supporting conviction.

5. Criminal law 🔑507(5).

One without knowledge that turkeys were stolen until after he received them would not be accomplice whose testimony must be corroborated.

6. Criminal law 🔑742(2), 1144(16)—Whether receiver of stolen turkeys was accomplice held for jury, and conviction of larceny will be construed to imply finding that such witness was not accomplice, if necessary to support it.

Whether one receiving stolen turkeys was accomplice in larceny, so as to require corroboration of his testimony, would be for jury on conflicting evidence as to his knowledge of theft when receiving them, and conviction of larceny will be construed to imply finding that he was not an accomplice, if necessary to support it.

---

*Hearing denied by Supreme Court December 27, 1926.

7. Criminal law 🔑507(3)—Wife concealing or protecting culprits with knowledge, acquired after thefts, that turkeys received by husband were stolen, would not be "accomplice," whose testimony must be corroborated (Pen. Code, §§ 32, 1111).

Wife concealing her knowledge, acquired after theft of turkeys received by her husband, that they were stolen, and protecting culprits with such knowledge, would be, not an "accomplice," whose testimony must be corroborated, under Pen. Code, § 1111, but, at most, an accessory, within section 32.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

8. Criminal law 🔑823(2)—Instruction that few days' difference in alleged and actual dates of offense is immaterial held not error as telling jury offense was committed, in view of succeeding correct statement of rule.

Instruction, that few days' difference in alleged and actual dates of offense is not material, *held* not erroneous as telling jury that offense had been committed, in view of succeeding sentence correctly stating that it is sufficient if offense was committed within three years before filing of indictment for grand larceny and one year before filing of that for petit larceny.

9. Criminal law 🔑1172(8)—Instruction that few days' difference in alleged and actual dates of offense is immaterial, held harmless to defendant, in view of unconflicting evidence sustaining allegation as to time.

In trial for grand larceny of turkeys, which, unconflicting evidence showed, were stolen by some one at time and place alleged, instruction that few days' difference in alleged and actual dates of offense is immaterial, *held* harmless to defendant, even if invading domain of fact on question of corpus delicti.

10. Criminal law 🔑763, 764(8)—Instruction to convict if corroborating evidence showed that defendant committed crime held not error as impinging on jury's function to determine its sufficiency to corroborate accomplices' testimony (Pen. Code, § 1111).

Instruction to convict if corroborating evidence, as whole, showed that crime was committed by defendant *held* not erroneous as impinging on jury's function to determine sufficiency of such evidence, under Pen. Code, § 1111, to corroborate accomplices' testimony.

11. Criminal law 🔑741(5).

Whether evidence is corroborating evidence, within Pen. Code, § 1111, is law question for court, but sufficiency thereof to corroborate accomplice's testimony is fact question for jury.

12. Criminal law 🔑1172(7)—Instruction to convict if evidence corroborating accomplice showed that defendant committed crime held not prejudicial, but favorable, to him.

Instruction to convict if evidence corroborating accomplices showed that crime was committed by defendant *held* not prejudicial, but favorable, to defendant, corroborating evidence merely tending to connect him with commission of crime being sufficient.

13. Criminal law 🔑763, 764(13)—Instruction that jury may consider all circumstances tending to show guilt held not error as telling them that evidence disclosed such circumstances or circumstances sufficient to prove guilt.

Instruction that jury may consider all circumstances in evidence tending to show guilt, in arriving at defendant's guilt or innocence, *held* not erroneous as telling jury that evidence disclosed such circumstances or circumstances sufficient to prove guilt.

14. Criminal law 🔑763, 764(5).

Judge may tell jury that certain evidence has been received to prove certain facts without stating or suggesting its effect or commenting on its weight.

15. Criminal law 🔑1144(14).

Instruction must be considered on appeal, as presumptively considered by jury, in light of other parts of court's charge.

16. Criminal law 🔑823(15)—Instruction to consider all circumstances tending to show guilt held harmless to defendant, in view of other instructions as to reasonable doubt.

Instruction that jury might consider all circumstances in evidence tending to show guilt *held* harmless to defendant, in view of instructions that jury must decide whether any particular circumstance is necessary link in chain of evidence, and, if so, it must be proved beyond reasonable doubt, and that each material fact and circumstance necessary to complete chain of independent facts tending to establish guilt should be established as main fact beyond reasonable doubt.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Homer Viets, Lynn Sischo, and George McKinney were indicted for, and defendant Sischo was convicted of, grand larceny, and he appeals. Affirmed.

George R. Freeman, of Willows, and Edward Bickmore, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were charged by an indictment duly returned and filed in the superior court of Glenn county with the crime of grand larceny. The defendant Sischo, being separately tried, was found guilty of the crime so charged, and he appeals from the judgment of conviction and the order denying his motion for a new trial. He claims that he is entitled to a reversal of the judgment and the order upon two grounds, to wit: (1) that the verdict is without sufficient support in the evidence; (2) that the trial court misdirected the jury upon the law of the case. The ground first stated involves the question whether the testimony given for the people in support of the charge by two alleged accomplices of the appealing defendant in the commission of the alleged crime, and which was the only direct testimony presented by the people connecting the said accused with the commission of the offense, was corroborated by other testimony, as required by section 1111 of the Penal Code.

The property alleged to have been stolen by the defendants consisted of a number of turkeys of which one E. E. Willard was the owner. The indictment alleges that the three defendants named in the title hereof stole said turkeys "on or about the 15th day of November, 1925," and, while the number of turkeys alleged to have been stolen by the defendants on or about said date is stated in the indictment to be 150, the district attorney, in his opening statement to the jury, said that the actual number feloniously taken on or about the time so alleged was 60, and, accordingly, at the trial attempted to prove the theft by the defendants of no greater number of the turkeys on the occasion referred to in the indictment.

It appears that the E. E. Willard named in the indictment as the owner of the stolen property was and had been, for some time prior to the 14th day of November, 1925, engaged on an extensive scale in the business of raising turkeys for marketing purposes, on a ranch a few miles east of the town of Willows, known as the Hess or Lear place. At the time mentioned, he had 7,000 or 8,000 turkeys grazing or ranging on said ranch and had men employed to herd them. The Hess or Lear ranch adjoins a tract of land known as the Singletary ranch, which was, at the date stated in the indictment and for some time prior thereto had been, in the possession and occupancy of one W. B. Spurlock. Willard's turkeys, or a large number of them, began to wander over to and graze on the Singletary ranch, and at nighttime would roost on the fences and outhouses on said premises.

The defendants Sischo and Viets were itinerant laborers, or, at all events, they were not engaged in carrying on any particular business and were without any permanent place of abode. Some time in the month of October, 1925, they found their way to the Singletary ranch without financial means, but it appears that, with the permission of Spurlock, they entered into the possession and occupancy of a small house—perhaps an ordinary cabin—situated on the said ranch about a quarter of a mile from the house occupied by Spurlock. This cabin or house is spoken of in the testimony of Viets as "the little red house." There is some testimony to the effect that Sischo and Viets secured possession of said house with the intention and for the purpose of establishing thereat duck-hunting facilities for the accommodation, for a consideration, of such sportsmen as might, in the open season, desire to engage in duck hunting in that locality, either for sport or the market. This testimony, however, was of consequence at the trial only in so far as it tended to rebut what seems to have been the theory of the district attorney that Sischo and Viets took up their abode in the "little red house" for no other purpose than to acquire convenient opportunity for stealing those of the turkeys of Willard that found their "roosting" places on the fences and outhouses on the Singletary ranch, and that Spurlock was agreeable to that plan or scheme.

The witness first called by the people was Viets, who admitted that he took part in the stealing of the turkeys. His story of the criminal operations leading to his arrest on the charge set forth in the indictment makes him an accomplice of the defendant Sischo in the commission of said crime, assuming that the story was true. His testimony, given here in narrative form, is: That, previous to the time that he and Sischo took up their abode in the "little red house," he had known the defendant McKinney some 15 or 16 years, and had at times, for brief periods, worked for said defendant on the latter's place, near Butte City, in Glenn county; that when he, with Sischo, located in the cabin on the Singletary ranch, both he and Sischo were entirely without financial means, although Sischo owned a Ford automobile, and, seeing the Willard turkeys grazing on the said ranch and noting that they roosted at night on the fences and buildings situated thereon, it occurred to him and Sischo that "some easy money" could be obtained by stealing and selling the turkeys. This proposition was suggested to Spurlock, who encouraged the launching and carrying out of the criminal enterprise upon an agreement between the three that each should be entitled to and receive one-third of the proceeds of the sale of all turkeys in the taking of which Spurlock should actively participate. Whether McKinney was a party to the original agreement is not clearly made to appear by Viets' testimony.

However, after the agreement mentioned was entered into between the three men, the stealing of the first "bunch" of turkeys (13 or 14 in number) occurred in the month of November, 1925, but prior to the 15th day of that month. These turkeys were taken by Viets in Sischo's Ford car to the ranch of McKinney and sold to the latter. Viets did not then tell McKinney that the turkeys had been stolen, but soon thereafter—either the same or the succeeding day—while Viets was accompanying McKinney in a car to the town of Dayton in Butte county, which is situated not far distant from Butte City, Glenn county, he (Viets) said to McKinney that the 13 or 14 turkeys referred to were "stolen turkeys," to which McKinney answered that he did not care whether they were stolen or not. Subsequently, McKinney entered into an agreement with Sischo and Viets to steal others of the Willard turkeys found roosting on the Singletary premises. This arrangement was, in substance, that Sischo and Viets were to steal the turkeys, that the "birds" should be taken to McKinney's ranch and that they should be disposed of and the proceeds of all sales to be divided, share and share alike, between the three, provided that the proceeds of the sales of all turkeys in the stealing of which Spurlock should take an active part should be divided into four parts, each of the quartet to take a one-fourth share or interest. On or about the 15th day of November, 1925, in the nighttime, Sischo and Viets captured 60 of the Willard turkeys perched on the fences and buildings on the Singletary ranch. The legs of the turkeys were fastened together by means of ropes or large strings and placed in two automobiles, the one Sischo's Ford car and the other a car owned by Spurlock, the last named having loaned his car to Sischo and Viets for the purpose of carrying the turkeys to the McKinney ranch. Sischo drove his own car and Viets drove Spurlock's car. When a short distance from McKinney's, the car of Sischo ran out of gas and was for that reason "stalled" on the road, and thereupon Sischo and Viets transferred the turkeys from the former's car to the car driven by Viets. The latter then, with the 60 turkeys, proceeded to McKinney's ranch, reaching there at a late hour of the night. The turkeys were by Viets and McKinney taken from the car, their legs were unmanacled, and the turkeys turned into a barn or chicken house. McKinney drained a quantity of gas from his own car and accompanied Viets in Spurlock's car to the point at which Sischo's car was "stalled," and deposited a sufficient amount of gas in the tank of Sischo's car to enable him (Sischo) to drive it back to the "little red house," to which he thereupon immediately started to return. Viets took McKinney to his home and then returned to the Singletary ranch.

On different occasions, always in the nighttime, other turkeys of Willard were taken by Sischo and Viets and conveyed in automobiles to the McKinney ranch. McKinney himself owned about 8 head of turkeys only. The 60 head of turkeys taken "on or about" the 15th day of November, 1925, were "turned loose" on the McKinney premises and thus were mixed with McKinney's and the other turkeys taken from time to time from the Singletary ranch and belonging to Willard. Some of the stolen turkeys were killed and dressed or "picked" on the McKinney ranch, Sischo assisting in that work, and were thereupon shipped to two commission houses—one in San Francisco and the other in Oakland. About 90 head were sold alive to one Linville, a farmer residing on his farm situated near the town of Princeton, in Glenn county, and five or six miles from McKinney's. There were three shipments made to the commission merchants referred to. The proceeds of the sales were received in the form of checks or drafts, and were divided between Sischo, Viets, and McKinney, the first named "receiving little better than one-third each." The sale of the turkeys to Linville brought the sum of $225. McKinney received the amount and thereafter drove to the "little red house" in which Sischo and Viets resided and gave each a one-third part thereof, and retained as his share one-third of the sum. Viets testified that from all the Willard turkeys stolen by him and his codefendants, the "snouts," or, as they are more properly to be called, the "wattles," had been removed prior to the time the turkeys were taken by them.

The testimony of the defendant George McKinney was in harmony with that of Viets to the effect that on or about the 15th day of November, 1925, in the nighttime (he thought near the hour of 2 o'clock a. m.) approximately 60 head of turkeys, marked by the removal of the wattles therefrom, were brought to his place by Viets, and further to the effect that, having been told by Viets that Sischo's car had "stalled" on the road a short distance from his (McKinney's) place for the want of sufficient gas to proceed further, he drained from his own car a quantity of gas and with Viets went to the spot where Sischo had been forced to stop and provided the latter's car with enough gas to take him back to the Singletary ranch. McKinney also stated that some of the turkeys were killed and "picked" on his place, were shipped to the commission houses above mentioned from the town of Biggs in Butte county, that, in all instances but one, he personally received checks from said houses as in payment for the turkeys, and that he caused the checks to be cashed and thereupon divided the proceeds in equal parts between Sischo, Viets and himself. He further testified that, besides the mark borne by the turkeys above described, their toes had also been removed or amputated. Sischo (McKinney proceeded) assisted in picking the turkeys preparatory to their shipment to the commission houses. About 80 of the turkeys, he continued to testify, were sold to Linville, above mentioned; that for these he received $225; that, of that amount, he deposited $75 in the bank at Butte City to his own credit, and the balance he delivered to Sischo and Viets at their cabin on the Singletary ranch, he having, in company with Viets, gone there for that purpose. McKinney explained that, on going into the cabin, he met Sischo and that he placed the money on a table and at the same time remarked, "Here is the settlement of the turkeys," to which remark Sischo made no answer; that, on that occasion, either Sischo or Viets did say that the turkeys taken by them to McKinney's and disposed of as explained had been stolen. As to the check from the commission house as payment for a certain shipment of turkeys which he said was not sent to or personally received by him, McKinney stated that Viets and Sischo visited his (McKinney's) home, and that Viets delivered to the witness a portion of the money received on said check. McKinney declared that, prior to his visit to the "little red house" to deliver to Sischo and Viets their shares of the money received on the sale of certain turkeys to Linville, he had never had any conversation with Sischo and Viets, or either, in which it was said that the turkeys delivered by the latter at his place were stolen. McKinney was not cross-examined by Sischo's counsel.

Mrs. McKinney, wife of the defendant of that name, testified that turkeys were brought to their place, near Butte City, on two different nights; that, all together, she thought that more than 100 head had been brought and left on their premises on the night referred to by her; that, other than such information as she received from her husband on the subject, she had no knowledge as to the parties who took the turkeys to their home. On one of the occasions mentioned by her, she stated, she was at the home of her mother where she remained overnight, and on the other she was in bed at her own home, but that the hour was so late when the parties arrived there with the turkeys that she did not arise, and, therefore, saw neither the parties nor what occurred at that time on their premises. She stated that on several occasions she saw Sischo on their place and engaged in "picking" turkeys after the turkeys were brought there, as above stated by her; that she then owned 9 turkeys, which were at the time running about her premises; and that, two days before Thanksgiving, 1925, Sischo "picked" one of her turkeys for the Thanksgiving dinner at their home.

W. B. Spurlock, spoken of above, was introduced by the people, and testified that in November, 1925, he was residing on the Singletary ranch; that at that time he owned and maintained at the ranch an Essex automobile; that he himself owned no turkeys; that there were then a number of turkeys "ranging on and about" the Singletary ranch; that, on several occasions, he called Willard on the telephone and told him about the turkeys being and grazing on said ranch, and that thereafter "the herder came around." Spurlock, on advice of his attorney, refused further to testify on the ground that the testimony sought by the district attorney to be elicited from him might tend to incriminate him, and such refusal was sanctioned on that ground by the court.

Alvarez Dowden, who resided with his parents about seven miles southeast of Butte City and a half-brother of the wife of the defendant George McKinney, testified that he was a visitor to the McKinney place in the month of November, 1925, after the turkeys in question were taken there, and that on that occasion Sischo and George McKinney were engaged in picking turkeys; that at that time he (witness) remained at McKinney's for about half an hour, during which time Sischo and McKinney picked one turkey each; that some of the turkeys were running about in the yard and some were in the chicken house; that they (Sischo and McKinney) were "catching" the turkeys in the chicken house; that he himself caught one. He further stated that, although Viets was at McKinney's at the time, he could not remember whether he (Viets) "picked" any turkeys. He said that there were about 90 head of turkeys on McKinney's premises at that time.

Joe Dowden testified that in the latter part of November or about the 1st of December, 1925, he was a visitor at the McKinney place, and there saw Viets and Sischo, and also saw McKinney deliver a piece of paper to Sischo, but that he was too far away from where the two then stood to discern or learn the nature of the paper.

E. E. Willard testified that for a number of years prior and down to November and December, 1925, he was engaged in the business of raising, buying, and selling turkeys; that in 1925 he had about 8,000 head of turkeys; that he divided them into several bands or herds, and kept them in different places in the neighborhood of his ranch; that in November, 1925, a large number of his turkeys roamed over and ranged and roosted on the Singletary ranch. He stated that, prior to November, 1925, he marked all his turkeys by cutting off their wattles. The market value of his turkeys in said month of November, he said, was about $5 per head. About one month after the 15th day of November, 1925 (Willard continued), he went to the farm of Linville (mentioned above) near Princeton, and there saw 84 head of his turkeys; that he knew that they were his turkeys because of the fact that from all that number the wattles had been removed, as he had himself marked or caused them to be marked. He also on the same day went to the McKinney ranch, where he saw three of his turkeys, marked as indicated above. In this connection, it should be stated that McKinney stated, when testifying, that three of the stolen turkeys were not disposed of, but were kept alive on his place.

Deputy Sheriff Heard, who was present with Sischo and the district attorney in the latter's office, in the latter part of December, 1925, testified that on that occasion the witness, in a conversation with Sischo, accused the last named of stealing the turkeys in question; that Sischo replied:

"You fellows have got the dope on me; I will take the jolt rather than let Spurlock take it."

The foregoing statement embraces, in synoptical form, substantially all the testimony introduced by the people. The defendant did not testify nor offer any testimony in rebuttal of the case made by the people.

Section 1111 of the Penal Code, among other things, declares:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

[1, 2] By the above provision of section 1111, the people, in the prosecution of a party for a public offense, if the proof of the charge is predicated primarily upon the testimony of an accomplice of the accused in the commission of the crime, are imperatively required to produce evidence, independent of the testimony of the accomplice, which corroborates that of the latter; otherwise, the conviction of the accused will be wholly wanting in a legal foundation to uphold it. The corroborating evidence, however, need not, in degree, be such as to establish guilt, "for, in that event, the testimony of the accomplice would not be needed." People v. Ames, 39 Cal. 403, 404; People v. Compton, 123 Cal. 403, 56 P. 44. All that is required in such a case is that there be produced some testimony other than that of the accomplice which tends, in some slight degree at least, to implicate the defendant in the commission of the crime for which he is on trial. People v. Clough, 73 Cal. 348, 351. 15 P. 5; People v. Wagner, 36 Cal. App. 41, 171 P. 699.

> "If there be some independent evidence fairly tending to connect the defendant with the commission of the crime, then the testimony of the accomplice is corroborated within the intent of [section 1111 of the Penal Code]." People v. Blunkall, 31 Cal. App. 778, 161 P. 997.
>
> "The corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration." People v. McLean, 84 Cal. 480, 482, 24 P. 32.

See, also, People v. Mace, 71 Cal. App. 10, 234 P. 841.

[3] Measured by the requirement of section 1111 of the Penal Code, as construed by the appellate courts of this state as indicated by the foregoing cases and many others which have not been and need not be named, as to the quantum of evidence which will suffice for the corroboration of the testimony of an accomplice implicating his codefendant in the commission of a crime, the evidence introduced by the people in this case, independent of the testimony of Viets, admittedly an accomplice, and that of McKinney, assuming that he, too, was a party to the crime charged and therefore an accomplice, is amply sufficient as in corroboration of the testimony of said witnesses. Eliminating from consideration entirely the testimony of Viets and George McKinney—assuming that neither had testified—and there remains, as in proof of guilt, the testimony disclosing these facts: (1) That prior to and at the time mentioned in the indictment a large number of the Willard turkeys had been and were stolen from the Singletary premises. (2) That Viets and Sischo had been and then were residing in a cabin on said ranch, and thus were afforded an opportunity for taking the turkeys. (3) That the Willard turkeys had been and were marked in such an unusual manner as to afford their ready identification by their owner, or by any one familiar with the "Willard mark," as thus it may be described. (4) That on each of two different occasions, and late in the nighttime, a large number of turkeys was taken to and left at the McKinney ranch, one of these occasions being the time stated in the indictment, when about 60 head were taken to and left at said place or ranch. (5) That in the month of November, 1925, McKinney had on his premises 8 or 9 turkeys only which belonged to him, but that in said month and about the time referred to in the indictment there were running about his premises or cooped in the chicken house thereof 100 or more turkeys, other than those of which he was the owner. (6) That 80 or more turkeys bearing the Willard mark, and which Willard, a few days subsequent to the discovery of the loss of his turkeys, saw on the Linville ranch, situated a few miles only from the McKinney place, were positively identified by Willard as his turkeys and of the number which had been taken from the Singletary premises at the time alleged in the indictment. (7) That, on the same day that he saw and identified the turkeys last referred to, Willard also found at McKinney's 3 turkeys, bearing his mark, and which he positively identified as turkeys belonging to him which had been stolen from the Singletary ranch, at the time stated in the indictment. (8) That the appealing defendant, Sischo, after the date named in the indictment as the time of the commission of the larceny charged, assisted, on several different occasions, in the "picking" of turkeys on the McKinney ranch. Thus we have before us, aside from the testimony of both Viets and McKinney, proof of the stealing of the turkeys, of opportunity to commit the crime, of the positive identification of the stolen property by the owner, and of the possession thereof by Sischo and his codefendants within a brief time subsequent to the date on which it is alleged that the crime charged was perpetrated.

[4] The circumstances thus recounted, it cannot be denied, afford not slight but very strong corroborative support of the testimony of Viets and McKinney. In fact, the conclusion that the testimony presented by the people, apart from that of Viets and McKinney, would itself be sufficient to uphold a conviction would not be stretched or far-fetched. It is true that neither mere opportunity to commit a crime, unless it excludes all reasonable opportunity for its commission by another, nor the unexplained possession of stolen property, standing alone, is sufficient to justify a verdict of guilty, and will therefore not support such a verdict. People v. Tarbox, 115 Cal. 57, 63, 46 P. 896, 897; People v. Silva, 48 Cal. App. 728, 737, 192 P. 330, on the proposition first stated; People v. Boxer, 137 Cal. 563, 564, 70 P. 671; People v. Nichols, 39 Cal. App. 29, 34, 177 P. 861, on the proposition secondly stated. But each of those circumstances takes on a greater amount of incriminatory significance or evidentiary value as in proof of guilt when they are found to coexist in the same case than when each stands alone or by itself without the support of other inculpatory circumstances, and, taken together, with full proof of the corpus delicti, may well be regarded on appeal as ample support for a verdict against the accused. At any rate, as stated, the corroborating evidence in this case is such as fully to meet the test of sufficiency prescribed by section 1111 of the Penal Code, as that section has been construed and the doctrine thereof applied by the higher courts of the state.

[5, 6] To what is said above it is well to add that, while some of the circumstances of the criminal transactions seem to be equally as strong against McKinney as against Viets and Sischo, still McKinney testified that he had no knowledge of the fact that the turkeys had been stolen until after they were brought to his place by Viets and Sischo. From that statement the inference would follow that he was not actively concerned in the stealing of the turkeys or the scheme to steal them. If this was the fact then McKinney, while doubtless guilty under the evidence of receiving stolen property, would not be an accomplice of Viets and Sischo in the larceny of the turkeys. Pen. Code, § 1111. The most, then, that could be said of the situation as to McKinney would be that an evidentiary conflict arose upon the question of whether he was an accomplice, in which case it would fall within the sole province of the jury to decide, upon the whole evidence, whether McKinney was or was not, in fact, an accomplice. In such case, the verdict, if necessary to its support, would be construed to imply a finding by the jury that he was not an accomplice. The proposition, however, is not of material consequence in this case since, as is hereinabove disclosed, the testimony of both Viets and McKinney is, as to the essentially vital matters to which it relates, substantially the same, and the corroboration of the testimony of the one is necessarily the corroboration of that of the other.

[7] As to the witness Mrs. George McKinney, there is no evidence in the record, nor, indeed, it is here claimed, that she was a particeps criminis in the asportation of the turkeys, and she therefore cannot be regarded as an accomplice of Viets and Sischo or of her husband, assuming that he was a party to the stealing. The most that could be said of the effect of the testimony upon her position in the transactions involving the felonious taking of the turkeys by Sischo and Viets is that a possible interpretation of her own testimony by the light of the other circumstances in the case might lead to the conclusion that, after the thefts, she acquired and possessed knowledge of the felonious taking of the turkeys, that she concealed the fact of such knowledge from the authorities, or, having such knowledge, gave protection to the culprits, and thus became an accessory (Pen. Code, § 32), or, as it was described at common law, "an accessory after the fact." But, even if such were her actual position in the case (and we do not affirm or intend even to insinuate that the record shows it), she would not be an accomplice, under our statute. Pen Code, § 1111, supra.

[8] The next contention is that the court committed grave error in the following parts of its charge to the jury:

"1. *A few days' difference in the dates upon which the offense was charged to have been committed in the indictment, and upon which the same was actually committed is not material.* It is sufficient so long as the offense was committed within three years before the filing of the indictment as to grand larceny, and within one year before the filing of the indictment as to petit larceny."

"(9) Corroborating evidence, in addition to that of an accomplice, need not go to every fact and detail covered by the accomplice's testimony, and such corroborating evidence may be of a character that, if it stood alone, it would be entitled to but little weight, though it must be more than to create mere suspicion, but it need not be of itself absolutely convincing, and it may be circumstantial as well as by direct evidence. *And, if you find therefore from the corroborating evidence, as a whole, that the crime was committed by the defendant, you should vote guilty.*"

"(12) The jury is entitled to take into consideration in arriving at the guilt or innocence of the defendant *all of the circumstances in evidence, tending to show such guilt,* and if such consideration of the evidence shows the commission of the offense, your verdict should be guilty."

[9] The complaint against the instruction, first in the order above given, is predicated upon what is said in the language therein in italics, whereby, it is here urged, the court

virtually told the jury that the offense charged in the indictment had actually been committed. The entire instruction, the part particularly here assailed as well as the other parts thereof, contains a correct abstract statement of a thoroughly established rule in criminal law, and, we think, when considered in connection with the entire charge of the court, may properly be regarded as no more than such a statement. But, granting that the jury might have understood it to be the purpose of the court to apply the challenged clause of the instruction concretely or to the instant case, still it is clear that it could have done the accused no harm, since there can be no question but that the evidence, without conflict, discloses that the crime charged and described in the indictment was committed by some party or parties at the time and place indicated in the accusatory pleading. There is, indeed, no pretense here, nor was there any serious claim at the trial, that the turkeys were not stolen at the time and place mentioned by somebody. The only question really open to controversy at the trial was whether there was sufficient legal evidence presented by the people to justify a conviction of the appealing accused under the indictment, and, as is plainly to be seen, the instruction under review, even if is to be viewed as being susceptible to the construction that it slipped a trifle into the domain of fact upon the question of the corpus delicti and that the jury might have so considered it, was not intended to take from the jury, nor could it have that effect, the question of the guilt or innocence of Sischo.

[10, 11] To the instruction secondly presented hereinabove (instruction No. 9), the objection is that the court thereby trespassed upon the function of the jury in that, in effect, it therein told the jury that there was introduced by the people evidence legally corroborative of that of the accomplice or accomplices. The objection, as a legal proposition, is without merit. Whether the evidence offered for the purpose of corroborating the testimony of an accomplice is "corroborating evidence," within the intent of section 1111 of the Penal Code, is a question of law to be passed upon and determined by the court. Whether such evidence, being introduced upon the assent of the court, is sufficient to meet the requirement of said section as to the quantum of proof necessary to corroborate the testimony of the accomplice, is a question of fact for determination by the jury. As to this the instruction did not, obviously, impinge upon the function of the jury, but left the question solely to their decision upon an instruction founded upon or, substantially, in the language of section 1111.

[12] The rights of the defendant on trial, however, could not, in any event, have suffered prejudice from the instruction or the language thereof to which objection is here specifically directed (the language in italics), since the rule as to the corroboration of an accomplice is thereby stated more favorably to the accused than he was entitled to have it stated, in that said language implies, or could by the jury reasonably have been understood to imply, that the corroborating evidence must be sufficient to show "that the crime was committed by the defendant"; whereas, as before explained, the corroborating evidence is sufficient if it *tends* to connect the defendant with the commission of the crime, and, if the jury justifiably finds this to be so, then the testimony of the accomplice may be considered and given, as may that of any other witness, such weight as the jury may deem it to be entitled to, and upon that testimony, with such corroborating proof, the jury may find the accused guilty, if they be satisfied that the testimony of the two classes is true and together sufficient to establish guilt.

[13, 14] The objection to the instruction third in the order given above (No. 12) is devoid of substantial merit. The specific complaint against the instruction arises from the language thereof in italics, as to which it is insisted that the court thereby in effect stated to the jury that the evidence introduced in the case disclosed circumstances tending to show the guilt of the defendant on trial, and, so it is argued, thus trespassed upon the exclusive right of the jury to find or determine whether there were in fact any such circumstances developed by the evidence. It has never been doubted that a trial judge may properly state that certain evidence has been received into the case to prove a certain fact without, of course, stating or suggesting its effect or commenting upon its weight. We can perceive nothing more than that in the instruction under review. There may be circumstances disclosed by the evidence *tending* to support or prove a certain issue, yet the jury may believe and find that, although tending to prove the fact, they are not sufficient to prove it to the degree legally required. The instruction does not say that there were circumstances sufficient to prove the guilt of the defendant on trial.

[15, 16] Moreover, the instruction, which, it seems to us, states a mere commonplace, must be considered, as presumptively it was considered by the jury, in the light of other parts of the charge of the court on the law. Elsewhere in its charge the court instructed:

> "It is for you to decide whether or not any particular fact or circumstance is a necessary link in the chain of evidence, and, if you decide that such fact or circumstance is a necessary link, then it must be proved to your satisfaction beyond a reasonable doubt."

Again, the court instructed:

> "When independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged, each ma-

terial fact and circumstance necessary to complete such chain or series of independent facts tending to establish the guilt should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that each essential and independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt, and, if the jury should then have a reasonable doubt upon any single essential fact relied upon to complete the chain of circumstances, they cannot convict the defendant as long as they entertain such doubt."

With those instructions in view, it is difficult to see how the defendant's case could have been damaged by the instruction under present consideration, assuming, but not deciding, that the court, by giving the latter, strayed a short distance across the line of demarcation between questions of law and those of fact.

The judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. CASEY. (Cr. 2950.)

(Supreme Court of California. Nov. 8, 1926.)

1. Criminal law 🔑643.

When official phonographic reporter is present at trial it need not affirmatively appear that defendant requested that arguments be taken down before he may assign as error anything occurring during arguments and of which no report was made.

2. Criminal law 🔑1137(1).

Defendant, having acquiesced in absence of reporter during prosecuting attorney's argument, cannot assign as error anything occurring during arguments.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

John J. Casey was convicted of infamous crimes against nature. Conviction was affirmed by the District Court of Appeal (249 P. 525), and defendant petitioned for hearing in the Supreme Court. Petition denied.

Wm. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

PER CURIAM. Appellant's petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal is denied.

[1, 2] However, we are not in accord with the intimation in the opinon that when the official phonographic reporter was actually present at and during the trial it must affirmatively appear that the defendant requested that the arguments of the prosecuting attorney to the jury be taken down before the defendant will be permitted to assign as error anything occurring during the arguments and of which no report was made. But in the case at bar the evidence sufficiently shows that the defendant acquiesced in the absence of the reporter during the argument of the prosecuting attorney, and should not now be heard to complain.

---

199 Cal. 652

CRAIGHAN v. O'BRIEN et al. Members of the Board of Health of the City and County of San Francisco. (S. F. 11557.)*

(Supreme Court of California. Nov. 10, 1926.)

1. Officers 🔑11.

Civil service commission cannot include in any one general classification numerous positions not reasonably related.

2. Municipal corporations 🔑217(3)—Civil service commission could embrace inspector of indigents, tuberculosis head, and field nurse of city in same classification (San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12).

Duties of inspector of indigents, head of tuberculosis division, and field nurse of city of San Francisco *held* so similar that civil service commission, acting under powers given by San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12 (St. 1913, pp. 1611, 1615), could embrace them in same classification.

3. Municipal corporations 🔑217(5)—Employees in same civil service classification may be assigned and reassigned by department head (San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12).

It is competent for department head to assign and reassign employees in same civil service classification without violating civil service provisions of San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12 (St. 1913, pp. 1611, 1615).

4. Municipal corporations 🔑217(5)—Power of civil service reassignment held exercisable only when salaries and duties of positions involved are reasonably within same class (San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12).

Power of reassignment of civil service employees arising out of San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12 (St. 1913, pp. 1611, 1615), is only properly exercisable when salaries and duties of several positions from which and to which assignments are made are reasonably within same class.

5. Municipal corporations 🔑217(5)—San Francisco board of health held authorized to transfer inspector of indigents to position with tuberculosis board (San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12).

Board of health of city of San Francisco *held* authorized by San Francisco City Charter, art. 10, § 5, and article 13, §§ 2, 12 (St. 1913, pp. 1611, 1615), to transfer inspector of indigents to position with tuberculosis board; two positions being in same classification.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Application for writ of mandate by L. A. Craighan against A. P. O'Brien and others, as members of the Board of Health of the City and County of San Francisco, to restore petitioner to certain civil service position. From a judgment granting the writ, defendants appeal. Reversed.

John J. O'Toole, City Atty., of San Francisco (Arthur H. Barendt, of San Francisco, of counsel), for appellants.

Grove O'Connor, of San Francisco, for respondent.

SHENK, J. This is an appeal from a judgment ordering the issuance of a peremptory

---

*Rehearing denied December 8, 1926.

writ of mandamus directing the respondents and appellants, as members of and constituting the board of health of the city and county of San Francisco, to replace the petitioner and respondent in the position of inspector of indigents in the department of health.

There is no dispute as to the facts which we deem material to this controversy. On September 6, 1916, the civil service commission, in accordance with its charter powers, duly established as a distinctive classification in the classified civil service of the city and county the position of "social service worker (includes inspector of indigents)." On the following day the commission, by resolution, directed that an examination of applicants for positions within that classification be held on September 28, 1916, and that due notice be given thereof. The notice was headed "Notice of Examination, Social Service Workers" and specified that an examination of applicants for "positions as social service workers (including inspectors of indigents)" would be held on said September 28th. The notice, among other things, contained the following:

> "The subjects of the examination and their relative weights on a scale of 100 are: (1) Personality and fitness, 30; (2) experience, 30; (3) written test, 40.
>
> "The applicants will be examined orally on subjects Nos. 1 and 2, and will be rated on these subjects by a board of special examiners as in the judgment of such board shall seem just and proper. Subject No. 1 will include education, personal history, habits, age, physical appearance, and address. Subject No. 2 will include experience had in social service work or work relating to the investigation, relief, and rehabilitation of the indigent sick and poor. Experience had in public health work, in nursing, sanitation, teaching, etc., will also be considered.
>
> "Under subject No. 3 applicants will be required to write reports telling what they did while acting as social service workers on certain hypothetical cases, outlined by the examiners, relating to proper treatment and relief of the sick and needy. Under this subject questions will also be asked regarding proper methods for the prevention of the spread of communicable diseases, questions relating to sanitation in homes and places of dwelling, as well as general questions relating to the destitute sick and the duties of a social service worker."

As a result of the examination the civil service commission adopted and established "as an eligible list of social service workers" 15 successful applicants, at the head of which list was the name of the petitioner. On December 29, 1916, the department of health requested the civil service commission to certify the name and address of the person standing highest on the register of eligibles for appointment to the position of social service worker with salary of $85 per month attached to the position and whose duties were to be performed at the central office. A similar request for certification, of date January 12, 1917, and bearing the same number but indicating that the person certified would receive $100 per month and would perform her duties at the central office as inspector of indigents, was transmitted to the civil service commission. In acting upon the request the commission decided that for the purposes of certification the second requisition was unnecessary and that the first be deemed amended so as to contain the change desired by the board of health. Thereupon, on January 13th, the commission directed its secretary to certify the No. 1 eligible on the register of "social service workers." The petitioner was accordingly certified and was immediately assigned to a position in the tuberculosis bureau of the San Francisco Hospital. After performing her duties in that position for several weeks she was transferred by the board of health to the position of inspector of indigents. In that position she worked under the direction of the board of health and the health officer and her duties generally were to investigate the status of those claiming the right to enter the San Francisco Hospital, first, to determine whether they were hospital cases, and, secondly, whether they were in such financial straits as to entitle them to enter. Upon her determination the applicant was accepted or rejected as a patient by the hospital authorities. At times she had assistants in her work. She held this position until November 9, 1922, when she was suspended from duty following charges of incompetency which had been lodged against her. The board of health conducted a trial on said charges, and on March 1, 1923, adopted the following resolution:

> "Resolved that the board of health finds the charges of incompetency as made against Lily A. Craighan, social service worker, not sustained. However, in view of the evidence of apparent discourtesy as developed in the testimony presented, it is the unanimous opinion of this board that for the good of the service Miss Craighan shall be instructed and is hereby directed to report to the health officer for assignment to the social service department of the tuberculosis division of the San Francisco Hospital."

After the adoption of said resolution the plaintiff was instructed by the health officer to report for duty to the tuberculosis bureau. She was thereupon assigned to duty as a nurse in that bureau and rendered services in that capacity (under protest, however, to the effect that she had been illegally deprived of her former position of inspector of indigents) until her appointment in a new classification of field nurses under the following circumstances: On January 4, 1924, the civil service commission held an examination for field nurses. This examination was largely promotional from the class of graduate nurses and social service workers, but did not and would not abolish the old classification of social service workers so long as there were eligibles on the latter list. The plaintiff took the examination for field nurse on January 4, and on February 5, 1924, the civil service commission announced and established a list of some 40 successful applicants eligible for appointment from that class. The petitioner was No. 1 on that list. On February 7, 1924, the board of health requested the certification of an eligible for appointment as field nurse for permanent employment. On February 20th the commission certified the name of the petitioner, and on March 1st the health officer notified her of her appointment, and she thereupon acknowledged the appointment by the indorsement of her signature on the notice of appointment. On March 25, 1924, the board of health assigned the petitioner to the position of supervising field nurse with the consent of the civil service commission, and so far as the record shows she is still occupying that position.

On February 5, 1924, the petitioner, through her attorney, presented an oral complaint and petition to the civil service commission, claiming that she had been illegally removed from the position of inspector of indigents, and requesting that she be restored to that position. Thereafter, on the same day, the complaint and petition were denied on the ground that the petitioner had been appointed, had served her probationary period, and at all times had been employed as a social service worker within the general classification of social service workers, and was subject to transfer and reassignment within that classification under civil service rules. This proceeding was commenced on February 13, 1924, and throughout the course of the litigation the status of the petitioner as of that time has been deemed of determinative importance. It will be so considered for the purposes of this decision. It may be said incidentally that the trial court found on sufficient evidence that the petitioner was not estopped from asserting her rights in this proceeding by her delay in the commencement of the same nor by the acceptance under protest of her present position.

The principal question for solution is whether at the time of the commencement of this proceeding the position of inspector of indigents was such a separate and distinctive position in the classified civil service as to render it impossible for the board of health to legally transfer the occupant thereof to another position in the classification of social service workers. As bearing upon this question the provisions of the charter of the city and county relating to civil service authorized and directed the civil service commission to classify all places of employment in the several departments of the city (except exempted positions, of which the one now under consideration is not one) in accordance with the duties attached thereto. It was and is provided that:

> "The commissioners may grade, and from time to time regrade, the positions covered by any class, in accordance with salaries and duties, to the end that like salaries shall be paid for like duties. * * * Before any new position is created, the authority creating such position shall secure from the civil service commission the proper designation of such positions, and the title of such position shall correspond with the classifications adopted in accordance with the provisions of this section. * * * Any classification or grading may be amended or abolished by the commission, and classes calling for similar qualifications may be consolidated, but persons who have been appointed from any such classes shall retain any position lawfully held thereunder so long as such position is maintained unless removed in accordance with the provisions of section 12." Charter, art. 13, § 2; Stats. 1913, p. 1611.

And no person employed in the classified civil service shall be removed or discharged except for cause. Charter, art. 13 § 12; Stats. 1913, p. 1615. Under section 5 of article 10 of the charter the board of health is authorized to appoint, subject to civil service regulations, such officers, agents, and employees as may be necessary for the proper and efficient carrying out and enforcement of the purposes and duties of the board, and to fix their salaries and prescribe their duties.

The purpose to create a branch of the public service to be known as social service workers is first evidenced by a communication of date December 13, 1915, addressed to the civil service commission, wherein the board of health stated that it desired to create such positions and requested information as to whether there was an existing eligible list from which appointees might be selected. In that communication the board specified generally the duties to be attached to the positions in the contemplated classification. Such duties included the following:

> "(1) Seeing that patients are removed from the hospital as quickly as recovery will permit; aiding in the solution of their social problems that may to a certain extent be a factor in their illness; (2) arranging for the transfer of incurable cases to the proper institutions when such cases should not longer be kept in the San Francisco Hospital; (3) visiting the home of the patient to ascertain social conditions; providing if possible for the welfare of the family while the wage earner or mother is ill; (4) endeavoring to obtain employment for patients who are about to be discharged; also for those who are physically handicapped by reason of disease; (5) providing adequate care for persons convalescing from disease, after their discharge from the hospitals and before they are able to support themselves; (6) arranging for care by relatives or friends located here or elsewhere, of patients who should not properly be a charge upon the city; (7) following up the case of the unmarried girl and her child after discharge from the hospital; (8) following up the child patient after discharge to ascertain if home conditions are such that illness will not recur; (9) providing for furnishing of surgical

appliances, apparatus, glasses, etc., to those unable to purchase same."

[1, 2] Undoubtedly certain positions theretofore unclassified would fall within the classification contemplating the duties thus originally outlined and as specified in the notice of examination in September, 1916. The position of inspector of indigents was such a position, for it had been in existence for some time, but had never been classified and no examination had ever been held therefor, although it appears to have been a position subject to inclusion in the classified civil service. The duties incident to that position fell reasonably within the classification to be established and was very properly included therein. According to the undisputed evidence the position of inspector of indigents was specifically mentioned as being included in the classification of social service workers to remove all doubt as to the classification to which it might belong. The petitioner must be deemed to have considered that such was the situation when she took the examination in September, 1916, for without that examination and a favorable rating she would not have been entitled to her certification from that class. She was placed on the eligible list of social service workers, received her appointment from that list and served as an eligible from that list for about five years. She earnestly insists, however, that the duties attached to the position of inspector of indigents are executive in character, in that the person performing the same is required to pass upon the merits of applications for admission to the San Francisco Hospital; that such person usually has several assistants in the work; and that the position is generally considered as the head of a department or bureau. But even so it would not follow that such duties might not be performed by any person eligible to appointment in the classification of social service workers. The occupant of that position might well be considered as the head of a division or bureau in the social service work, but it also appears that there are other positions in said classification which are considered as of similar importance, such as the head of the child welfare bureau and head of the tuberculosis division, all filled from the classification of social service workers, and all subject to be filled by any one on that eligible list by proper certification. It is conceded that it would be beyond the power of the civil service commission to include in any one general classification numerous positions whose duties would be so dissimilar as to bear no reasonable relation one to the other, such, for example, as a captain of police and a draftsman in the city engineer's office. But such is not the situation here presented. The duties of inspector of indigents, head of child welfare bureau, head of tuberculosis division, field nurse, etc., were so similar as to enable the civil service commission, under its charter powers, to embrace them within a single classification. The record before us would seem to admit of no other reasonable construction and is insufficient to support the finding of the court to the contrary.

[3, 4] It is clear that it is competent for the head of a department to assign and reassign employees in the same civil service classification to positions within that classification without violating either the letter or spirit of the civil service provisions of the charter. The respondents concede, as indeed they must, that such power of reassignment is properly exercisable only when the salaries and duties of the several positions from which and to which these assignments are made are reasonably within the same class and grade. No question of difference of salary is here involved, and there is no reasonable basis for concluding that it was beyond the power of the board of health to transfer the petitioner to any position included in the classification of social service workers. The civil service commission has properly taken the position that it will not interfere in the transfer or reassignment of a civil service employee by the head of a department regardless of the title of the position, provided there is no change of duties and salary within the same grade, and that when a transfer or reassignment is made within a particular classification the duties are presumed to be the same or so similar as to authorize the change. There is nothing in the record indicating that this presumption may not be indulged in this case. For the reasons indicated, the commission refused to interfere in the transfer of the petitioner from the position of inspector of indigents to the position which she occupied at the time of the commencement of this proceeding, for at that time the two positions were within the same classification and consequently within the same grade.

[5] The attitude of the civil service commission and the board of health would seem to promote the interests of the public service and of the civil service employees as well. On the one hand it enables the head of a department to assign employees within a civil service classification to positions therein of the same grade to which they are most adaptable, and on the other hand preserves for the employees highest on the register the security of their employment within the classification in the event some of the positions therein be abolished. To hold otherwise would be to establish a rigidity of position within a particular classification not in consonance with the right of the head of a department to exercise a reasonable discretion in assignment to positions within the class and also unduly restrict the right of employees standing highest on the eligible lists. It is therefore concluded that the board of health was within its rights in transferring the petitioner from her position to another position in the same

classification as was done in this case, and that the peremptory writ should have been denied.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; FINLAYSON, J.

---

199 Cal. 661

In re PURINGTON'S ESTATE.

PURINGTON et al. v. McPHERSON et al.

(S. F. 11896.)

(Supreme Court of California. Nov. 10, 1926.)

1. Wills 🔑14.

All absolute bequests and devises and bequests in trust for charitable uses, where beneficiary is a state institution or municipality, are exempt from Civ. Code, § 1313, prohibiting charitable bequests in excess of one-third of estate of decedent.

2. Wills 🔑14.

Bequest of $5,000, the income of which is to be used for maintenance of laboratory research in State University, is not within Civ. Code, § 1313, inhibiting charitable bequests in excess of one-third of estate of decedent.

3. Wills 🔑14—Bequest to State University to enable needy women students to obtain college education is for benefit of University, and not within inhibition against charitable bequests in excess of one-third of estate of decedent (Civ. Code, § 1313).

Bequest to State University, to be invested by board of regents as a perpetual fund to assist needy women students to obtain a college education, is a trust for benefit of University, conferring benefit on it, and hence is not within Civ. Code, § 1913, inhibiting charitable bequest in excess of one-third of estate of decedent.

4. Wills 🔑439.

Nature and quality of an estate or interest bequeathed is to be determined by intent of testator, and an intent will be inferred from character of conveyance.

5. Wills 🔑470.

In construing will, court will consider whole document in light of all circumstances to determine intention of testator.

6. Charities 🔑31.

As construing deed under doubtful circumstances, most strictly against grantor and most favorably for grantee, courts lean in favor of charity, rather than against it.

7. Contracts 🔑147(1).

Written instrument must be construed to ascertain true intention of testator, when it can be done consistently with law of land.

8. Charities 🔑12.

Founding of "scholarship," which means the maintenance for a school or student, is favored by law because of meritorious motive and public advantage.

[Ed. Note.—For other definitions, see Words and Phrases, Scholarship.]

9. Charities 🔑12.

Free scholarships may be established in the University by any one for purpose of private benefaction, under Pol. Code, §§ 1395, 1415, and Const. art. 9, § 9.

10. Charities 🔑48(1).

In directing administration of trust for benefit of University, founder is not precluded from declaring what preference shall be given to any particular class.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

In the matter of the estate of Henrietta Elizabeth Purington, deceased. Petition by Margaret D. Purington and others for a decree of partial distribution against Wm. H. McPherson, executor, etc., and another. From an order denying petition, petitioners appeal. Affirmed.

Leo J. McEnerney and Charles L. McEnerney, both of San Francisco, for appellants.

Grant H. Smith, of San Francisco, for respondent McPherson.

John U. Calkins, Jr., of San Francisco, for respondents Regents of the University of California.

PER CURIAM. This appeal involves the validity of a certain bequest made to the Regents of the University of California. The facts are simple and without conflict. Henrietta Elizabeth Purington died in San Francisco on February 3, 1924, possessed of an estate of the appraised value of $70,912. She left a last will and testament dated November 13, 1923. After making minor bequests to five of her personal friends she bequeathed a legacy of $7,000 to the endowment fund of Grace Cathedral Corporation. The remainder of the estate was disposed of by her under a residuary clause in her will. The sum of $5,000 was devised to the Regents of the University of California for the maintenance of the laboratory of the Homeopathic Research Foundation, and the remainder of the fund was given to the regents in trust as a scholarship to be known as the Irene Purington fund. It was stipulated at the trial that the Grace Cathedral Corporation is a charitable institution. It is claimed, therefore, that the amount bequeathed to charity by the testator is approximately $58,712, which sum is $38,408 in excess of one-third of the net value of the estate exclusive of the absolute specific bequest to the University of the sum of $5,000 for research work which is admitted to be valid, a matter hereinafter referred to.

Upon petition for partial distribution it was contended by appellants, who are heirs at law of said deceased by virtue of their relationship to her deceased husband, that the bequest to the University of the fund for scholarship purposes was a bequest in trust for charitable uses, and hence invalid to the extent that it, together with the specific bequest to Grace Cathedral Corporation, exceeds one-third of the total value of the estate. After hearing, the trial judge held that the bequest in question was a bequest to the University, and therefore not within the inhibition of section 1313 of the Civil Code, and appellants' petition for partial distribution was accordingly denied. The sole question here presented is the validity in toto of such bequest. The history of the legislation controlling this subject shows that, up to the year 1917, section 1313 of the Civil Code provided in substance, among other things, that a bequest or devise to a charitable or benevolent corporation, or to any corporation, or person, in trust for a charitable use, was invalid to the extent that such bequest exceeded one-third of the total value of the estate of the decedent. In the year 1917, the section was amended by adding at the end thereof the following:

> "And provided, further, that bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution, are excepted from the restrictions of this section." St. 1917, p. 272.

In the year 1919 (St. 1919, p. 324), the section was recast so as to include the above proviso. The section was again amended in 1925 (St. 1925, p. 264) by exempting from its restrictions all bequests and devises "to any municipality, county or political subdivision within the state."

In the year 1918, after the amendment to section 1313 of the Civil Code, removing the restrictions upon gifts to state institutions, the Constitution was amended to the same effect. The amendment reads as follows:

> "The University of California shall constitute a public trust, to be administered by the existing corporation known as the Regents of the University of California. * * * Said corporation shall be vested with the legal title and the management and disposition of the property of the University and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, or gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the University or incidentally to its conduct." Const. art. 9, § 9.

[1, 2] It is manifest that the amendments above recited served to exempt from the operation of section 1313 of the Civil Code all absolute bequests and devises and all bequests in trust for charitable uses, where the beneficiary is a state institution or municipality. Appellants insist, however, that the instant bequest does not come within the exceptions created by the amendments. It is conceded that the bequest of the sum of $5,000, the income of which it is provided shall be used for the maintenance of laboratory research, is a valid one, because of the fact that the University is a direct recipient of the benefit, and therefore the bequest is within the exception made, by the amendment of 1917, to section 1313 of the Civil Code. With reference to the remainder of the fund, however, it is contended that the regents are merely the trustees thereof, having no beneficial interest in either the corpus of the bequest or the income to be derived therefrom, the beneficiaries being the women students to be selected, and, this being so, the trust under consideration is a private one and does not come within the exceptions created by the amendment to section 1313 of the Code, and it is therefore void to the extent that it, together with the other charitable bequest, exceeds one-third of the net distributable value of the estate. We do not so construe the bequest.

[3] The will of the deceased, after providing for the minor bequests and the legacy to the Grace Cathedral Corporation, above referred to, concluded with a residuary clause reading as follows:

> "3rd—All the rest, residue and remainder of my estate * * * I give to the Regents of the University of California to be by them invested and held as a perpetual fund to be devoted to the following purposes. The sum of five thousand dollars ($5,000.00) shall be set aside, and the income applied to the development and maintenance of the pharmacological research laboratory of the Homeopathic Foundation. The remainder of the fund shall be known as the Irene Purington scholarship fund, the annual income whereof shall be applied by the regents to assist deserving women students at the University of California, who without such assistance might not be able to obtain the advantage of a college education. The Regents of the University of California shall have full authority to invest and reinvest such funds from time to time in such manner as they may deem wise in order to produce as large an income as possible compatible with the safety of the fund itself, to accumulate any unused income and to select the recipient or recipients as they may fix and to apportion the income among such recipients."

[4-10] It seems clear to us that the trust in question is one in trust for the University, as it confers upon that institution a benefit to the extent of the bequest, in caring for and advancing the interests of those desiring public education. The nature and quality of an estate or interest bequeathed is to be determined by the intent of the testator, and an intent will be inferred from the character of the conveyance. In giving a construction to a will, courts consider the whole document in the light of all the circumstances, and conclude what was the probable intention of the testator. As construing a deed under doubtful circumstances most strictly against the

grantor and most favorably for the grantee, courts lean in favor of a charity, rather than against it. It is the duty of courts to construe written instruments in order to ascertain the true intention of a testator when it can be done consistently with the law of the land. The founding of scholarships is favored by the law, first, on account of their meritorious motive; and, second, on account of the public advantage. A scholarship means the maintenance for a school or student. Webster's Dict.; Butts v. McMurry, 74 Mo. App. 526. Free scholarships may be established in the University by any person for the purpose of private benefaction (Pol. Code, § 1395) and the regents in their corporate capacity may take by bequest any property for its use or to carry out a trust created for its benefit (Const. art. 9, § 9; Pol. Code, § 1415). In directing the administration of such a trust, a founder is not precluded from declaring what preference shall be given to any particular class. The right to give such direction in regard to the management of the charity is generally recognized. Here the complete management and control of the fund is given to the regents to be invested by them and held as a perpetual fund to be devoted to the purposes of assisting deserving women students who without such assistance might not be able to obtain the advantages of a college education. This is the very purpose and object of a scholarship. The University is a state institution and the beneficiary of many scholarships which it is expressly authorized to take and from the income of which many students derive special benefits. The object of the University is to impart scholastic knowledge, as a means of human betterment and a scholarship furthers the dissemination of such knowledge, by permitting certain persons to receive this elevating and beneficial influence which a lack of means might otherwise prevent. That the regents of the University are made trustees of the fund is a strong circumstance going to show that the testatrix intended the bequest for the benefit of the University in order to assist it in carrying out the objects for which it was created. The fact that the recipients also received a benefit in no manner changes the character of the bequest. A scholarship of necessity insures such benefit; nor does the fact that the testatrix directed that the income should be apportioned among the ever changing persons who might be determined to be the most needy and deserving constitute it a private charity. The regents were required to do this very thing without any direction. In exercising this right and determining the nature and extent of assistance necessary to be given to those selected, a discretion and supervision is vested in the regents. The testatrix has merely designated a class within which this discretion is to move in conferring the benefits the bequest insures.

To hold that the regents are the mere trustees of a charitable use whose sole interest consists in the management of the fund and the distribution of the proceeds would be to defeat the manifest intention of the testatrix. Concluding as we do that the bequest is one in trust in which a state institution is the beneficiary, it comes within the exception to the statute, and is therefore valid.

From what we have said, it follows that the judgment should be and it is hereby affirmed.

---

199 Cal. 610

PEOPLE v. STONE. (Cr. 2874.)*

(Supreme Court of California. Nov. 9, 1926.)

1. Criminal law 🔑517(4)—Evidence held to establish corpus delicti as to murder of children, rendering admissible extrajudicial statements of accused.

Evidence as to ages of deceased children 8 to 12 years old, circumstances of their home life, sudden disappearance, and discovery of bodies covered with cut weeds in ditch in isolated field, was sufficient to establish corpus delicti in advance, and independent of extrajudicial statements of accused rendering statements admisible.

2. Homicide 🔑234(10)—Evidence held to warrant conviction for murder, though there was no direct confession of guilt.

Evidence, together with statements and admissions of defendant as to association with girls, found murdered, clearly indicating consciousness of guilt, warranted conviction for murder,. though there was no direct confession of guilt.

3. Criminal law 🔑742(1)—Homicide 282½.

In prosecution for murder, jury is sole judge of credibility of all witnesses, and under Pen. Code, § 190, responsibility of fixing penalty rests solely with jury.

4. Criminal law 🔑703—Opening statement of district attorney, offering to prove that defendant debauched girls before murdering them, held not misconduct.

Opening statement of district attorney that defendant would be shown to have debauched girls before murdering them, not objected to when made, *held* not prejudicial misconduct where exclusion of testimony offered thereon was a debatable question and offer was shown to have been made in good faith.

5. Criminal law 🔑706—Offer of evidence as to defendant's misconduct with girls, other than ones he was charged with murdering, stricken from record on objection, with instruction to disregard, held not misconduct.

In prosecution for murder of two young girls, offer of evidence of defendant's misconduct with other girls, struck from record on objection, together with instruction to jury to disregard same, *held* not prejudicial

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 8, 1926.

misconduct by district attorney, where made in good faith.

6. Criminal law ⚷706—District attorney held not chargeable with misconduct because witness, when asked to relate certain conversation with defendant, gave inadmissible testimony, which could not have been anticipated, and which was stricken.

Answer of witness in relating conversation of defendant, prosecuted for murder, that defendant told him about killing three men in another state, interrupted before completion and stricken on objection, *held* not to show misconduct by district attorney, who could not have anticipated answer.

7. Criminal law ⚷655(1).

Statement by judge that court would "go out and visit premises where killing is alleged to have taken place" *held* not prejudicial misconduct in use of word "killing."

8. Criminal law ⚷651(½).

Failure to swear officer before his taking charge of jury for purpose of viewing premises, not objected to at time nor prejudicial to defendant, *held* not error.

9. Criminal law ⚷1104(3)—Transcript of record, setting forth only portions of argument of district attorney objected to, held sufficient, in absence of objection to transcript when served on defendant's counsel.

Transcript setting forth portion of argument of district attorney, objected to by defendant at time, *held* sufficient compliance with order to prepare record, including argument of district attorney; especially where transcript was not objected to by defendant when served on him.

10. Criminal law ⚷1032(5)—Objection to indictment that it charged defendant in two counts with murder of two persons, made for first time on appeal, comes too late (Pen. Code, §§ 954, 1004, 1012, 1185).

Indictment for murder, presented in conformity to Pen. Code, § 954, not objected to at trial as provided in sections 1004, 1185, cannot be objected to for first time on appeal, under section 1012, on ground that defendant was charged in two counts with murder of two persons.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

S. C. Stone was convicted of murder in the first degree, and he appeals. Affirmed.

Chandos E. Bush, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

SHENK, J. The defendant was accused by the grand jury of Los Angeles county of the murder, on August 23, 1924, of Nina and May Martin, 8 and 12 years of age, respectively. The jury found him guilty of murder in the first degree and fixed the penalty at death. He was sentenced accordingly, and has appealed from the judgment of conviction and from the order denying his motion for a new trial. The primary question for our consideration is the contention of the defendant that the corpus delicti was not established, and that therefore the court erred in admitting in evidence his extrajudicial statements and admissions. The facts tending to establish the corpus delicti are undisputed and are substantially as follows:

The deceased were the children by a former marriage of Mrs. Paul Buus. Prior to the time of their disappearance they were living with their mother and stepfather at 2854 South Mansfield street in the southwesterly portion of the city of Los Angeles. They were healthy and apparently normal children, and left their home in a happy frame of mind about 6:15 p. m. on August 23, 1924, to go to the home of their grandmother, who lived about three blocks distant. They were never seen alive after that night. When they did not return home that evening their disappearance was heralded abroad and searching parties were organized. Several hundred persons, officers and inhabitants of the neighborhood, engaged in the search without avail. On February 4, 1925, Julio Martinez, a Mexican youth, discovered what proved to be their remains in a small ditch from 18 inches to 2 feet in depth. This ditch for some distance traversed a large cultivated field near the base of the Baldwin Hills in the same section of the city and had been used at one time as an irrigating ditch. At the time of the discovery the land in the vicinity was being sowed with seed in anticipation of a forthcoming spring crop of grain. There were no trees in the locality, but tall weeds had grown along the ditch where the bodies lay. The remains were covered with cut weeds, and the only part thereof exposed to view was a small portion of a leg of one of the children. A shoe was on the foot, and another shoe was found some 75 feet away. The bodies were badly decomposed, practically nothing remaining but the skeletons. The body of the older girl lay face downward with the head toward the north and was to the right of the body of the smaller girl, which lay in the same direction and a foot or two distant. The clothing of both was disarranged, but was positively identified as the clothing worn by the children at the time of their disappearance. The measurements of the bodies corresponded with those of the living children. The place where the bodies were found was several hundred feet southerly from the Pacific Electric Railway Company's "Air Line" tracks, which ran along a slight embankment. The territory southerly from the railway tracks was an uninhabited section, and extending from the spot where the remains were found to the nearest highway was an old dirt road or trail. Across the railroad track to the north was a tract of land newly subdivided.

[1] From the facts and circumstances shown in evidence death and identification were established beyond the peradventure of a doubt. Furthermore, the showing of the age of the children, the circumstances of their home life, their sudden disappearance, the discovery of the bodies covered with cut weeds in a ditch in an isolated field as above related, were sufficient to exclude any reasonable hypothesis that death was due to natural causes, justifiable homicide, suicide, or accident. The only inference that could reasonably be drawn from these facts and circumstances was that the children had met their death as the result of criminal agency. Such facts and circumstances were therefore sufficient to establish the corpus delicti and were shown in evidence in advance and independently of extrajudicial statements and admissions of the defendant. Consequently such statements and admissions were properly received in evidence.

The next contention of the defendant is that, assuming the corpus delicti to have been established, the evidence was insufficient to connect him with the commission of the crime. Aside from the statements and admissions of the defendant hereinafter referred to, it appeared in evidence that the children went to the home of their grandmother between 6:30 and 7 o'clock on August 23, where they remained for a very brief period. They were then seen for a moment at a neighbor's house where two other girls of about the same age were living and where the decedent children had played parcheesi that afternoon. They were then seen to enter and leave a nearby store, where they had purchased some confections. About sundown that evening they were seen riding westerly on Jefferson street near Potomac street in the Dodge roadster of the defendant. The defendant was driving the car. He was dressed in his uniform. His employment was that of a night watchman in an organization known as the West Adams Patrol, whose business it was to provide for the protection of persons and property in the neighborhood at the voluntary expense of some of the inhabitants thereof. As the car was so proceeding on Jefferson street it was wobbly in its movements and uncertain in its speed, and when it suddenly turned to the left without signal it nearly collided with another car, some of whose occupants knew and recognized the defendant and the Martin girls. The children were again seen "about dark" with the defendant in his car at another place in the same neighborhood. On the next day, Sunday, the defendant was seen to drive his car to a point on the northerly side of the Pacific Electric Railway track near the newly subdivided tract, remove from the car a large bundle with newspaper wrappings, and carry the same up to and over the railway track, then down and out of sight toward the place where the bodies were found. In the defendant's car at the time was a man later identified at Shorty Smith. This man did not leave the car during the excursion of the defendant across the railway track, but as he sat in the car he fidgeted nervously and continually mopped his face with his hand. When the defendant returned to the car he entered the same and the two men rode away. At the time of the arrest of the defendant a rouge box was found in his room which was identified as a rouge box that had belonged to May Martin. Shortly thereafter evidences of blood were found on the seat, floor, and running board of the defendant's car. Reference to this incriminating circumstance will hereafter be made.

The statements and admissions of the defendant which tended to connect him with the commission of the crime were developed through the testimony of numerous witnesses, the most damaging of which came from the lips of a fellow prisoner of the defendant while in the county jail. This witness was Alva H. Floyd, who had been city recorder of Culver City for several years and is referred to in the record as Judge Floyd. This witness was confined in the same tank with the defendant, and was approached by the defendant with a request that he advise the defendant as to how he could extricate himself from his difficulty with reference to the Martin girls. This witness was not an attorney at law but he told the defendant that he would help him if he were told truthfully all the facts with reference to the defendant's relations and conduct with those girls. A dozen or more conferences were had between the two. After each of these conferences the witness transcribed the substance of the conversation in typewriting. These transcriptions were in the form of question and answer. They were read by the defendant in the presence of the witness, and the accuracy thereof was never challenged by the defendant. During these conversations the defendant related that he knew the Martin girls, had taken them riding with him frequently in his automobile, and had them with him in his room on at least one occasion; that Shorty Smith was batching with him in his room in August, 1924, and was assisting him at times in the performance of his duties as night watchman; that on the morning of August 23 the defendant arose about 10 o'clock; that he and Smith had breakfast together and then worked for a couple of hours on the defendant's car; that they then went into the house, had something more to eat, drank some brandy, slept for a couple of hours, and then had three more drinks; that they then separated, but returned to the house about 5 o'clock in the evening and had three more drinks, then in the evening the defendant picked up the Martin girls and went for a ride; that he bought them candy and then took them to a moving picture show. He was asked:

> "Stone, did you ever at any time take any of the girls you had with you down to your room in the rear of the barber shop?"

And he replied:

> "Now, Judge; I will not stand for this to be brought out in case there is a trial, as it would mean the gallows for me. I have had dozens at my room at different times."

He stated that he did not take small boys to his room because "they talked too much." When asked if he ever drank in the presence of the girls or offered them drinks, he stated:

> "Yes; I have taken many drinks before the girls, and some of them have drank with me, and two or three of them drank a little too much, and I had to get something at the drugstore to fix them up before letting them go home."

When asked, "Stone, when you and the Martin girls were at your room and May had two or three drinks, did you play and feel of her?" he replied:

> "Sure, I did; what do you suppose I had her down to the room for?
>
> "Q. Did you do the same thing to the little girl, Nina, in front of May? A. No; I didn't like her, and she was too stuck up to have a good time."

He was asked how he managed to get girls to go to his room and to keep them there. He replied:

> "Judge, I told you a few moments ago that I wouldn't stand for this to be brought out, and I am going to tell you that you don't know girls. * * * I promised that I would get them into the movies with my boy Jack, and I would take them down to my room, show them Jack's pictures, and all you have to do is to promise them that Jack will make a star out of them in a short time. * * * I always tell them a funny story and give them a glass of wine, and if I did not have a glass of wine I would give them a little peach brandy.
>
> "Q. Did all the girls you had at your room drink with you? A. Not all, but most of them."

Floyd further testified that on July 27 he again asked the defendant about the Martin girls and what was the reputation of May Martin among the other girls that he had out with him. The defendant answered: "They didn't like her. They said she was no good and too fast." He was then asked what he thought about May Martin, and he answered:

> "She was no faster with me than the other girls.
>
> "Q. At the time the two Martin girls were down at your house did they take a drink, and how long did they stay? A. They were there only once, and if I recollect correctly the little one did not take a drink, but May had two or three.
>
> "Q. Now, Stone, do you remember about what time you and the two girls, May and Nina Martin, left your room to return to their home? A. I want you to understand that you are not going to get me to say that I murdered these girls. To hell with the district attorney's office and the sheriff; let them prove that I murdered the Martin girls."

The defendant admitted to Floyd that he recalled the incident of nearly having a collision with another car on Jefferson street on the evening of August 23. He first denied that the children with him at that time were the Martin girls, giving the names of other children in the neighborhood as the names of those who occupied the car with him at that time, but he finally stated that the Martin girls were with him on that occasion. He admitted to this witness that he carried the large bundle across the railroad tracks on August 24, but when asked what was in the bundle he refused to state. He admitted that Shorty Smith was with him on that occasion, but when asked where Shorty Smith lived he stated:

> "Thank God he is gone to Arizona, and no one knows his address but myself, and I will keep it. * * * I don't want this boy Shorty Smith back here, and if I can keep him away I am going to do so."

The defendant was then asked:

> "Stone, just tell me why you do not want Shorty Smith back in Los Angeles; has he got something on you about these Martin girls or does he know something else that you are mixed up in that has not been brought out? Do you think that Shorty Smith had anything to do with the murder of the Martin girls?"

He answered:

> "I don't want him back here, as the sheriff's office would grab him, and God only knows what he would tell. He would say anything to save his own hide. He is a crook; I thought so when he was working for me. He is a dangerous kind of a fellow—will do anything.
>
> "Q. Well, listen, Stone; if he is not connected with the Martin murder, let him talk, how can he hurt you? A. Judge, are you crazy? I told you a few moments ago that Shorty Smith was working for me on the night they say the Martin girls were killed, and he knows that I had them out in my car when I passed him in front of the drug store. The sheriff's office would make him say I killed them, and he might even sign a statement; you know what the other boy did. He talked too much. I don't want him back here.
>
> "Q. Stone, you had been drinking all day Saturday, and you are positive you remember everything that happened that afternoon and

that night? A. Yes; I told you the truth, and if they hang me I will say the same thing.

"Q. Stone, you have been an officer for 30 years, and I am going to ask you, as man to man, if you think it sounds good for a man to say he let two girls out of his car at 12:30 at night at their father's home, and they were found months afterwards dead? Stone, if you are protecting Shorty Smith in this case be a man and tell me. If you did it yourself tell me, and I can figure out at least something for you. A. No; it doesn't sound right, but I am not the man that killed them, and if I did I wouldn't say so. No man can ever say a Stone ever said anything about what they did. They can't find Shorty Smith, and they will not be able to convict me."

Shorty Smith was called as a witness for the prosecution, but when asked where he was and what he did on the evening the children disappeared and the next day he consistently stated that he did not remember. The defendant was asked by Floyd to explain the presence of blood on the seat and floor and running board of his car shortly after the 23d of August. The defendant had formerly stated to this witness that on that day he had taken Mrs. Gold and her daughter to Manhattan Beach. Later he said that on that trip he had gotten a sack of chickens and carried them on the seat of his car, and that blood ran out of the sack on the seat and on the floor. When confronted by Floyd with these inconsistent statements and asked to tell the truth about it the defendant replied:

"Well; the truth of the matter is, I lied in both cases. I never went to the Beach on that day, and I will tell you all some day."

Floyd asked him:

"Between you and myself, why was it these Martin girls were placed where they were found?"

He answered:

"I don't know; unless it was because the dirty old sewer ditch was there, and it would be hard to notice the odor.

"Q. Stone, when you and Shorty Smith started out to throw that bundle away, what caused you to go where you did and be forced to walk four blocks over the railroad and through weeds, when a paved boulevard ran within 50 feet of where you laid the bundle? A. I don't know.

"Q. By the way, Stone, what motive do you think any one could have had to murder these children? A. I don't know, without somebody got the best of the older one and the little devil put up a scream that she was going to tell and start serious trouble. Maybe they had been drinking or something like that. One thing, the man that did it will never tell."

The witness asked him:

"Stone, I am going to be honest in telling you you have got a hard proposition to beat, and without you can show every step you made from the time you picked up those Martin girls until you carried them back home, our backs will be against the wall. If the district attorney prefers charges against you for murdering those two Martin girls and you are unable to explain your whereabouts on the night of August 23d, after the people saw you with the girls in your car, I would advise you to see what kind of an arrangement can be made with the district attorney's office, and if you do not, your case will be about the same as the Clark Case at San Diego [People v. Clark, 70 Cal. App. 531, 233 P. 980]. You remember the particulars of that case?"

And he answered:

"Judge, I have been in a lot of trouble in my life and managed to get out by one way or another, but this girl affair is the worst I ever had. I could fix this up if I had not plead guilty to the Merritt Case. * * * I have told you more about my troubles than any man in the world, as I believe you will stick with me, but if you ever tell anybody what I have told you I will shoot you on sight, or, if I am in San Quentin, I will have one of my boys to kill you."

Floyd testified that on another occasion the defendant expressed regret because he had talked at all about the case. He flew into a rage, according to this witness, and said with profanity that he would give his right arm if he could recall what he had told him, and that if Floyd ever mentioned what he had told him he would kill him on sight. The defendant also stated to the witness, Elliott, who was another fellow prisoner in the county jail, that "he didn't think they would ever find Shorty Smith, that he was gone; * * * that he hoped that they never would find him." He was asked, "Why not?" and he replied, "Well; he ain't competent, and he knows too much."

On June 29, 1925, Captain Hunter, of the district attorney's staff, had a conversation with the defendant in which the latter was questioned as to his movements on August 23 and 24, 1924. He was uncertain and inconsistent in his replies. The defendant admitted, however, that he had nearly collided with a machine on Jefferson street on the evening of the 23d. Captain Hunter was making a written memorandum of the conversation at the time. As it was about completed the defendant "grabbed" the piece of paper from Captain Hunter's hand and destroyed it.

During the investigation as to the cause of the disappearance of the Martin children the defendant was taken to the sheriff's office and there confronted with certain persons who had made statements tending to connect him with the commission of the crime. Among those persons was Mrs. Winifred F. McIntosh, who was one of the occupants of the car with which the defendant's car nearly collided on the evening of August 23. She was ushered into the presence of the defendant on that occasion, and when asked to relate what the defendant did or said and what otherwise occurred on that occasion, replied:

> "Well, he said when I first went in, he said, 'How do you do, Mrs. McIntosh?' he said, 'All I ask you women to do is to tell the truth, so if you tell what you have been telling you are putting a rope around my neck.' I said, 'Mr. Stone, I have told nothing but the truth, and I have no intention of telling anything but the truth,' and then I asked—he asked where I had seen him, and I said, 'On Jefferson with the Martin girls,' and he said, 'My God! what is the use to fight? If you say that, it is the rope for me.'"

At numerous times during his acquaintance with May Martin the defendant had taken her with him in his car and had caused her to call at houses in the neighborhood to collect for him the $2 monthly fee for watchman services. On September 1, 1924, which was about a week after the children had disappeared, the defendant was asked by a woman who lived in the vicinity as to what had become of the little girl who used to come around and collect money for him, and his reply was that she had gone to Imperial Valley or Texas. Later on, when asked a similar question, he stated that the Martin children had gone to Chicago or some other place, where they would get better care than they received at home.

[2] Other evidence of inconsistent statements and of a shifting of position on the part of the defendant also appears in the record. A consideration thereof and of what has been above set forth satisfies us that the jury was justified in fastening upon the defendant the commission of the crimes. While there was no direct confession of guilt, the inferences to be drawn from the facts and circumstances shown in evidence and the statements and admissions of the defendant, clearly indicating a consciousness of guilt, warranted the jury in finding that he was the perpetrator of the offenses charged. People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Willard, 150 Cal. 543, 89 P. 124.

[3] The defendant did not take the witness stand, and the evidence adduced on his behalf, mainly for the purpose of reflecting on the credibility of certain witnesses for the prosecution and in the nature of an alibi, was inconsequential and obviously did not have the effect desired in the minds of the jury, which was the sole judge of the credibility of all the witnesses produced at the trial. And under section 190 of the Penal Code the responsibility of fixing the penalty rested solely with the jury.

[4] It is also contended by the defendant that the district attorney was guilty of prejudicial misconduct. The claim is predicated, first, upon certain portions of the opening statement of the prosecutor. In that statement the district attorney told the jury that he expected to prove that Deputy Sheriff Stensland arrested the defendant; that the defendant told him at that time "that he had been in the habit of taking little girls out for a ride; that it was his duty as a watchman to take them out riding; * * * that he expected to prove that the defendant took them out for a lustful purpose; that at the time of his arrest he had upon his person the things that go with a libertine; * * * that when these children were found, the disarticulated corpses or skeletons that lay there, the position in which they were lying, the clothing as it was pulled up about them, the feet in the ground and the bloomers torn from the bodies, that the children were debauched either before or after death or maybe both." From an examination of the record we are satisfied that this offer of proof was made in good faith. Information was in the hands of the district attorney from which his conclusions might reasonably be drawn. Certain testimony introduced in support of the offer was stricken from the record on motion of the defendant, and the jury was instructed to disregard the same. The admissibility of this evidence presented a debatable question, but the trial court ruled in the defendant's favor. The complaint is without legitimate foundation. Furthermore, no objection was made by counsel for defendant to that portion of the opening statement at the time it was made.

[5] During the course of the trial the district attorney endeavored to prove that the defendant was guilty of misconduct with other girls in the neighborhood, particularly with one by the name of Merritt, concerning whose case the defendant had been arrested and had entered a plea of guilty. Most of the testimony with reference to that case was stricken from the record on motion of the defendant and the jury instructed to disregard the same. The only portion not stricken was the statement of the defendant to the witness Floyd that he could have extricated himself from the difficulty in the case involving the Martin girls if he had not entered a plea of guilty in the Merritt case. No objection was made to that testimony, and no motion was made to strike it out. Assuming that evidence with reference to the Merritt case was inadmissible, and we are not called upon to rule on that question, the action of the district attorney in making the offer of proof was not in bad faith, and the rulings of the trial court with reference thereto were all in favor of the defendant. Numerous other charges of misconduct were made against the district attorney during the course of the trial. They have been examined with care. We find nothing upon which just criticism may be based.

[6] During the trial the witness Floyd was asked to relate his conversation with the defendant on August 11, 1925. The witness

commenced his answer by stating that the defendant told him on that occasion about killing three men in Gotham, Tex. The answer was not completed, and was interrupted by counsel for defendant, whose motion to strike it out was granted. There is nothing in the record to indicate that the district attorney could have anticipated what the answer would be, and the portion that was given and stricken cannot reasonably form the basis of a charge of misconduct on his part.

[7] Prejudicial misconduct is charged against the trial judge. The trial was commenced on December 1, 1925, at 2 p. m. At the close of the day's proceedings it was suggested by the district attorney that the jury be taken to the place where the bodies were found for the purpose of a view of the premises. Counsel for the defendant stated that there was no objection and arrangements were made for the defendant, court, counsel, and jury to be taken out the following morning. When the court convened at 10 a. m. on December 2d, the court announced that the court would "go out and visit the premises where the killing is alleged to have taken place." It is the contention of the defendant that the use of the word "killing" in the quoted statement of the court was prejudicial misconduct, and he relies on the case of People v. Orosco (Cal. App.) 239 P. 82, wherein it was held in effect that the use of the word "murder" in the presence of the jury in the following question, "What is the use of taking up time with an episode that happened after the murder?" was misconduct on the part of the court. It was stated, however, in that case that said expression of the court taken alone would not require a reversal. It will be noted in the present case that the trial judge endeavored to safeguard his statement by the use of the word "alleged," but it is argued that he used it in the wrong place or not in the right connection. The criticism of the language as used would seem to be colorable but without substantial merit.

[8] Complaint is also made that the record does not show that Captain Hunter was sworn before taking charge of the jury for the purpose of viewing the premises. The defendant stipulated that Captain Hunter might act in that capacity, but, assuming that the stipulation was insufficient to dispense with the oath, no objection was made to the proceedings at the time, and it is not made to appear that the defendant suffered the slightest prejudice by reason of the omission.

[9] After the conviction of the defendant and denial of his motion for a new trial his counsel gave oral notice of appeal, and later on filed an application for an order for the preparation of the record on appeal, specifying therein the entire record, including the arguments of the district attorney and the defendant before the jury. Pursuant to the application an appropriate order was made by the trial judge and the record was prepared. The defendant now complains that the arguments of the district attorney were not set forth in full in the reporter's transcript. The transcript, however, does purport to set forth those portions of the arguments on behalf of the people to which the defendant objected at the time. This was a sufficient compliance with the order. Furthermore, the reporter's transcript was duly served on counsel for the defendant, and he tendered no objection to the same as prepared, served, and approved.

[10] The defendant complains because he was charged in two counts with the crime of murder, was found guilty on each count, and was sentenced to be hanged on each count. In the first count the defendant was charged with the murder of Nina Martin and in the second count with the murder of May Martin, all on the 23d day of August, 1924. The indictment was presented in conformity with section 954 of the Penal Code. No demurrer was filed or other objection made to the indictment in the trial court as provided in sections 1004 and 1185 of the Penal Code. The objection now urged therefore comes too late. Penal Code, § 1012; People v. Byron, 103 Cal. 675, 37 P. 754; People v. Ellenwood, 119 Cal. 168, 51 P. 553; People v. Dean, 66 Cal. App. 602, 226 P. 943. We do not wish to intimate that the objection would have been well taken if seasonably made.

We find no error in the instructions given or in refusing instructions proposed by the defendant.

The record in this case is singularly free from any ruling that might be claimed to be error. Doubts as to the admissibility of evidence were uniformly resolved in favor of the defendant and he received a fair and impartial trial. The jury was fully and fairly instructed, and, under the law, its determination of the facts and of the penalty cannot be disturbed on the appeal.

The judgment and order are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; FINLAYSON, J.

199 Cal. 569

WHITNEY et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR FRESNO COUNTY et al. (S. F. 11921.)

(Supreme Court of California. Oct. 30, 1926. Rehearing Denied Nov. 29, 1926.)

1. Attachment 🔑251—Order discharging attachment and releasing property from lien thereof held to have become final; hence not subject to collateral attack on motion to extend lien (Code Civ. Proc. § 542a.)

Order discharging attachment and releasing property from lien thereof, valid on its face and no appeal having been taken therefrom *held* to have long since become final; hence not subject to collateral attack on motion to extend attachment lien, under Code Civ. Proc. § 542a.

2. Attachment 🔑251—On collateral attack final order discharging attachment will be presumed to have been entered before filing of motion for change on venue notwithstanding recitation that defendant had appeared. (Code Civ. Proc. § 1014).

On collateral attack of order discharging attachment, court must presume that order, though apparently made on same day as that on which defendant filed notice of motion for change of venue, was made and entered prior to presentation and filing thereof, since otherwise trial court would have been deprived of jurisdiction; presumption not being negatived because order recited that defendant had appeared in the action in view of Code Civ. Proc. § 1014.

3. Attachment 🔑183—Statute providing for extension of attachment liens has reference only to existing liens, and does not apply to attachment liens which have ceased to exist. (Code Civ. Proc. § 542a).

Code Civ. Proc. § 542a, referring to lien of attachments and extension thereof, has reference only to existing liens, and does not apply to attachment liens which have either expired by operation of law or have otherwise ceased to exist prior to making of motion for extension thereof.

4. Prohibition 🔑10(2)—Prohibition will lie to restrain threatened act of court beyond its jurisdiction in reviving discharged attachment or lien thereof against property of strangers to the action. (Code Civ. Proc. § 542a).

Threatened act of court to revive discharged attachment or extending lien thereof, under Code Civ. Proc § 542a, against property of strangers to the action, being beyond its jurisdiction, writ of prohibition would properly lie; right of intervention not affording petitioners a plain, speedy, and adequate remedy at law, and remedy through writ of certiorari not being available.

In Bank.

Application by Vincent Whitney and others for writ of prohibition to be directed to the Superior Court of Fresno County, C. E. Beaumont, Judge, to restrain a hearing and determination of a motion to extend an attachment lien. Writ granted.

Sweet, Stearns & Forward, of San Diego, for petitioners.

Gallaher, Simpson & Hays, of Fresno, and Redman & Alexander, of San Francisco, for respondents.

RICHARDS, J. Petitioners herein apply for a writ of prohibition to be directed to the respondents herein, having for its purpose the restraining of the respondent court and the judge thereof from hearing and determining a motion made by the plaintiff in a certain action for an order of said court extending the time of an attachment lien pursuant to section 542a of the Code of Civil Procedure. The facts upon which the application is predicated and which are not in dispute are the following: On December 1, 1922, M. Blum & Co., a corporation, commenced an action in the superior court in and for the city and county of San Francisco against one Eric Larson to recover the sum of $12,980.33, alleged to be due for services performed, cash advanced, and on an account stated. An attachment was regularly issued in said action and levied upon certain parcels of land belonging to Larson situated in the county of San Diego. On December 11, 1922, Larson and his wife, for a valuable consideration, conveyed the title to said property to El Cajon Vineyards, Incorporated, and the latter on December 26, 1922, conveyed the title to the same property to the Valley Bank of Fresno, a corporation, as trustee, for the purpose of securing payment of certain bonds issued by said El Cajon Vineyards, Incorporated. Thereafter the defendant Larson in said action presented an undertaking in due form of law for the release of said attachment, and thereupon and upon notice duly given to the plaintiff in said action presented said motion to said superior court, which thereupon, after the attorneys for said plaintiff had waived further justification of the sureties upon said undertaking, on December 29, 1922, made an order discharging said attachment and directing the sheriff of the county of San Diego to release the said real property and the whole thereof therefrom and from the lien thereof, and thereafter and on the 3d day of January, 1923, and pursuant to said order, the said sheriff did release in writing said property from said attachment and from the lien thereof. No appeal was taken from said order, and the same has long since become final.

On the same day upon which the order of said court was made and entered discharging said attachment, namely, on December 29, 1922, the defendant Larson filed a demurrer to the complaint in said action, and also and at the time of filing thereof filed a notice of motion for a change of place of trial of said action from the city and county of San Francisco to the county of Fresno, upon the ground that he was a resident of the last-named county, and which notice of motion was supported by the demand and affidavit required by law. Said motion came on for hearing January 12, 1923, in said court and was granted, and said cause was by virtue thereof transferred to the county of Fresno, where it was subsequently tried and a judgment rendered therein in favor of the plaintiff against the defendant Larson for the sum of $14,318.02 and costs. Said judgment was entered on April 21, 1924, and no appeal was taken therefrom, nor were there any further proceedings had or taken in said action until November 1, 1925, when the plaintiff therein served and filed its notice of motion to extend the lien of said attachment, the granting of which motion is sought to be prohibited by the issuance of the writ applied for herein. In the meantime the El Cajon Vineyards, Incorporated, had defaulted in the payment of its aforesaid bonds, and on December 13, 1924, the Valley Bank of Fresno, as trustee, had, after proceedings taken as provided in its said deed of trust, sold said real property at trustee's sale to Messrs. Sprague, Tyler, and Whitney, who are three of the petitioners herein, and who thereafter conveyed various parcels thereof to the other petitioners herein, with the result that the entire property which had been the subject of said attachment in said action is now owned by these petitioners, who are, respectively, purchasers for value thereof. The foregoing facts appear from the petition herein, and it further appears therefrom that said respondent court and the judge thereof is threatening to make, and unless restrained by this court will make and enter, its order in said action granting the motion of the plaintiffs therein for an extension of the writ of attachment so as to effectuate a renewal thereof and the extension of its lien over and upon the said property herein, thereby creating a cloud upon their title to said property.

The respondents herein have filed no answer or other pleadings to the petition herein, but are relying upon the facts, very fully set forth in said petition, and which embrace, in addition to the matters above set forth herein, the papers and proceedings presented to said superior court upon the application for the extension of said writ of attachment, and which, according to the contention of the respondents herein made orally at the time of the hearing upon this petition, are sufficient to justify the said superior court in making its proposed order, and hence are sufficient to compel a denial of the petition herein.

[1, 2] The first contention which the respondents thus make herein is that the original order made and entered by said superior court discharging said attachment and releasing said property from the lien thereof was void, the basis of said contention being the attempted showing presented upon its motion for the said extension of said attachment, to the effect that at the time said court was applied to for said original order and at the time it made the same there had been filed in said action by the defendant Larson a notice of motion for a change of place of trial of said action, the effect of which, according to the respondents' contention, was to deprive said superior court of jurisdiction to make said order discharging the said attachment or to take any other action in said cause except to grant the motion for change of venue. The respondents rely for support in their said contention upon the cases of Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209, Nolan v. McDuffie, 125 Cal. 334, 58 P. 4, and McClung v. Watt, 190 Cal. 155, 211 P. 17. An examination of the record herein, however, discloses that the original order of said court, made and entered on December 29, 1922, discharging said attachment and releasing said property from the lien thereof, is upon its face a valid order, and that since no appeal was taken therefrom it has long since become final. This being so, said order is not subject to collateral attack. The present assault which the respondents seek to make upon said order is clearly a collateral attack, and against such attack every presumption is to be indulged in respecting the validity of such order and the jurisdiction of said court to make and enter the same at the time it did so. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Galvin v. Palmer, 134 Cal. 426, 66 P. 572; Rowe v. Blake, 112 Cal. 637, 44 P. 1084. This being so, we are bound to presume that the said court at the time it made and entered said order had jurisdiction to make and enter the same, and hence to presume that said order, although apparently made upon the same day as that upon which the defendant presented and filed his notice of motion for change of place of trial, was made and entered prior to the presentation and filing thereof, which otherwise, under the authorities cited by the respondent, would have deprived said court of jurisdiction.

The fact that said court in said order recited that the defendant had appeared in said action is not to be held to negative the application of this presumption, for the reason that there are several ways provided by law for the appearance of a defendant in an action. A defendant may appear in an action under the provisions of section 1014, Code of Civil Procedure, either by presenting his answer or demurrer, or by giving to the plaintiff written notice of his appearance. He may also appear by presenting himself in court and making a motion to dissolve an attachment. Salmonson v. Streiffer, 13 Cal. App. 395, 397, 110 P. 144. When, therefore, the said court recited in its original order the fact of the appearance of the defendant in said action it is to be presumed that it had reference to his appearance in open court for the purpose of making his motion for said order and not to his appearance therein by answer or demurrer when he presented his motion for change of place of trial. The respondents herein attempted to show by affidavit at the time of the presentation of the motion for an extension of the lien of said attachment that the action of said court in making said original order was taken after the filing of defendant's notice of motion for change of place of trial. But since such an attempt amounted to nothing more than a collateral attack upon the validity of said order it cannot be permitted to avail the respondents as against the conclusive presumption establishing the validity of said order. Canadian Co. v. Clarita Co., 140 Cal. 674, 74 P. 301; Crouch v. Miller, supra.

[3, 4] Having thus determined that the original order of said court discharging said attachment and releasing the real property in question from the lien of said attachment must be presumed to be a valid order, it follows necessarily that the effect thereof was to render said property as fully and completely free from such attachment process and from the lien created by the levy thereof as though such attachment had never been issued and such levy thereunder never made. In so far, therefore, as the grantees of said property, either immediately or mediately, from said Larson, are concerned, they must be held to have been after the entry of said order, and especially after the same became final, entire strangers to said action, having no further interest or concern therein than they would have had had such action been dismissed and ended contemporaneously with the entry of said order or with the date of the finality thereof. When, therefore, the plaintiff in said action attempted by its said motion to obtain an order of said court purporting to extend said attachment and to so revive the lien thereof as to affect the aforesaid property of these petitioners or to create or continue a lien thereon, it must find its warrant for the exercise of such jurisdiction on the part of said court or of the judge thereof either in the Constitution or in the statutes of this state investing said court with such jurisdiction.

The respondents asserted the right to make said motion under the authority of section 542a of the Code of Civil Procedure, which section has reference to the lien of attachments and to the extension under certain conditions of such attachment liens beyond the period provided in said section at the expiration of which the lien shall cease. A cursory reading of said section, however, will show that it has reference only to existing liens, and that it has no application to attachment liens which have either expired by operation of law or have otherwise ceased to exist prior to the making of the motion for the extension thereof provided for in said section of the Code. The respondents do not rely upon any other statutory provision than that above referred to as a justification for their said motion, nor do they contend that said superior court possesses any constitutional power to impose the lien of an attachment upon the properties of strangers to an action other than is provided for in said section of the Code of Civil Procedure. It would seem to follow that the attempted or threatened exercise of power by said respondent court or by the judge thereof to make or enter an order reviving said discharged attachment or the lien thereof, against or upon the property of the petitioners herein would be an act beyond the jurisdiction of said court or of the judge thereof, and that, this being so, the instant proceeding is one in which a writ of prohibition would properly lie.

The respondents, however, make two further contentions against the issuance of said writ. The first of these is that the petitioners are not entitled to said writ for the reason that they have a plain, speedy, and adequate remedy in the ordinary course of law, which remedy, according to respondents consists in the right of the petitioners to intervene in the said action wherein said court is attempting or threatening to make said order, and to thereby protect themselves against the imposition thereof either at the time of its proposed entry or thereafter upon appeal. We are cited in support of this contention to the sections of the Code of Civil Procedure which relate to the subject of intervention. We do not feel called upon in the instant proceeding to determine whether said sections of the Code of Civil Procedure relating to intervention may be given application to an action or to the inclusion of parties therein after the entry of final judgment in said action against those who have theretofore been parties thereto, since we are of the opinion that the right of intervention, conceding it to exist in these petitioners, would be wholly inadequate to protect them against the imposition of a lien upon their property which the respondent court herein or the judge thereof has no jurisdiction to create or to impose. White v. Superior Court, 126 Cal. 245, 247, 58 P. 450.

The further contention of the respondents herein is that the petitioners are not entitled to the issuance of this writ for the reason that they have a sufficient remedy through a writ of certiorari, and that in the case of Hill v. Superior Court, 21 Cal. App. 424, 131 P. 1061, it has been decided that the writ of prohibition should not ordinarily issue where certiorari will lie. A complete answer to this contention is, however, to be found in the decision of this court that a writ of certiorari will not issue at the instance of applicants therefor who are not parties to the action the proceedings in which are sought to be reviewed thereby. Elliott v. Superior

Court, 144 Cal. 501, 506, 77 P. 1109, 103 Am. St. Rep. 102.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; FINLAYSON, J.

199 Cal. 625

FONTANA LAND CO. v. LAUGHLIN.
(L. A. 7633.)

(Supreme Court of California. Nov. 10, 1926.)

1. Executors and administrators 🔑390—Purchaser of property from estate under deed containing clause that it was subject to mortgage not contained in notice or order of sale, held not to have assumed mortgage long barred by lapse of time.

Mortgage, barred by lapse of 14 years before sale of property by estate of mortgagor and 18 years before proceedings to quiet title, *held* not to have been assumed by purchaser from estate by clause in deed that it was subject to mortgage not made part of notice or order of sale by court.

2. Evidence 🔑113(16), 157(1).

Proposed bid by prospective purchaser of property from estate, not conforming to terms of sale made by court in notice and order for sale, has no evidentiary value as to market value of land and is at best but secondary evidence.

3. Executors and administrators 🔑390—Deed of purchaser of property of estate, stating that it was subject to barred mortgage, does not show that other prospective purchasers were prevented from submitting higher bids.

That deed of purchaser of property of estate contained clause that it was subject to mortgage which had been barred by statute of limitations without showing that it was intended as reduction from purchase price does not show that other prospective purchasers were thereby prevented from submitting higher bids if property were sold free of mortgage.

4. Constitutional law 🔑107.

Power to nullify acts of Legislature prescribing limitation on time within which actions may be commenced is not a judicial prerogative.

5. Limitation of actions 🔑1.

Statutes of limitations have become rules of property and are to be viewed as statutes of repose constituting meritorious defenses.

6. Executors and administrators 🔑213.

Probate court and administrator must guard interests of creditors and heirs vested with title of intestate's property immediately on his death and disallow outlawed claims, under Code Civ. Proc. § 1499.

7. Executors and administrators 🔑213.

Administrator acts as trustee of estate for benefit of creditors and heirs and cannot permit reduction in sale price of lands of estate by amount of mortgage barred by statute of limitation.

8. Executors and administrators 🔑213—Personal privilege of waiving bar of statute of limitations against mortgage expired with death of mortgagor (Code Civ. Proc. § 337).

Personal privilege of mortgagor to waive limitation prescribed in Code Civ. Proc. § 337, for enforcing mortgage, expired with his death and was not transmitted to administrator, or any other person, to be exercised for benefit of barred claimants to prejudice of creditors.

9. Executors and administrators 🔑375.

Administrator must remove cloud from title tending to reduce market value of real property, and court must refuse confirmation of sale, if barred claims hold down sale price.

10. Quieting title 🔑46.

Court cannot compel recognition of mortgage showing on its face that it is barred by statute of limitations, and revive lien, in suit to quiet title to property.

11. Frauds, statute of 🔑56(4)—Action to foreclose mortgage barred by statute of limitation cannot be maintained, in absence of written renewal (Civ. Code, §§ 2911, 2922).

Where lien of mortgage was extinguished, under Civ. Code, § 2911, at time principal obligation expired, no action to foreclose it could be maintained, in absence of written renewal of mortgage required by section 2922.

12. Executors and administrators 🔑388(6)—Purchaser of mortgaged property from an estate after mortgage has become barred by statute of limitation is not required to pay debt before suing to quiet title.

Rule that, where privity of relation exists, mortgagor cannot quiet title without paying debt, does not apply to purchaser of mortgaged land after lapse of time within which action to foreclose mortgage could have been brought and at time when record showed that mortgage had become extinguished, especially where property had been probated, severing all privity that may have existed between parties.

13. Limitation of actions 🔑164.

Subsequent renewal of barred note may create a debt anew, but does not renew, revive, nor continue mortgage securing note.

14. Executors and administrators 🔑213.

Estate is not liable for claim under mortgage against property of testator, barred by Code Civ. Proc. § 337; it being neither creditor nor debtor in matter.

15. Limitation of actions 🔑148(1).

Acknowledgment of debt to revive barred claim must be distinct, unqualified, unconditional recognition of obligation for which person making admission is liable.

16. Executors and administrators 🔑213.

Neither administrator nor his attorney was competent, as representative of estate, to enter into contract reviving statute of limitation in favor of any one as to barred debt, in view of Code Civ. Proc. § 1499.

17. Mortgages 🔑275.

Purchaser taking subject to mortgage is not estopped from showing that it has been paid, or is not legally owing, unless he assumes or agrees to pay mortgage, or amount thereof is deducted from purchase price.

18. Executors and administrators ⟹390.

Purchaser at probate sale of property, not shown to have assumed outlawed mortgage under deed made subject to it, nor to have received reduction in purchase price by reason of mortgage, *held* not liable on note and mortgage.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by the Fontana Land Company against Gail Laughlin, substituted for Mary S. Sperry, in which defendant filed a cross-complaint. From the judgment for defendant, plaintiff appeals. Reversed.

Leonard, Surr & Hellyer, of San Bernardino (D. A. Rothrock, of Riverside, of counsel), for appellant.

Gail Laughlin, of Portland, Me., Caroline Kellogg, of Los Angeles, and J. E. Pemberton, of San Francisco, for respondent.

SEAWELL, J. On March 8, 1892, Frederick Wittram, being the owner of certain lands described in the complaint, executed a mortgage thereon to Mary S. Sperry to secure the payment of his promissory note of even date, whereby he promised to pay to the said Mary S. Sperry, one year after the date thereof, the sum of $4,000, with interest payable quarterly in advance at the rate of 8 per cent. per annum. No part of the principal has at any time been paid, nor has any sum been paid on account of interest except the first quarterly installment, to wit, $80. The period prescribed by the provisions of section 337, Code of Civil Procedure, within which an action founded upon a written instrument may be maintained, expired on March 8, 1897. No attempt was made by the maker or holder of the note, or her assignee, to renew, or revive it, or to extend the time of payment, or to reduce her cause of action to a judgment until many years after the action had become barred by the statute of limitations. Frederick Wittram, the maker of said promissory note, died intestate June 3, 1910, leaving surviving him five adult children. Viola Berryman, a daughter, qualified as administratrix of his estate, but soon thereafter resigned and was succeeded by Frederick Wittram, a son of decedent, who was appointed administrator November 18, 1910.

No claim founded upon the mortgage or the promissory note, or at all, was ever presented in the probate proceedings as a claim against the estate of Frederick Wittram, deceased, or was ever filed, or presented to, or allowed, by the administrator or the court in the administration of said estate. The decree of final distribution was made and given by the superior court of the county of Alameda on July 15, 1913. Viola Berryman, during her term as administratrix, on July 5, 1910, commenced an action on behalf of said estate against the said Mary S. Sperry, alleging that said Mary S. Sperry claimed some right or interest in, or title to, or lien upon, said real property, and prayed for a decree quieting plaintiff's title thereto as the administratrix of said estate. The defendant answered on August 8, 1910, admitted the death of Frederick Wittram, set out the mortgage and note above mentioned, alleged nonpayment except as to the first quarterly payment of interest, and further alleged, upon information and belief, that the mortgage at all times since its execution constituted and continued to constitute a good and valid lien in favor of the defendant upon said real property. Defendant concluded her answer by praying that plaintiff take nothing by the action unless the estate pay to defendant the amount remaining due and unpaid upon said note and mortgage, which were barred by the statute of limitations more than 13 years prior to the day the answer was filed. The trial court, by its interlocutory decree in this proceeding, recited the facts as to the execution of the note and mortgage by Frederick Wittram on March 8, 1892, as heretofore set forth, and nonpayment, except as to said first quarterly payment of interest, and decreed that plaintiff, by reason of said nonpayment, was not entitled to a decree quieting title to said real property except upon the payment of the amount which it found to be due upon said mortgage, to wit, the principal sum of $4,000, with interest thereon at the rate of 8 per cent. per annum computed from March 8, 1892, to June 11, 1911, a period of 19 years and 3 months, and amounting to approximately $6,100, including the payment of all future sums of interest that might thereafter accrue upon said principal sum at the rate of 8 per cent. per annum. The decree further provided that, if the plaintiff should not pay said principal sum and interest found to be due upon said mortgage within 60 days after the service of a copy of the decree upon her, then a final judgment should be entered dismissing the action. The interlocutory decree further provided that if, within 60 days from the date of service of a copy of the interlocutory decree upon plaintiff, there should be filed with the clerk of the court a satisfaction of the mortgage, then a final decree would be entered quieting plaintiff's title to said real property. The administratrix of the estate and her successor having failed to comply with the terms of said interlocutory decree, the court, on March 1, 1913, almost 2 years after the entry of said interlocutory order or decree, made its final order, upon motion of the attorneys for the defendant, dismissing said action. No further proceedings were taken in the case.

In the course of the administration of said estate, the administrator, Frederick Wittram, Jr., in April, 1912, petitioned the probate court for an order of sale of the real estate of said estate, or so much thereof as the administrator might deem best, either at public or private sale. The petition recited the history of the administration and set forth in detail the existing indebtedness as furnishing the necessity for the sale. In describing certain mortgage indebtedness no mention was made of the Sperry note and mortgage, nor was it listed as an estate debt, although the real property upon which the lien is claimed to exist was described as a part of the realty to be sold. The real property was estimated to be of the value of $58,940. Pursuant to the petition, the court made its order on April 5, 1912, directing the sale of said real property on terms, one-half to be paid in cash at the time of sale and one-half to be evidenced by the promissory note of the purchaser secured by a mortgage upon the property sold, the time of payment not to exceed one year. The published notice of the administrator's sale was in the language of the notice of sale prepared by the administrator. The property was noticed to be sold at private sale on June 14, 1912, and on that day, pursuant to notice and the court's order, "all of the right, title, and interest of the estate of Frederick Wittram, deceased, in and to" the real estate described in the notice, was sold to Joseph R. Loftus, who was acting as the agent of plaintiff, Fontana Land Company, and was the only bidder. His bid was $86,100 and incorporated in full the printed notice of the administrator's sale of real estate and adopted the terms of payment prescribed by said notice, and provided further that any 40 acres mortgaged for the purchase price might be released from the mortgage at any time during the one-year period of liquidation upon the payment of $50 for each acre released. The bid also required the furnishing of a certificate of title by the estate, "made by the Consolidated Abstract & Title Guaranty Company of San Bernardino, to become the property of the purchaser in the event of the sale being completed." The language which the defendant places much emphasis on and claims to be equivalent to an express assumption of the mortgage indebtedness immediately follows the clause above quoted, and is in these words:

> "And it being further understood that this bid is made subject to the mortgage of Frederick Wittram to Mary S. Sperry for the sum of four thousand ($4,000.00) dollars and interest, dated the 8th day of March, 1892."

The usual 10 per cent. deposit, $8,610, accompanied the bid, which provided for the forfeiture of the deposit in case of failure on the part of the purchaser to comply with the terms of sale, and, on the other hand, provided that said deposit should be applied on account of the purchase price in the event that the bidder complied with the terms of said sale.

On July 25, 1912, upon the return of the sale and after proof of due notice, the probate court made its order confirming said sale, which was made in accordance with the terms prescribed by its order to Loftus for the sum of $86,100. The court found that the sale was legally made and fairly conducted and the bid was not disproportionate to the value of the property sold; that a sum exceeding said bid by at least 10 per cent., exclusive of the expense of a new sale, could not be obtained; that said real estate had been appraised within one year of the time of said sale; that the sum of $86,100 was more than 90 per cent. of the appraised value of said real estate, and the sale was conducted as by the statute provided in such cases. Upon the confirmation of the sale legal conveyances were directed to be made to said Joseph R. Loftus. Accordingly a deed was executed by the administrator to the purchaser at the probate sale. By specific reference the "order of sale" was made a part of the deed. The mortgage terms of the one-half unpaid purchase price were complied with and the interest disposed of by the administrator's deed was:

> "All the right, title, interest, and estate of Frederick Wittram, deceased, at the time of his death, and also all the right, title, and interest that the said estate by operation of law or otherwise may have acquired other than or in addition to that of said intestate at the time of his death."

The habendum clause contained the same language that was inserted in the bid, to wit:

> "Subject to the mortgage of Frederick Wittram to Mary S. Sperry for the sum of four thousand ($4,000.00) dollars and interest, dated March 8, 1892."

On October 21, 1915, the plaintiff, as the legal owner of the fee and title to said real property, commenced an action against Mary S. Sperry and certain fictitious parties, alleging absolute ownership in itself, and praying that its title be quieted against defendants and all other claimants. Subsequent to the filing of the complaint, Mary S. Sperry, in 1916, sold and assigned said note and mortgage to Mary A. Sperry. The latter died testate in 1919, and by her will devised her entire estate to Gail Laughlin. The decree of distribution distributed to Gail Laughlin the "mortgage on said land situated in San Bernardino County," which, from the description that follows, shows it to be the property described in the complaint herein. Gail Laughlin, having been substituted for Mary S. Sperry, filed an amended answer, and admitted that plaintiff was the owner of the real estate described in the complaint, subject, however, to the lien of defendant arising out of the mortgage dated March 8, 1892, the effect of which is set out in the answer, together with a partial history of the probate proceedings and transactions. The interlocutory decree was pleaded at length and a portion of the final order or decree of dismissal was also pleaded, and the allegations that no appeal was taken from either of said decrees appear in said amended answer. It concludes with a prayer that plaintiff take nothing by the action, and that defendant have judgment for the foreclosure of said mortgage dated March 8, 1892, and for a sale of the land described in the complaint, and that out of the proceeds of said sale there be paid to defendant the sum of $4,000, with interest at the rate of 8 per cent. per annum from March 8, 1892, until date of judgment, and interest at the rate of 7 per cent. per annum on each installment of interest called for in said note from the time payment became due, for attorney's fees at the rate of 3 per cent. upon the amount found due as provided in the mortgage, and for costs of the action. Plaintiff demurred to the answer, on the ground that it did not state a defense, for the reason that the cause of action grounded upon the note and mortgage was barred by section 337, subd. 1, Code of Civil Procedure. Defendant, in addition to answering, filed a cross-complaint, alleging the execution of said note and mortgage, nonpayment thereof, the former action to quiet title, the interlocutory decree, and the decree or order of dismissal made thereon, and concluded with a prayer for the foreclosure of said mortgage in terms and substance similar to the affirmative relief sought by the amended answer. Plaintiff in its answer to the cross-complaint, and as a bar to the affirmative relief sought, pleaded sections 319, 337, subds. 1, 339, 343, 1499, and 1500, Code of Civil Procedure. It is specifically alleged therein that no claim founded on said promissory note or mortgage was ever presented to the executor or to said estate or filed or allowed in the administration of the estate and that final distribution had been made several years prior to the filing of the answer and cross-complaint. Plaintiff also alleged a want of knowledge that said bid contained the clause subject to any mortgage; the expenditure of $25,000 in making improvements without protest or claim being made by defendant's predecessors that they claimed any right to or interest in said real property, and without claim by them or either of them as to any ownership therein; that plaintiff and its predecessor held and occupied said lands for a long period of years without the assertion upon the part of defendant's predecessors of any interest, title to, or lien upon, said land; that the price paid was the full, fair market value of said land, and no reduction was made, contemplated, or intended to be made by the purchaser by reason of the mortgage given in 1892; that there was no intention on the part of the plaintiff or its predecessors to acknowledge said barred mortgage and note, or either, as constituting a claim or lien upon said lands, and no intention at any time to revive or renew said mortgage or extend the time for the payment of said note; that the clause "subject to the mortgage," etc., in the bid and deed, was inserted by the attorney for the estate only to relieve the fears and anxiety of the administrator as to any liability that might accrue against him by reason of any implied covenant against incumbrances arising out of the transaction, and it was so understood by the administrator and the purchaser at said probate sale, and the clause was not intended to constitute an assumption by the purchaser of any mortgage debt whatsoever; that plaintiff and its predecessors and said administrator were informed, believed, and understood that said mortgage lien had long since become barred by the statute of limitations and was wholly ineffective for any purpose.

The court found generally that all of the allegations of defendant's amended answer and cross-complaint, respectively, were true. It then found specifically that plaintiff was the owner of the fee and legal title to all the land described in the complaint; that defendant's claim to a lien on said lands was just and valid; that defendant's cause of action as set forth in her cross-complaint was not and is not barred by any provision of any section of the Code of Civil Procedure; that no claim founded on the promissory note set forth in the cross-complaint was ever presented in the probate proceedings as a claim against the estate of Frederick Wittram, deceased, which was finally closed in 1913; and that Loftus was the agent of plaintiff and the latter was bound by his acts. Paragraph 6 of the findings, from which the deduction is made that the bid of Loftus influenced others *not to bid*, is as follows:

> "That Loftus, as the agent of plaintiff, and the said plaintiff, received and had the advantage of an equivalent to a deduction from the purchase price to the extent of the sum unpaid on the debt secured by said mortgage, consisting of having the bid of said Loftus treated and accepted as the highest and best bid, when other persons were ready and willing to bid and pay a much larger sum for the land, on condition that they should not be required to bid on it as subject to the mortgage, or to accept a deed making the land subject to the said mortgage."

The court also found that the defendant and cross-complainant had not been guilty of laches so as to bar her from prosecuting the action presented by the cross-complaint and was not estopped from claiming her lien on the land. The allegation as to the intention of the purchaser by the insertion of the "subject to mortgage" clause in said bid and deed was found against plaintiff. The sum of $500 was found to be a reasonable attorney's fee and was allowed.

The conclusions of the court were that the plaintiff was entitled to a decree quieting its title to the lands described in the complaint only upon condition that it make payment to the defendant of such sum of money as should be found sufficient to discharge defendant's lien upon said lands, which at the time judgment was entered was decreed to be $4,000 principal, together with interest from 1892 at the rate of 8 per cent. per annum, computed at $20,051.83 and $500 attorney's fees and costs of action; that, if such payments were made at the time thereafter fixed by the interlocutory decree (90 days from and after receipt of notice of the entry of the interlocutory decree), plaintiff should have a final decree quieting its title to said lands, and, if plaintiff should fail to make payment as set forth in said interlocutory decree, the defendant and cross-complainant, upon application to the court, would be entitled to and have a final judgment and decree for foreclosure of her lien on said lands and would be entitled to an order for the sale of said lands in satisfaction of said lien and judgment. The interlocutory judgment incorporated, substantially, the matters set out in the conclusions of law. The appeal is taken from the judgment and decree as related.

[1] Counsel have devoted many pages in argument and have cited authorities extensively as to the effect of the language of the bid, which was also carried into the habendum clause of the deed, and which was as follows, to wit:

> "* * * And it being further understood that this bid is made subject to the mortgage of Frederick Wittram to Mary S. Sperry, for the sum of $4,000 and interest, dated the 8th day of March, 1892."

This language, however, was no part of the notice of sale nor the court's order and was introduced into the transaction by the attorney for the estate, who prepared the bid. The only parol evidence admitted by the court as to whether the purchaser made any reduction from the purchase price on account of the outlawed mortgage was that no such reduction was made, considered, or discussed by the purchaser with the attorney of the estate or the defendant or any of her predecessors in interest, or with any other person, and that the purchaser regarded the mortgage as long since barred by the statute of limitations and of no legal effect whatsoever. The administrator and attorney for the estate were active in interesting other persons to bid, but no other bid could be obtained. A form of bid prepared by the attorney for the estate on behalf of W. D. Frederick, which was not offered or presented to the administrator, and in which the purchase price was set at $91,000, was allowed in evidence against the objection of appellant.

[2] In addition to the objection that it was not offered as a bid by the prospective purchaser, it did not conform to the terms of sale, inasmuch as it provided for a period of 3 years in which payment might be made of the unpaid one-half purchase price instead of one year as provided by the notice and order of sale, and was conditioned that, if payment should be made within one year after date, the rate of interest was to be 5 per cent. instead of 6 per cent. as provided by the Loftus bid. The proposed bid had no evidentiary value as to the market value of the land and was at best but secondary evidence. Besides, the probate court, whose duty it was to protect the interests of the estate, found, by elaborate recitals, that the Loftus bid was full, fair, and adequate, and represented the market value of the property sold, and the sale was fairly conducted. The bid was more than 10 per cent. above the appraised value and was $27,160 above the estimated value made some time prior to the sale.

[3] The probate court found that a sum exceeding said bid by at least 10 per cent. exclusive of the expenses of a new sale, could not be obtained. A letter written by Frederick a short time after he forwarded the form bid to the attorney was received in evidence over plaintiff's objection. In this letter he stated that it was not his intention to make a bid in the form prepared by the estate's attorney, which contained the "subject to the mortgage" clause. The cloud on the title was mentioned, but the legal enforceability of the lien was not admitted. The opportunity left open to bring suits on the claims was adverted to. The attorney for the estate was permitted to testify, against objection, that there were several persons who *said* they would go above the Loftus bid if the title could be cleared. It will be remembered that all the administrator purported to sell was the right, title, and interest of the estate. A letter from J. H. Adams & Co. to the estate's attorney was received in evidence in which the firm referred to the mortgage of 1892 and stated that it would be impossible for it to handle the land, as it intended to subdivide it and it was necessary for its purposes to give a *perfect* title. The letter further stated, unquestionably in reply to suggestions made in the course of negotiations as to the bar of the statute, that—

> "Even though the collection of the mortgage be barred by the statute of limitations, it, nevertheless, remains an incumbrance upon the property of such character as would prevent its sale to subdivision purchasers."

The purchaser in the instant case was in no wise responsible for the condition of the title and he could not, as a matter of fact or law, have been placed in a better position by reason of the barred mortgage than any other prospective purchaser was placed. It is not quite understandable how the Loftus bid, as suggested in paragraph 6 of the findings, could have had a retroactive effect or influence upon other prospective bidders. At any rate his act could not have made the law of the case as to others. Any purchaser as a matter of law was bound to take the title as it then existed. The logic of the situation is itself sufficiently persuasive of the fact that no person in a normal frame of mind would have intentionally and deliberately assumed a mortgage indebtedness aggregating $24,051.83 in excess of the valuation of the property as fixed by the probate court, which valuation was not contradicted by any legal evidence in the case, and this, too, in the face of the record showing said indebtedness to have been barred by the lapse of more than 14 years before the sale and 18 years before the filing of the cross-complaint herein.

[4, 5] The power to nullify acts of the Legislature prescribing a limitation upon the time within actions may be commenced is not a judicial prerogative. Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored by the law. Nichols v. Randall, 136 Cal. 426, 69 P. 26; Shain v. Sresovich, 104 Cal. 402, 38 P. 51. They are to be viewed as statutes of repose, and as such constitute meritorious defenses. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann. Cas. 1279.

[6] The title to the real property in the instant case immediately upon the death of Frederick Wittram, Sr., vested in his heirs at law. It is the duty of probate courts to guard the interests of heirs and creditors. So zealous is the law of their interests that it specially enjoins upon administrators and courts the duty to reject and disallow outlawed claims. Section 1499, Code of Civil Procedure, provides:

> "No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations. * * * "

In Reay v. Heazelton, 128 Cal. 335, 338, 60 P. 977, 978, the above-cited section was construed by this court, and it was there said:

> "As between parties acting in their own right, the plea of the statute of limitations is unquestionably a personal privilege which may be waived. But an executor or administrator, acting for others, and in a trust capacity, is not vested with this privilege, and may not waive such a defense. By section 1499 of the Code of Civil Procedure the personal representative, as well as the judge of the superior court, is forbidden to allow any claim which is barred by the statute of limitation. It would be a most unwarranted evasion of this mandatory provision to permit an executor or administrator by his failure to invoke the plea to suffer judgment upon a claim which, when presented to him, he was bound by law to reject because of the bar of the statute. In Vrooman v. Li Po Tai, 113 Cal. 302 [45 P. 470], it was held that the administrator, by appearing and answering, could not waive the objection that the claim in suit was barred by the statute; and in Boyce v. Fisk, 110 Cal. 107 [42 P. 473], it is declared that an administrator will not be permitted to waive the statute of limitations upon a claim which is barred. To like effect is Butler v. Johnson, 111 N. Y. 212 [18 N. E. 643].
>
> "The same principles must apply here, and however tardily the plea may have been presented, since the facts appear of record and are now called to this court's attention, it must be held that plaintiff's right of action upon the judgment is barred by the statute of limitations."

See, also, Etchas v. Orena, 127 Cal. 588, 60 P. 45; Barclay v. Blackinton, 127 Cal. 189, 59 P. 834.

[7-11] Neither the administratrix nor the administrator were acting in their own right, but as trustees of the estate for the benefit of the creditors and heirs, and to have allowed or permitted a reduction of the sale price of lands belonging to the estate would be, as was said in effect in Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470, to pay a barred claim out of moneys belonging to creditors who had been vigilant in pursuing their remedies, and also to take from the heirs property which had vested in them. The personal privilege of waiving the statute of limitations expired with the decedent and was not transmitted to the administrator or any other person to be exercised for the benefit of barred claimants to the prejudice of creditors. It was the duty of the administrator to remove from the title any cloud that tended to reduce the market value of the real property. As a matter of fact it would have been the duty of the court to have refused confirmation of the sale and to have ordered appropriate proceedings taken if in its judgment untenable asserted claims were pressing down the sale price to an appreciable extent. The refusal to allow barred claims is more than a general policy of the law; it is the positive command of the statute. The mortgage indebtedness showed upon its face and it was apparent upon the public records of the county of San Bernardino that it was barred long prior to the first assignment made in 1916 by Mary S. Sperry to Mary A. Sperry. If the statute was effective for any purpose it would seem to furnish an answer to the resistance made by the defendants in the first action brought by the administrator to quiet title. The first purported interlocutory decree shows upon its face that it was void. The court was without authority or jurisdiction to make it, inasmuch as it compelled the recognition of a claim proscribed by statute. If respondent's contention be accepted as the true rule, barred claims not presented for allowance or rejection could be used to defeat the closing of estates, and real property belonging thereto would become inalienable. This would be indulging mere subterfuges to defeat the plain letter of the statute. It would also place the creditors of an estate who had been vigilant on no better terms than those who had been guilty of gross laches, and, if barred claims are to be paid prior to or as a condition to the right of

the administrator to sell real property, persons chargeable with negligence would be in a position to defeat the just claims of the vigilant. The interlocutory decree or order made in the second action commenced to quiet title in 1915 goes even beyond the first in its exaction. It not only forbids alienation until a large sum of interest computed on the barred principal is paid, but it also revives and restores a lien without any attempt being made on the part of the lien claimant to comply with the law in bringing to life a dead lien.

> "A mortgage can be created, renewed, or extended *only* by writing executed with the formalities required in the case of a grant of real property." (Italics supplied.) Civil Code, § 2922.

The lien in this case was extinguished under the provisions of section 2911, Civil Code, at the time the principal obligation expired, and therefore no action to foreclose it could be maintained on the cross-complaint. California Savings Bank v. Parrish, 116 Cal. 254, 48 P. 73. There can be no pretense that the cross-complainant or her testate held at any time a subsisting, enforceable obligation. There was no renewal or extension of the lien, and it was extinguished long before any attempt was made to assign it or enforce it. It therefore could not form the basis of a foreclosure action.

[12, 13] The rule in this state is that where a privity of relation exists the mortgagor cannot quiet title without paying his debt. But this rule cannot be applied to one who acquired the mortgaged land by purchase for a consideration after the lapse of the time within which an action to foreclose the mortgage could have been brought and at a time when the records, as in this case, showed the mortgage had become extinguished. Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209. The instant case presents a situation far less favorable to respondent than the ordinary relation of mortgagor and mortgagee, or the assigns of either. Here the law intervened and absolutely severed all privity that may have theretofore existed between the original parties or their assigns. The transaction has passed through the purging processes of the probate court, which by statutory mandate guards the interests of creditors who have not allowed their claims to become stale. The subsequent *renewal* of a barred note may create a debt anew, but *it* does not *renew*, *revive*, nor continue the mortgage. Sanford v. Bergin, 156 Cal. 43, 103 P. 333; Wells v. Harter, 56 Cal. 342; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145. Hence the court in the instant case was powerless to revive the lien. Neither do we think the language contained in the bid or deed amounts to an unqualified admission or assumption of an existing debt which the bidder expressed an intention to acknowledge or assume. This conclusion seems quite irresistible when all the facts and circumstances surrounding, leading up to and constituting material parts of the transaction before us are considered together.

> "'If there be *accompanying* circumstances which *repel* the promise or intention to pay, if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action.' Mr. Justice Story in Bell v. Morrison, 1 Pet. 362 [7 L. Ed. 174]." Visher v. Wilbur, 5 Cal. App. 562, 90 P. 1065, and cases therein cited.

[14-16] The estate was not liable for the barred claim as it was neither creditor nor debtor in the matter. To whom, it may be pertinent to inquire, was the alleged promise to pay made? The acknowledgment of a debt in the contemplation of the statute must be a distinct, unqualified, unconditional recognition of an obligation for which the person making such admission is liable. Powell v. Petch, 166 Cal. 329, 136 P. 55. The administrator and his attorney surely were not acting as the agents of the holder of the barred claim against the interests of the estate. No one pretended to represent the barred lien claimant. Neither the administrator nor his attorney was competent as the representative of the estate to enter into a contract which would revive the statute of limitations in favor of any one as to the barred debt. Code Civ. Proc., § 1499; Visher v. Wilbur, supra; Boyce v. Fisk, 110 Cal. 107, 42 P. 473; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195.

[17] In their search for precedents to sustain the respective theories of counsel as to the construction to be placed upon the "subject to the mortgage" clause, cases from many jurisdictions are cited. The greater weight of authority and the better reasoning is that, unless the grantee in the deed assumed or agreed to pay the mortgage, or unless the amount of the mortgage was deducted from the purchase price, a purchaser who merely takes subject to the mortgage is not estopped from showing that it has been paid, or that the amount claimed is not legally owing upon it. This rule, which we believe to be sound, is elaborated in Brunswick Realty Co. v. University Co., 43 Utah, 75, 134 P. 608; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Ault v. Blackman et al., 8 Wash. 624, 36 P. 694; Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; Thompson v. Morgan, 6 Minn. 292 (Gil. 199); Christopher v. Ferris, 55 Wash. 534, 104 P. 818; Hewitt v. Durant, 78 Mich. 186, 44 N. W. 318. Many other cases, including decisions of the courts of this state, and text-writers, might be cited to the same effect.

[18] In the instant case it must be kept in mind that we are dealing with the application of the statute of limitations to a probate sale and not with the general question as it affects the privities that exist ordinarily between mortgagors and mortgagees. This is a distinction that cannot be set aside. But aside from this aspect of the case there is no evidence to sustain the conclusion that any reduction was intended to be made by the purchaser by reason of the outlawed note and mortgage.

The judgment and decree appealed from are reversed.

We concur: WASTE, C. J.; RICHARDS, J.; FINLAYSON, J.; SHENK, J.

---

199 Cal. 641

In re ROSS' ESTATE.

GORMAN v. TAYLOR et al.

(S. F. 11291.)

(Supreme Court of California. Nov. 10, 1926.)

1. **Appeal and error 🔑1011(1).**

Appellate court is bound by finding of trial court on conflicting evidence, since it is exclusive function of trial court to determine credibility of witnesses.

2. **Wills 🔑290—Will last seen and known to have been in possession of deceased, and which could not be found after her death, was presumed to have been destroyed by deceased with intention of revoking same.**

Where will was in possession of deceased two months before death, and she was in possession of her physical and mental faculties until her death, and will could not be found after her death, presumption arose that will was destroyed by testatrix with intention of revoking same.

3. **Wills 🔑290—There is no presumption of revocation of lost will, where will was deposited by deceased with custodian, and deceased had no subsequent access to it.**

Presumption of revocation of will on failure to find same does not apply, where it appears that will was deposited by deceased with a custodian, and that deceased did not thereafter have it in her possession or have access to it.

4. **Wills 🔑290—Applicable special presumption of revocation is not rebutted by general presumption of continued existence (Code Civ. Proc. § 1963, subd. 32).**

Where special presumption of revocation of will is applicable to facts, it is not rebutted or overthrown by application of general presumption of continued existence, under Code Civ. Proc. § 1963, subd. 32.

5. **Wills 🔑306—Evidence held insufficient to support finding that will was in existence on death of deceased (Code Civ. Proc. § 1339).**

Evidence *held* insufficient to justify finding of fraud necessarily implied in finding that will was destroyed after death of deceased, and that will was in existence on death of deceased, as required by Code Civ. Proc. § 1339.

6. **Wills 🔑292, 300.**

Rules of evidence and weight to be accorded to evidence are same in proceedings for probate of will as in any other civil case.

7. **Fraud 🔑50.**

One asserting fraud has burden of proving it by substantial evidence.

8. **Fraud 🔑58(1).**

To establish fraud, evidence must give rise at least to reasonable inference of fraud, and not mere suspicion.

9. **Appeal and error 🔑996.**

Though it is province of trial court to draw inferences as to fraud, *held*, that as a necessary prerequisite there must be facts and circumstances in evidence from which inference of fraud may reasonably be drawn.

In Bank.

Appeal from Superior Court, Santa Clara County; Peter F. Gosbey, Judge.

Application by James Marco Gorman for the probate of the will of Bettie Ross, deceased; G. B. Palmer and others appearing as heirs. From an order admitting lost or destroyed will to probate, the contestant, Ella Taylor, appeals. Reversed.

H. A. Blanchard, of San Jose, for appellant.

Ward Sullivan, of San Jose, and Jas. L. Atteridge, of Sacramento (Chas. M. Cassin, of Oakland, of counsel), for respondent.

SHENK, J. This is an appeal from an order admitting to probate an alleged lost or destroyed will. Mrs. Bettie Ross died on the 18th day of June, 1923, in the county of Santa Clara, at the age of 72 years. She died childless, without father or mother living, and her next of kin and heirs at law are James Marco Gorman, a nephew, Mrs. Ella Taylor, a sister, John Butterfield, a brother, and G. B. Palmer, L. C. Palmer, D. B. Palmer, and Carrie Palmer Noble, the children of a deceased sister. The deceased left an estate in said county of the approximate value of $95,000, consisting of a house and lot at No. 493 South Thirteenth street, in the city of San Jose, of the value of $8,500; the balance being principally money in bank. On July 6, 1923, the said James Marco Gorman, who will be referred to herein as the proponent, filed a petition for letters testamentary, in which he alleged, in addition to the jurisdictional facts, that the deceased made a will bearing date June 20, 1920, which was her last will, was unrevoked, and was in the possession of the deceased at the time of her death; that said will had disappeared from among her papers after her death, could not be found, and was, therefore, a lost or destroyed will. The petition then set forth the names and addresses of the sole devisees and legatees under said will and prayed that the same be established as a lost and destroyed will and be admitted to probate.

On July 9, 1923, the said Ella Taylor filed her answer and grounds of opposition and contest, wherein she denied that the deceased left a last will bearing date the 20th day of June, 1920, or any other date, denied that the alleged will was in the possession of the deceased at the time of her death, denied that the alleged will disappeared from the papers of the deceased after her death, denied that it was a lost or destroyed will, and alleged that the said will was destroyed by the deceased in July, 1920, with the intent and for the purpose of revoking the same, and that the said Bettie Ross died intestate. The contestant prayed that the court adjudge and decree that said alleged will was not and is not the last will and testament of the deceased. and that the same was revoked by the decedent in July, 1920, and that it be denied probate. The proponent filed an answer to the grounds of opposition and contest, wherein he denied that the said alleged will had been destroyed or revoked in July, 1920, or at any other time, and denied that the said deceased died intestate.

With the issues as thus framed the court tried the matter and found from the testimoney of two witnesses who had read said will, and who clearly recalled the provisions of the same, that the deceased had made and executed her last will and testament on June 23, 1920. The will is set forth in hæc verba in the findings. It is therein provided that the proponent receive 2½ acres of land and the improvements thereon at Los Gatos (which was sold before the death of the testatrix) and $42,967.83 in cash; that Peter Bennett receive $29,077.82 in cash, and in case of his death before the death of deceased the same to go to the proponent; that Ella Taylor receive the sum of $5,600 and John Butterfield the sum of $6,922.99. The residue of the estate was left to all of the beneficiaries, share and share alike. The will provided that in the event of the death of Ella Taylor before the death of the deceased the bequest to her go to Zack Taylor, her son, a nephew of deceased, and in the event of the death of the proponent before the death of deceased the portion of the estate left to him should go to his issue. The court further found that it was not true that Bettie Ross destroyed said will in July, 1920, with the intent to revoke the same, or at all, and that after the death of deceased said will, after diligent search, could not be found. The court concluded that the said will was entitled to probate and made the order from which this appeal is taken. The record is presented in a bill of exceptions.

The contestant specifies some 27 grounds for reversal, but the one of major importance is that the evidence is insufficient to justify the further finding and conclusion of the court:

> "That it has been proved and established that the said will was in existence at the time of her death, on the 18th day of June, 1923, and that the same has been lost or destroyed since her said death."

It is the contestant's contention that the evidence is entirely insufficient to overthrow the presumption that the will, last seen and known to have been in the possession of the deceased, and which could not be found after her death, was destroyed by her with the intention of revoking the same. It is also contended that the evidence is insufficient to meet the prohibition contained in section 1339 of the Code of Civil Procedure, as follows:

> "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. * * *"

There is, concededly, no proof that the will was destroyed during the lifetime of the testatrix, either fraudulently or by public calamity. Nor is it contended by the contestant that the provisions of the will were not clearly and distinctly proved by the testimony of at least two witnesses, as required by said section 1339. That the testatrix was competent to make the will and that the same was duly executed by her on June 23, 1920, is not questioned.

On behalf of the proponent it was in evidence by the testimony of Mr. Leo B. Archer, the attorney who drew the will and witnessed its execution, that the will was in existence in September or November, 1922. This witness saw the original will at that time in the possession of Mrs. Ross and examined the same. It was also in evidence by the testimony of Mrs. Lucia Gorman, the wife of the proponent, that the will was in existence on the 19th day of April, 1923. This witness was visiting the deceased at the latter's home in 493 South Thirteenth street, in San Jose, on that date and there saw the will among the deceased's private papers, which were located in a sideboard drawer in said home. It was also in evidence that the deceased had stated at numerous times after July, 1920, but not later than April 19, 1923, that she had made the will. She stated to Dr. Ada Scott Martin, in June, 1922, that she had made a will and that James Marco Gorman, the father of the baby then in her presence, was to have everything she had worth while.

On behalf of the contestant it was in evidence by the testimony of Zack Taylor that in July, 1920, at her then Los Gatos home, the deceased tore said will into pieces and directed the witness to take the torn pieces and place them upon a fire then burning in the back yard, saying to him at the time:

> "Marco Gorman and his wife will never spend any of my money, the way he has talked to me. Take this [the will] out; I have torn it up, take it out and throw it on the fire, and that will be the end of it,"

—and that the witness did as he was directed. It was also in evidence by the testimony of many witnesses that the deceased on many occasions had stated, as late as May 13, 1923, that she had destroyed the will.

[1] It was, of course, the exclusive function of the trial court to be the judge of the credibility of the witnesses. In exercising that power the court concluded, by necessary implication from the findings of fact that were made, that the testimony of the witnesses for the contestant to the effect that the deceased had destroyed the will in July, 1920, was untrue. The court accepted as true the testimony of the witnesses for the proponent that the will was in existence in September or November, 1922, and was seen and known to be in existence and in the possession of the deceased at her home in April, 1923. The only way by which the sharply conflicting evidence might be harmonized consistently with the truthfulness of all the witnesses is, as counsel for contestant suggests, by the due consideration of the undisputed evidence that when the will was prepared for execution in Mr. Archer's office both an original and a carbon typewritten copy were prepared; that the original was signed by the testatrix; the names were filled in on the carbon copy by Mr. Archer; and at the request of Mrs. Ross both the original and the carbon copy were delivered to her. Therefore, it is suggested, the deceased may have destroyed the one and retained the other. But we are not concerned with that question. We are bound by the finding of the court on the conflicting evidence presented to it. It will therefore be assumed for the purposes of further discussion that all question of the alleged destruction of the will in July, 1920, has been eliminated from the case. Of paramount importance it is then to determine whether the evidence was sufficient to support the finding that the will was in existence on the death of the deceased, as required by said section 1339.

[2] It was established beyond question that the will was last seen and known to have been in the possession of the deceased on April 19, 1923; that from that date until the day of her death she was in the possession of her physical and mental faculties; and that the will could not be found after her death. From these facts the presumption arises that the will was destroyed by the testatrix with the intention of revoking the same. Estate of Johnston, 188 Cal. 336, 206 P. 628; Estate of Sweetman, 185 Cal. 27, 195 P. 918; Griffith v. Higinbotom, 262 Ill. 126, 104 N. E. 233, Ann. Cas. 1915B, 250. See note 50 L. R. A. (N. S.) 864. The proponent places great reliance on the Estate of Sweetman, supra, as supporting his contention that the evidence was sufficient to support the finding that the will was in existence at the time of the death of deceased. But we do not deem that case controlling, first, because the facts were not the same, particularly in that all of the factors giving rise to the presumption of revocation were not there present. It appeared in that case that the testatrix on her deathbed had stated that about 2½ months theretofore she had delivered the alleged lost or destroyed will into the hands of a third party, with instructions to place the same in a safe for safekeeping. In the absence of a showing of some other disposition of the will prior to death, and it was there declared that there was none, it was held that the presumption of revocation did not apply and that the presumption announced in subdivision 32 of section 1963 of the Code of Civil Procedure should be applied. That presumption is:

> "That a thing once proved to exist continues so long as is usual with things of that nature."

[3, 4] We are in accord with the rule which seems to have been approved in that case that the presumption of revocation does not apply, or is overcome and is rebutted, where it appears that the will was deposited by the deceased with a custodian and that the deceased did not thereafter have it in her possession or have access to it. Schultz v. Schultz, 35 N. Y. 653, 91 Am. Dec. 88; In re Colbert, 31 Mont. 461, 78 P. 971, 80 P. 248, 107 Am. St. Rep. 439, 3 Ann. Cas. 952. See, also, R. C. L. 385, and 50 L. R. A. (N. S.) 865. But if the opinion in that case be deemed to hold that when the facts which raise the presumption of revocation are shown such presumption is met and rebutted by the presumption of continuing existence, as announced in subdivision 32 of section 1963, or that the latter presumption, coupled with proof of the existence of the will at some time prior to death, supplies the proof of the existence of the will at the time of death, as required by said section 1339, we are not in accord with that conclusion and the case is overruled to that extent. The Sweetman Case was decided by a divided court, and the dissenting opinion serves to accentuate the importance of applying the presumption of revocation when the facts, as in this case, call for its operation, regardless of the presumption of continuing existence. Where the special presumption of revocation is applicable to the facts, it must therefore be held that it is not rebutted or overthrown

by the application of the general presumption embodied in subdivision 32 of said section 1963. In the case of Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442, a similar question with reference to the proof required to establish a lost or destroyed will was involved, and the court said:

> "It is urged that in such cases the law presumes that a fact continuous in its character continues to exist until the contrary is proved, and that there is a presumption that an instrument shown to have been executed continues in existence. This rule, however, has no application to an ambulatory instrument like a will or codicil. Indeed, as to such an instrument the presumption is the other way."

If the rule were otherwise all that would be necessary in order to prove a lost or destroyed will would be to show that the will was in the possession of the testatrix some time, any time, prior to her death, with no apparent intervening cause for destruction or revocation, and thus rebut the presumption of revocation and entirely nullify the requirements of said section 1339.

In further justification of the finding that the will of Bettie Ross was in existence at the time of her death, but was destroyed after her death, the proponent at length discusses the facts and circumstances shown in evidence with reference to the disposition of the jewelry and valuable papers of the deceased on the morning of the day of her death and thereafter. Certain acts and statements of Mrs. Alice Silverstine before and after the death of the deceased and of Mrs. Ella Taylor after the death are commented upon, and thereon the proponent predicates a charge of conspiracy on the part of those two women to defraud the proponent out of that portion of the estate represented by the difference between what he would receive under the will and the one-fourth part thereof which he would receive as an heir at law of the deceased if it be declared that the deceased died intestate. Mrs. Silverstine and Mrs. Ross lived on adjoining properties. The relation between the two was that of friendly neighbors. Mrs. Ross had been ailing physically for some time before her death and Mrs. Silverstine had evidenced a kindly concern in her welfare. As Mrs. Ross lived alone in her home, it was arranged between the two women that when Mrs. Ross arose in the morning she would raise a window shade on the side of the house toward the Silverstine home. On the morning of June 18th the shade was not raised as usual, whereupon Mrs. Silverstine went to Mrs. Ross's back door, found it open, and entered. She then found Mrs. Ross in bed, in great pain. She called a doctor and an ambulance and had her taken to the hospital. In the meantime Mrs. Ross instructed Mrs. Silverstine to pack her grip in preparation for the trip to the hospital and asked her to hand to her the valuable papers and other effects which were in the sideboard drawer. Mrs. Silverstine did so, and Mrs. Ross in turn handed these effects back to Mrs. Silverstine with a request: "Mrs. Silverstine, will you take care of these for me?" She also requested Mrs. Silverstine to telegraph her sister, Ella Taylor, at Corvallis, Or., to come immediately. This was also done. Mrs. Silverstine made a list of the articles handed to her by Mrs. Ross for safe-keeping. They consisted of jewelry, certificates of deposit, and other papers, but the will, according to her testimony, was not contained therein. She consulted Mr. H. A. Blanchard, and on his advice placed all of these effects in a safe deposit box in the Bank of San Jose. This was done before Mrs. Taylor arrived from Oregon, on June 20th. The proponent, who lived in San Francisco, was notified of the death on that day, and on the morning of the 21st met Mrs. Taylor at the Ross home, from which place they went to the undertaking parlors. On the evening of the 20th, in the office of Mr. Blanchard, Mrs. Taylor signed a petition for the issuance to her of letters of administration, but she said nothing to Mr. Gorman about that fact. Said petition was filed on the 21st, and on the afternoon of that day Mrs. Taylor left by train with the remains for Corvallis, Or., where the funeral and burial took place a few days later. Prior to her departure there was no extended conversation between herself and the proponent with reference to property matters; it being agreed between the two that such matters would be taken up on her early return from Oregon. On the morning of the 22d the proponent went to the office of Mr. Archer for consultation, and on the latter's advice entered the home place on Thirteenth street to search for the will, but could not find it. A second search was made by him in the presence of a witness, with a like result. After learning of the filing of the petition for letters of administration by Mrs. Taylor, the proponent, on June 30th, made an ex parte application for and received special letters of administration, which authorized him to collect all of the personal property of the estate upon the giving of a bond for $5.000. When Mrs. Taylor returned to San Jose she went to the home place on Thirteenth street. She there found the proponent, who was engaged in packing up some articles belonging to deceased. An extended conversation took place beween the two at that time, a portion of which is related by the proponent as follows:

> "She said what am I doing? I said, 'I am packing these things up,' and the question arose, 'Why?' I said, 'Several different things have been missing around here and I am putting them in storage for safe-keeping.' For instance I told her three cut glass drinking glasses were gone, and the papers and the jewelry, and may be some cash that my aunt might

have had in the house, little things, and she immediately accused me of saying she took them. I said, 'No, aunty; I didn't tell you that.' I have a witness here to the effect that I didn't say anything like that. I said, 'The reason I asked you if you knew anything about them is because I possibly thought you might have taken them back with you to Oregon for safekeeping,' not the cut glasses. I was referring to the jewelry and the certificates. And she said, 'No; I don't know anything about them.' I said, 'Well, gosh, we will have to start a police investigation then.' She says, 'I will soon find out where they are. Maybe Mrs. Silverstine knows.' And she went out of the house, out the front door, to the side toward the back of Silverstine's house, and I followed, but just as we were near Silverstine's back steps she turned around real quick, and said, 'Marco, is there a will?' I said, 'My attorneys are looking that up.' 'Now,' she said, 'I will tell you right now there is no will.' * * * Mrs. Taylor said she didn't know where the jewelry was. I went over to Mrs. Silverstine and found out for myself; Mrs. Taylor didn't tell me."

It appeared in evidence that Mrs. Taylor knew at that time that Mrs. Silverstine had the valuables in safe-keeping. Mrs. Gorman testified that, when the proponent and Mrs. Taylor proceeded to the house of Mrs. Silverstine on the occasion referred to in the foregoing, she heard Mrs. Taylor say to Mrs. Silverstine: "Don't say anything." It would naturally be supposed from what had taken place before the proponent and Mrs. Taylor started to the Silverstine house that the relations between the two had become somewhat strained. But no confidential relation was shown and the evidence as related could not reasonably form the basis of a finding of fraud.

A few days after the foregoing occurrence the proponent and Mrs. Taylor were present at the bank when the safe deposit box was opened and the valuables of the deceased removed therefrom in the presence of a representative from the county treasurer's office. An inventory of the property was taken at that time and the will was not found therein.

[5] It would unduly prolong this opinion to set forth all of the testimony relied upon by the proponent in support of his position. It is enough to say that the entire record, including the evidence, has been reviewed with care. From a consideration of the same in the light most favorable to the proponent, we fail to find sufficient evidence upon which to justify the finding of fraud necessarily implied in the finding that the will was destroyed after the death of the deceased.

[6-9] The rules of evidence and the weight to be accorded to the evidence are the same in this proceeding as in any other civil case. Estate of Caspar, 172 Cal. 147, 155 P. 631. It is true that the trial court is the exclusive judge of the weight to be given to the evidence, but it is also true that the presumption is in favor of honesty and fair dealing (see Estate of Sweetman, supra), and the burden is upon the party asserting the fraud to prove it by some substantial evidence (12 Cal. Jur. 817). The facts and circumstances shown in evidence must have given rise at least to a reasonable inference of fraud, and not a mere suspicion thereof. Roberts v. Burr, 135 Cal. 156, 67 P. 46. Indeed, it has been held that—

> "If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing." Ryder v. Bamberger, 172 Cal. 791, 158 P. 753.

It is urged that it is the province of the trial court to draw these inferences, and such is the law, but as a necessary prerequisite there must be facts and circumstances in evidence from which inferences of fraud may reasonably be drawn. We do not find them in the record.

There is much argument in the briefs of proponent dealing with the alleged impeachment of the testimony of Mrs. Silverstine. The evidence in that behalf came almost wholly from the lips of a detective and his wife who were housed by the proponent in the Ross home on Thirteenth street for almost a month for the express purpose of trapping Mrs. Silverstine. Conceding that the evidence of these detectives was worthy of full credit, the impeachment alleged to have resulted therefrom appears to have been on matters wholly collateral to the main issue.

There is also much argument by proponent relating to the reasons why the deceased may have desired to bestow her bounty upon the beneficiaries named in the will and in the particular manner therein provided. Discussion of the evidence in that respect would be futile, as it is not deemed of determinative value.

By reason of our conclusion as to the principal contention of the contestant, it is unnecessary to discuss the many other points raised on the appeal.

The order is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; FINLAYSON, J.; SEAWELL, J.

199 Cal. 582

Ex parte IVERSON. (Cr. 2839.)

(Supreme Court of California. Nov. 8, 1926.)

1. Municipal corporations 🔑592(1)—Municipal regulations cannot be inhibited unless state itself completely occupies field.

Municipalities derive their authority from Constitution, and only way Legislature can inhibit them from enacting rules and regulations is by state itself occupying same legislative field so completely that legislation by local bodies will necessarily be inconsistent with state act.

2. Municipal corporations 🔑592(1)—That Legislature has made general rules applicable to cities does not impliedly prohibit enactment of additional consistent local regulations by municipalities.

That Legislature has made certain rules applicable in all cities and elsewhere in state does not impliedly prohibit enactment of additional local regulations by municipalities are in conflict with general law, or unreasonable or discriminatory.

3. Municipal corporations 🔑592(1)—Municipality may make appropriate additional regulations in aid of general law, if not unreasonable.

Where Legislature has assumed to regulate a given course of conduct by prohibitory enactments, municipality may make such additional regulations as may be reasonable and appropriate to necessities of particular locality.

4. Intoxicating liquors 🔑11—Ordinance imposing more stringent limitations on manner for filling prescriptions for intoxicating liquor, not being unreasonable, held not in conflict with general law (Const. art. 11, § 11; Wright Act).

City ordinance, enacted pursuant to Const. art. 11, § 11, imposing limitations on manner in which prescriptions for intoxicating liquor may be filled, more stringent than those imposed by subsequently enacted Wright Act (St. 1921, p. 79), not being in themselves unreasonable or discriminatory, are not therefore conflicting with the general law.

5. Intoxicating liquors 🔑10(2)—Statute indicates intent of state to reserve to cities power to legislate on subject of intoxicating liquors, providing local regulations do not conflict with general law (Wright Act, § 4).

Wright Act (St. 1921, p. 79), § 4, disclaiming intent to limit "power of any city * * * to prohibit the manufacture, sale, transportation or possession of intoxicating liquors for beverage purposes," indicates that state intended to reserve to local subdivisions power to legislate upon same subject, providing that local regulations do not conflict with general law.

6. Intoxicating liquors 🔑15—Ordinance imposing more stringent regulations in filling prescriptions for intoxicating liquors and punishing violations as for misdemeanor held not unreasonable (Pen. Code, § 19; Wright Act).

Ordinance imposing more stringent regulations in filling prescriptions for intoxicating liquor than provided by the Wright Act (St. 1921, p. 79), and making violation of its provisions constitute a misdemeanor punishable as provided in Pen. Code, § 19, *held* not unreasonable.

In Bank.

Application by Alfred Iverson for writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County to secure the release of petitioner from custody after conviction for a violation of the ordinance regulating the sale of intoxicating liquor. Writ discharged, and petitioner remanded.

Ray E. Nimmo, of Los Angeles, Brobeck, Phleger & Harrison, of San Francisco, E. E. Lighton and Errol O. Shour, both of Los Angeles, for petitioner.

J. M. Friedlander and A. T. Folsom, both of Los Angeles, for respondent.

WASTE, C. J. Alfred Iverson, in whose behalf a petition for a writ of habeas corpus was filed, is a regularly licensed and registered pharmacist, and at the time of his arrest, which it is alleged resulted in his unlawful detention, was employed in a retail drug store in the city of Los Angeles. His prosecution in the police court was based upon the alleged violation of a provision in an ordinance of the city of Los Angeles, an initiative measure known as the Gandier ordinance, adopted prior to the time the general prohibition law of the state, known as the Wright Act (St. 1921, p. 79), became effective. The ordinance provides that it shall be unlawful to sell, serve, or give away any alcoholic liquor within the city of Los Angeles except as in the ordinance provided, and permits the filling at pharmacies, on the date of issuance, of prescriptions calling for not to exceed 8 ounces of alcoholic liquor each. Iverson was prosecuted and imprisoned for violating this provision.

For the purposes of this hearing the facts are not disputed, but it is urged on behalf of the petitioner that the police court was without jurisdiction for the reason that the complaint states no public offense and that the ordinance under which the charge was made is in conflict with the state Prohibition Act, which provides that prescriptions calling for intoxicating liquor may be filled in quantities not exceeding 16 ounces. The single question at issue is whether or not the provisions of the Gandier ordinance are in conflict with the Wright Act, which has adopted the penal and prohibitory features of the National Prohibition Law.

It is not denied by petitioner that the city of Los Angeles has the power, under section 11 of article 11 of the Constitution, to enact police regulations and ordinances promoting considerations of public welfare, public morals, public health and public safety, provided that such regulations and municipal by-laws are not in conflict with general laws. It is also admitted that the city has constitutional and charter power to enact such a by-law as the Gandier ordinance if its provisions are not in conflict with the state law.

[1-4] The first contention made by the petitioner is that the state has entered and covered the entire field of liquor regulation and prohibition by the enactment of the general Prohibition Law, and that the ordinance limiting prescriptions of intoxicating liquor to a quantity less than that permitted by the Wright Act is an attempt to invade the same field, and is void. Municipalities derive their authority from the Constitution. The only way the Legislature can inhibit local legislative bodies from enacting rules and police regulations is by the state itself occupying the same legislative field so completely that legislation on the subject by local legislative bodies will necessarily be inconsistent with the state act. It does not follow that because the Legislature has seen fit to make certain general rules applicable in all the cities and elsewhere in the state it has thereby impliedly prohibited the enactment of additional local regulations by municipalities in keeping with the purpose of the general law. So long as the requirements of the municipal ordinance are not in themselves pernicious as being unreasonable or discriminatory, both may stand. There may be different regulations without a conflict. Ex parte John, 17 Cal. App. 58, 118 P. 722; Ex parte Hong Shen, 98 Cal. 681, 684, 33 P. 799; In re Murphy, 128 Cal. 29, 60 P. 465; In re Hoffman, 155 Cal. 114, 117, 99 P. 517, 132 Am. St. Rep. 75. Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. Mann v. Scott, 180 Cal. 550, 556, 182 P. 281. Petitioner has cited In re Sic, 73 Cal. 142, 14 P. 405, and In re Mingo, 190 Cal. 769, 771, 214 P. 850, as holding that a municipality has no power, under section 11 of article 11 of the Constitution, to pass an ordinance punishing precisely the same acts which are punishable under the general laws of the state. It must be noted, however, that in the Sic Case the court made it plain (page 149 [14 P. 405]), that it did not wish to be understood as holding that provisions of an ordinance which makes criminal other acts not punishable under the general law of the state are void because the Legislature has seen fit to legislate upon the same subject.

Whether the Legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate. Mann v. Scott, supra, page 557 (182 P. 281). A comparison of the provisions of the Gandier ordinance with the provisions of the Wright Act discloses that while both deal with the same general subject, to wit, the regulation of traffic in intoxicating liquors—a subject which lies within the police power of both the municipality and the state—the section of the ordinance here under attack is but another, a different, and a more stringent regulation relating to one phase of the question dealt with in the state law. If the city of Los Angeles had provided in the Gandier ordinance that prescriptions for intoxicating liquor might be filled in a larger quantity than that permitted by the state law, there would be presented a plain case of conflict. The municipality would thereby be endeavoring to legalize that which the state had declared to be unlawful. What the ordinance in fact does is to impose limitations, on the manner in which prescriptions may be filled, different and more stringent than those imposed by the subsequently enacted state Prohibition Law. They are not in themselves unreasonable or discriminatory, and do not therefore, conflict with the general law. In re Hoffman, supra; Mann v. Scott, supra.

Petitioner places great emphasis upon the decision in Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, and relies upon it to sustain the contention that the Wright Act covers the entire field of liquor regulation and prohibition in the state of California. There is a marked distinction between the Motor Vehicle Act and the state Prohibition Law. The former provides that one traveling the highway shall not travel at an unsafe rate of speed, and in no case in excess of a certain maximum, and, also, that no other limitation shall be put upon him. For the reason that the Motor Vehicle Act expressly prohibits municipalities from fixing as a maximum a lesser rate of speed than that fixed by the act, and provides that the limitations as to the rate of speed therein fixed shall be exclusive of all other limitations, the court held that the conclusion must follow that it was clearly the intention of the Legislature to declare that the limitation upon the speed fixed in the law should be the only limitation controlling the conduct of the driver of a motor vehicle upon the streets and highways of the state, and that it could not be doubted that the Legislature had intended to occupy the whole field of traffic regulation. But the court also said (page 645 [192 P. 446]):

> "If the Legislature had merely fixed the maximum speed limit, it is clear that local legislation fixing a lesser speed limit would not be in conflict therewith, but would be merely an additional regulation [citing cases]."

[5] The state Prohibition Law provides a maximum alcoholic content which shall not be exceeded in the filling of prescriptions by

licensed pharmacists. There is not to be found in the provisions of the act any express or implied intention on the part of the Legislature to occupy the entire field of prohibition legislation, or the regulation of traffic in intoxicating liquors. There is nothing in the act from which an intention can be inferred to repeal by implication any ordinance in existence at the time of its adoption. After declaring (section 2) that all acts or omissions prohibited or declared unlawful by the Eighteenth Amendment to the Constitution of the United States, or by the Volstead Act (U. S. Comp. St. § 10138¼ et seq.), are prohibited and declared unlawful and subject to the penalties provided in the Volstead Act, the Wright Act (section 4) provides that nothing in the "act shall be construed as limiting the power of any city or county, or city and county, to prohibit the manufacture, sale, transportation or possession of intoxicating liquors for beverage purposes." The power to prohibit the sale of intoxicating liquor includes the power and right to regulate by the imposition of conditions and restrictions. McRae v. Pine, 25 Cal. App. 594, 598, 144 P. 983. In Re Mingo, supra, the court held that the provision of the Wright Act, supra, does not purport to grant to counties any power which they did not already possess. That is, of course, a proper construction, for when the state law and a local ordinance are in conflict the situation is not changed by a legislative declaration that the act shall be construed as though there were no conflict. But when we keep in mind the purpose and intent of the Legislature and of the people in enacting the general state Prohibition Law, and the wide extent of the police power residing in both the state and municipalities in the regulation of the traffic in intoxicating liquor, we are of the view that the legislative declaration should be regarded as an indication that the state did not intend to occupy the entire field, but to recognize and to reserve to the local subdivisions of the state the power to legislate upon the same subject, within the constitutional limitation, of course, that local regulation shall not conflict with the general law.

A situation somewhat similar to that presented here was occasioned by the passage of an initiative prohibition measure in the state of Washington. It was urged that a city ordinance relating to the issuance by physicians of prescriptions for intoxicating liquors was invalid for the reason that the state, by the passage of the initiative measure, had expressed an intention of removing the subject of intoxicating liquors from the control of municipalities. The court said:

"The fact that there is state legislation relating to the sale of intoxicating liquor does not deprive the city of the power to legislate upon the same subject so long as the city ordinance does not conflict with the general laws of the state, unless the state act should show, upon its face, that it was intended to be exclusive." Seattle v. Hewetson, 95 Wash. 612, 616, 164 P. 234.

See, also, Seattle v. Brookins, 98 Wash. 290, 292, 167 P. 940.

Petitioner contends that the detailed regulations for the issuance of prescriptions for alcoholic liquor contained in the Volstead Act, and included by adoption in the state statute, exclude by their comprehensiveness the possibility of local regulation. As the entire field was not occupied by the state, to the exclusion of local legislation, the regulations provided by the ordinance, not being unreasonable or discriminatory, must be held to apply to prescriptions filled under the provisions of the local law. The further contention of petitioner, that the municipality cannot lawfully forbid what the state law has expressly permitted to be done, is completely answered by the decision in Re Hoffman, supra. We do not think it can be seriously contended that, because the state has passed a law allowing intoxicating liquor to be prescribed in certain quantities, a municipality having the constitutional and charter powers of the city of Los Angeles may not, in the clear exercise of its police power, still further restrict the amount which may thus be sold. Both the statute and the ordinance have appropriate relation to a purpose within the police power of the state—a purpose enjoined on the state by the Eighteenth Amendment to the federal Constitution.

[6] The last contention of petitioner we need consider is that the Gandier ordinance authorizes the court to impose more severe penalties than are permitted under the state Prohibition Act. For this additional reason, it is argued, the ordinance is not in harmony with the general law, and is therefore unreasonable and void. A complete answer to the contention is that the regulatory provisions of the ordinance differ from those of the state law. Any violation of its provisions constitutes a misdemeanor, punishable in the same manner and to the extent provided by the general state law. Pen. Code, § 19. It is therefore not unreasonable. As the offense legislated against by the ordinance is not the same as the offense proscribed by the state law, there is no conflict. In re Hoffman, supra.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; FINCH, Justice pro tem.; CURTIS, J.

199 Cal. 590

Ex parte SIMMONS. (Cr. 2790.)

(Supreme Court of California. Nov. 8, 1926.)

1. Intoxicating liquors 🔑11—Municipality may enact ordinance making possession of beverage containing one-third of 1 per cent. alcoholic content unlawful (Wright Act).

Since Wright Act (St. 1921, p. 79), does not by terms or implication occupy whole field of regulation of alcoholic liquor, municipality has power to enact an ordinance making possession of beverages with an alcoholic content of one-third of 1 per cent. unlawful, though general statute permits possession of beverage containing one-half of 1 per cent. of alcohol.

2. Intoxicating liquors 🔑6—Legislative body may fix alcoholic content below that which is in fact intoxicating, so that Prohibition Law may be enforced effectively.

Legislative body, whether national, state, or municipal, has power to define the term "intoxicating liquor," and to fix the alcoholic content below that which is in fact intoxicating, so that Prohibition Law may be effectively enforced.

3. Evidence 🔑7.

It is a matter of common knowledge that liquor containing .51 per cent. of alcohol is not in fact intoxicating.

4. Constitutional law 🔑70(1)—Discretion permitted municipal legislative body to fix alcoholic content in defining offense under Prohibition Law is legislative, and not to be controlled by the courts.

Discretion permitted municipal legislative body to determine conclusively, in defining an offense under the constitutional prohibition, whether there is any material difference between liquor containing one-half of 1 per cent. and that containing one-third of 1 per cent., is legislative, and not to be controlled by the courts.

5. Municipal corporations 🔑592(3)—Statute does not limit punishment which may be fixed by municipality for commission of forbidden act within its police power (Pen. Code, § 19).

Pen. Code, § 19, fixing penalty for commission of misdemeanor, does not limit punishment which may be fixed by municipal body for commission of forbidden act within its police power.

6. Intoxicating liquors 🔑11—That penalty for violation of ordinance relating to intoxicating liquor differed from that fixed by the state law held immaterial.

As ordinance relating to intoxicating liquors did not undertake to punish precisely the same acts as are punishable under the Wright Act (St. 1921, p. 79), it was immaterial that penalty for its violation differed from that fixed by the state law.

7. Habeas corpus 🔑30(2).

Complaint in prosecution for unlawful possession of intoxicating liquor in violation of ordinance *held* sufficient when attacked on habeas corpus.

8. Habeas corpus 🔑30(2)—If facts alleged in complaint purport to be a substantive statement of offense, though defectively or inartificially stated, writ of habeas corpus will not lie.

In determining sufficiency of complaint on application for writ of habeas corpus, greatest liberality must be indulged, and if facts alleged purport to be a substantive statement of the offense, though defectively or inartificially stated, writ will not lie.

9. Habeas corpus 🔑27—Defect in complaint will not be ground for defendant's release on habeas corpus, where it states facts showing that defendant has committed a public offense.

Where a complaint in a court of inferior jurisdiction states facts showing that defendant has committed a public offense, but is demurrable because uncertain as to particular offense committed, inferior court has jurisdiction, and defect will not be ground for defendant's release on habeas corpus.

10. Habeas corpus 🔑30(2)—Defect in complaint for violation of ordinance prohibiting possession of intoxicating liquor held not ground for defendant's release on habeas corpus.

Defect in otherwise sufficient complaint in prosecution for violation of an ordinance prohibiting possession of intoxicating liquor because not being sufficiently specific in particulars of offense charged, which defect might have been remedied by demurrer or by motion in arrest of judgment, *held* not ground for defendant's release on habeas corpus.

In Bank.

Application by D. S. Simmons for writ of habeas corpus, to be directed to the Sheriff of Kern County to secure the release of petitioner from custody after conviction of violation of an ordinance prohibiting possession of intoxicating liquor. Writ discharged; petitioner remanded.

See, also, 71 Cal. App. 522, 235 P. 1029.

Dorsey & Campbell, of Bakersfield, for applicant.

Brittan & Brittan, of Bakersfield, for respondent.

WASTE, C. J. The petitioner contends that he is unlawfully imprisoned and restrained of his liberty by the sheriff of Kern county after conviction on a charge of violating an ordinance of the city of Bakersfield on a complaint charging him with the possession of intoxicating liquor containing more than one-third of 1 per cent. of alcohol by volume.

Following the decision of this court in Re Mingo, 190 Cal. 769, 214 P. 850, the city of Bakersfield passed an emergency ordinance, No. 165 (New Series), prohibiting the "manufacture, sale, storage, serving, gift, transportation, importation or exportation and possession of intoxicating liquors for beverage purposes; regulating all other traffic in such liquors"; providing penalties for violation thereof, and repealing certain other ordinances then existing. By section 1 (a) it is provided that, for the purposes of the ordinance:

> "The words 'intoxicating liquors' or 'intoxicating liquor' wherever used in [the] ordinance shall be construed to include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, which contains more than one-third of one per cent., by volume, of alcohol, and all alcoholic liquids and compounds, whether proprietary, patented or not, which are potable or capable of being used as a beverage, and which contains more than one-third of one per cent., by volume, of alcohol."

[1-4] Petitioner attacks the ordinance as being unconstitutional, in that it is in conflict with the spirit and letter of the Wright Act (St. 1921, p. 79), which permits possession of liquor containing one-half of 1 per cent. of alcohol, by volume. He argues, first, that the definition of intoxicating liquor in the Volstead Act (U. S. Comp St. § 10138¼ et seq.), incorporated by reference in the Wright Act, and its application, necessarily make lawful the possession in this state of beverages containing less than one-half of 1 per cent. of such alcohol. That would undoubtedly be so were it not for the fact that the state law is one of regulation of a traffic which may be further regulated by local legislation, provided there is no conflict between the two enactments. That question, in its relation to the Wright Act and a municipal ordinance, has been fully considered and decided in the opinion and decision this day handed down in Re Iverson, 250 P. 681 (Crim. No. 2839). It was there held that, as the state law did not in terms or by implication occupy the whole field of the regulation of the sale of alcoholic liquor in this state, it was within the power of a municipality to enact an ordinance dealing with the same subject, but providing other and more stringent regulations than those found in the general statute. The same reasoning applies, and the same result follows, in relation to the possession of beverages with an alcoholic content. The first contention of the petitioner, therefore, would not be seriously considered were it not for the further claim that the ordinance and the general law punish exactly the same acts. If that be true, there is a conflict, and the ordinance is void. In Re Sic, 73 Cal. 142, 149, 14 P. 405; In Re Mingo, supra, page 773, 214 P. 850. There is, it must be admitted, seemingly little difference between having in one's possession liquor containing one-third of one per cent. of alcohol, by volume, which is permitted by the ordinance, and possessing the same kind of liquor containing one-half of 1 per cent. of alcohol, which is lawful under the Wright Act but forbidden by the ordinance. But that is not a question which concerns this court. The legislative body, whether national, state or municipal, has authority to define the term "intoxicating liquor" and to fix the alcoholic content below that which is in fact intoxicating, in order that the Prohibition Law may be effectively enforced. Ruppert, Inc., v. Caffey, 251 U. S. 264, 40 S. Ct. 141, 64 L. Ed. 260; State v. Brothers, 144 Minn. 337, 175 N. W. 685; 33 Cor. Jur. p. 519, par. 65. It is a matter of common knowledge that liquor containing .51 per cent. of alcohol is not in fact intoxicating, yet, under the Wright Act, the possession of such liquor for beverage purposes is unlawful, while the possession of liquor containing .49 per cent. is lawful. There is no appreciable difference between the two, yet the Legislature had the discretion to make, and has made, the possession of the one unlawful and that of the other lawful. The same discretion permitted the legislative body of the city of Bakersfield to determine conclusively, in defining an offense under the constitutional prohibition, whether there is any material difference between liquor containing one-half of 1 per cent. and that containing one-third of 1 per cent. The discretion is legislative and not to be controlled by the courts.

[5, 6] The second line of petitioner's attack is that the ordinance is unreasonable, and therefore void, for the reason that the penalty for its violation is disproportionate to the offense and in conflict with general laws of the state. Violation of the ordinance is made a misdemeanor, and any person who violates any of its provisions is, on conviction, subject to punishment "by a fine of not less than two hundred and fifty * * * dollars, nor more than five hundred * * * dollars, or by imprisonment in the county jail for a period not to exceed one hundred and eighty * * * days, or by both such fine and imprisonment." The general law of the state (Pen. Code, § 19), fixes the penalty for the commission of a misdemeanor, except in cases where a different punishment is prescribed, at imprisonment in a county jail not exceeding 6 months or by a fine not exceeding $500, or by both, but does not fix the minimum of any fine that may be imposed. The section, however, does not limit the punishment which may be fixed by a municipal body for the commission of forbidden acts within the police power of the municipality. People v. Fages, 32 Cal. App. 37, 162 P. 137; Ex parte Isch, 174 Cal. 180, 162 P. 1026. As the ordinance does not undertake to punish precisely the same acts as are punishable under the Wright Act, it makes no difference that the penalty for its violation differs from that fixed by the state law. In re Hoffman, 155 Cal. 114, 119, 99 P. 517, 132 Am. St. Rep. 75.

The argument of the petitioner that the complaint does not state facts sufficient to constitute a public offense, for the reason that it does not charge him with the possession of intoxicating liquor as defined in the Wright Act, is answered by what we have said in sustaining the validity of the ordinance under which the charge was preferred.

[7-10] A further contention is that the complaint does not sufficiently charge a violation of the ordinance if it be held that the ordinance is not void. Petitioner is accused "of the crime of misdemeanor, to wit, violation of section 4 of Ordinance No. 165 N. S., committed as follows: That said D. S. Simmons on or about the 11th day of March, 1924, within the corporate limits of the said city of Bakersfield, county of Kern, state of California, did then and there willfully and unlawfully have in his possession intoxicating liquor containing more than one-third of 1 per cent. alcohol by volume in a public place, to wit, that certain building situated and located at 903 California avenue in the city of Bakersfield, without a valid permit so to do, in violation of the provisions of section 4. Ordinance No. 165 N. S., passed and adopted by the council of the city of Bakersfield on the 30th day of April, 1923." To this charge the petitioner entered a plea of "guilty," and his conviction and commitment to the custody of the sheriff followed. We are of the view that the complaint was sufficient. Ex parte Mansfield, 106 Cal. 400, 408, 39 P. 775. The petitioner was plainly informed of the nature of his offense. In determining the sufficiency of such a complaint the greatest liberality must be indulged. If the facts alleged purport to be a substantive statement of the offense, though defectively or inartificially stated, the writ will not lie. Ex parte Williams, 121 Cal. 328, 330, 331, 53 P. 706; In re Culver, 187 Cal. 437, 440, 202 P. 661.

Where a complaint in a court of inferior jurisdiction states facts showing that the defendant has committed a public offense, but is subject to attack by demurrer on the ground that it is uncertain as to the particular offense committed, the inferior court has jurisdiction, and the defect will not be ground for his release on habeas corpus. In re Reineger, 184 Cal. 97, 104, 193 P. 81. The most that can be said in criticism of the complaint in this case is that it is not sufficiently specific in the particulars of the offense charged. The defect, if any, might have been remedied by demurrer or by motion in arrest of judgment. In re Von Perhacs, 190 Cal. 364, 368, 212 P. 689; In re Hayward, 62 Cal. App. 177, 216 P. 414.

The last contention of the petitioner is that, as the ordinance is invalid and the complaint upon which petitioner was convicted and under which he is imprisoned does not state facts sufficient to constitute a public offense, the judgment is illegal and the commitment is therefore void. Our determination of the other points urged in the attack on the ordinance disposes of this contention.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff.

We concur: RICHARDS, J.; FINCH, Justice pro tem.; CURTIS, J.; SHENK, J.

---

79 Cal. App. 650

JOHNSON v. SUPERIOR COURT OF SAN BERNARDINO COUNTY. (Civ. 5448.)

(District Court of Appeal, Second District, Division 2, California. Nov. 6, 1926.)

1. Courts 🔑80(4)—Rule that party appealing must prosecute appeal within 30 days after its perfection held valid as "existing rule" (Code Civ. Proc. § 981a).

Rule that party appealing must prosecute appeal within 30 days after its perfection, though legally inoperative for 10 years, *held* "existing rule," within terms of Code Civ. Proc. § 981a, validating existing rules relative to limitation of right of appeal within one-year period.

2. Courts 🔑78.

Courts have inherent power to regulate practice before them through rules, especially on subjects not covered by statute.

3. Courts 🔑80(4)—Variance of judicial right of regulation of own government by Legislature's prescribing of rule as to prosecution of appeal held proper (Code Civ. Proc. §§ 129, 981a).

Variance of right of courts of record to make rules not inconsistent with state laws for own government and government of court officers, given by Code Civ. Proc. § 129, by prescribing rule as to prosecution of appeal within 30 days, under Code Civ. Proc. § 981a, *held* proper.

4. Statutes 🔑47.

Language of Code Civ. Proc. § 981a, validating existing rules of court, *held* sufficiently definite and clear not to violate Constitution.

5. Statutes 🔑85(4).

Since Code Civ. Proc. § 981a, prescribing time limit for prosecution of appeal, applies to superior courts generally, it is not invalid as special legislation.

Application for writ of mandate by Frank H. Johnson against the Superior Court, County of San Bernardino, to compel the respondent to reinstate an appeal from the justice court to calendar and to conduct hearing thereof. Alternative writ vacated, and peremptory writ denied.

Earl D. Finch, of Redlands, for petitioner.

Martin J. Coughlin, of San Bernardino, for respondent.

WORKS, P. J. The petition alleges that E. M. Ragan commenced an action against petitioner in a justice court and had judgment; that petitioner then prosecuted an appeal to respondent court; and that the appeal was dismissed by respondent court, about two months after it was perfected, because of a noncompliance with one of respondent's rules of court. The rule in question was attempted to be adopted in 1921, and provided that an appeal might be dismissed for a failure to prosecute it or for unnecessary delay in bringing it to a hearing; that upon the failure of the appellant to have the cause placed upon the trial calendar within 30 days after the receipt by the clerk of the papers necessary to perfect the appeal the respondent might pay the clerk's costs, have the cause placed on the trial calendar, and, after notice, have the appeal dismissed; and that a failure to have an appeal placed on the calendar within the 30 days specified would be deemed a "failure to prosecute," as that expression is employed in the early part of the rule. The petition asks for the writ of mandate to compel respondent court "to reinstate said appeal and try said action." We issued the alternative writ. The return is by general demurrer.

Petitioner contends that the attempted dismissal of the appeal was ineffective, and that the rule of court was void under the decision in Kraker v. Superior Court, 15 Cal. App. 651, 115 P. 663, decided in 1911, ten years before respondent went through the process, formally, of adopting its rule. Respondent insists that if the rule was ineffective for a time, under the law as announced in the case cited, it became operative upon the passage of section 981a of the Code of Civil Procedure, a new section added to the Code in 1923, and that the dismissal of the appeal was therefore proper. In Kraker v. Superior Court an order of the respondent court dismissing an appeal was held invalid because the order was based upon the erroneous assumption that it was the duty of an appealing defendant to press an appealed cause to hearing. Under the state of the law at that time it was the duty of the plaintiff in such a cause to bring it on for trial.

Section 981a provides, in effect, that an appeal from a justice court must be dismissed if the "appealing party fails to bring such appeal to trial within one year" from the date of filing the appeal (Middlebrook v. Superior Court [Cal. App.] 241 P. 914), and the enactment also contains the proviso "that any superior court may, by existing rule or by rule hereafter to be enacted, provide for dismissal of such appeal within a time less than one year."

The question to be decided here is whether the rule of respondent court, "adopted" long before section 981a became a law, was made effective upon the passage of that enactment granting that it was invalid before that time for the reason that it penalized an appealing defendant for his failure to press an appealed cause for trial. The proviso in the section is designed, principally, to permit superior courts, by rule, to provide for dismissals after the lapse of a time less than the year contemplated by the section, but we think there is shown in the enactment a plain legislative intent to authorize rules providing for dismissals where appealing defendants do not bring causes on for trial, conceding that such a rule would have been inoperative before the passage of the section under the decision in Kraker v. Superior Court to the effect that a certain order was invalid. The earlier part of section 981a, as quoted above, fastens upon the appealing defendant the duty to force an appealed action to trial, and it must be that by the proviso contained in the section the Legislature intended not only to authorize superior courts to provide by rule for dismissals within a period less than a year, but to allow them to base a provision for such dismissals upon the very dereliction denounced by the statute itself—the failure of an appealing defendant to bring forward the appealed cause for trial. Such a view seems necessary in order to make the proviso completely effective and to fit rules of court to the general purpose of the statute.

[1] Petitioner contends that the rule of respondent court was not, at the time of the passage of section 981a, an "existing rule," as that term is employed in the proviso contained in the enactment, for the reason that it was at that moment, and had been ever since its attempted adoption, invalid under the law as stated in Kraker v. Superior Court. We think this ground is not tenable. It is obvious that the section was intended to breathe life into something that had not before its passage a legal existence. The phrase "existing rule" plainly was not intended, as it seems to us, to contemplate a rule that was legally operative. A rule that was fully available for use, one that, had not the decision in Kraker v. Superior Court, for instance, standing in its way, needed not the mandate of the Legislature to give it life. We think the proviso contemplated rules which the courts had gone through the motions of adopting—rules which had an apparent existence on paper, but which were ineffective for want of legal authority for their existence. As section 981a removed the very ground of objection which petitioner founds upon Kraker v. Superior Court, we think the proviso contained in it operated to make the "rule" of respondent court operative. The fact that Kraker v. Superior Court was decided long before the rule was "adopted" has no effect upon these views. That case did not make the law, but merely declared it. The situation, so far as the invalidity of the rule of court before the passage of section 981a is concerned, would have been the same if Kraker v. Superior Court had been decided between 1921 and 1923, instead of in 1911, or if it had never been decided. The rule of law announced in the decision, if it stood in the way of the rule of court at all, did so because it was a continuing rule of law, not be-

cause it was stated by the court in a particular case. If it, or other rules of law, operated forever to throttle rules of court which were attempted to be adopted before 1923, we do not perceive how the phrase "existing rule," in the proviso contained in section 981a, could have had any application or could have performed a useful purpose. Under such a view there could be no rule of court to which the expression "existing rule" could attach.

[2] Petitioner cites Hanson v. McCue, 43 Cal. 178, to the proposition that rules of court must be construed as statutes are to be construed, and argues from this premise that such rules may not be made effective in the manner attempted by the Legislature in the proviso contained in section 981a. We are not here called upon to construe a rule of court, and the case cited is not therefore of assistance to us. The question remains, however, whether an "existing" rule of court, previously inoperative, could be made effective by the language employed in the proviso. We think the point is not one of great difficulty. While it is well settled that courts have the inherent power to prescribe rules regulating the practice before them, especially to the extent that the subject has not been covered by statute (7 Cal. Jur. 621, § 34), the matter is essentially one for the attention of the Legislature (15 Cal. Jur. 901, 902). In this state the subject is regulated by the terms of section 129 of the Code of Civil Procedure, which reads, in part:

> "Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers."

[3, 4] It was, of course, proper for the lawmaking body to vary this provision to the extent indicated by the proviso contained in section 981a, unless the language referring to "existing rules" is so uncertain as to be ineffective, or is violative of some inhibition of the organic law. We think the phrase quoted is not ineffective for uncertainty, and what we have said above as to the meaning of the expression bears somewhat upon that question. The language of the proviso points out sufficiently the subject-matter upon which it is to operate. The meaning of the expression being sufficiently plain, it does not, in our opinion, infringe any mandate or inhibition of the Constitution. The proviso in section 981a does nothing more than validate rules which before its enactment were invalid. The Legislature frequently, and beyond the possibility of tenable objection, passes validating laws upon a variety of subjects. It is said in one case:

> "In the absence of constitutional restrictions the power of the Legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights." City of Redlands v. Brook, 151 Cal. 474, 91 P. 150.

Plainly, the Legislature might have authorized, in advance, the rule of respondent court which is now brought in question. Nor can we see any vested right which was imperiled by the attempted resuscitation of the stillborn rule of court. Other instances of the exercise by the Legislature of the power to validate past acts or transactions are dealt with in City of Sacramento v. Adams, 171 Cal. 458, 153 P. 908, Los Angeles F. C. Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028, and Cole v. City of Los Angeles, 180 Cal. 617, 182 P. 436. In our opinion the legislation incorporated in the proviso in section 981a shows a proper exercise of the power.

[5] Petitioner contends that the proviso applies especially to respondent court and that it is therefore invalid as special legislation. The point is without merit. Section 981a, in its entirety, applies to superior courts generally.

Demurrer sustained. The alternative writ of mandate is vacated, and a peremptory writ is denied.

We concur: CRAIG, J.; THOMPSON, J.

80 Cal. App. 388

CASHEL v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5702.)

(District Court of Appeal, First District, Division 2, California. Dec. 21, 1926.)

Master and servant 🔑417(7)—Question of credibility and weight of testimony is for Industrial Accident Commission.

In proceeding to recovery for medical, hospital, and burial expenses of employee, power of determining what witness should be believed and what weight should be given to testimony of any witness rested with Industrial Accident Commission to be determined in exercise of sound discretion.

Proceeding under the Workmen's Compensation Law by Ethel W. Cashel for medical, hospital, and burial expenses of her daughter, claimant, opposed by the Palo Alto Hospital, employer, and the Hartford Accident & Indemnity Company, insurer. The Industrial Accident Commission made its award that applicant take nothing, and claimant applies for certiorari. Writ denied.

Alfred J. Hennessy, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, and W. F. Beem, for respondent Industrial Accident Commission.

John J. Goldberg, of San Francisco, for respondent Hartford Accident & Indemnity Co.

STURTEVANT, J. Prior to November 8, 1924, Miss Lois H. Coll was in the employment of the Palo Alto Hospital. On November 29, 1924, she died and the cause of her death was, as recited in the death certificate, "acute rheumatic fever broncho pneumonia streptococcic septicemia (streptococcus viridano)." Later the petitioner, her mother, filed an application with the defendant commission, asking that her claim for burial expenses and medical and hospital expenses be established. The commission thereafter made its award that the applicant take nothing. The petitioner applied for a rehearing, that application was denied, and thereafter the petitioner applied to this court for a writ of review. Subsequently an alternative writ was issued and on the 10th day of September, 1926, the defendants filed their return. No objection regarding the form or the contents of said return has been made.

The grounds on which the petitioner applies to this court are stated by petitioner as follows:

> "(a) That the commission acted without and in excess of its powers.
>
> "(b) That order, decision, and award were procured by fraud.
>
> "(c) That the order, decision, and award were unreasonable.
>
> "(d) That the evidence does not support the findings of fact.
>
> "(e) That the findings of fact do not support the award.
>
> "(f) Errors by the commission in admitting and excluding evidence material to the petitioner's case.
>
> "(g) That the commission submitted alleged facts that never had any existence to physicians for an opinion and based their opinion and ruling on said opinions deduced from the said alleged facts that never had any existence.
>
> "(h) Irregularity in the trial of said cause in this, that your petitioner served on the Palo Alto Hospital a subpœno duces tecum requiring them to produce its register of patients, books, and clinical records of patients in the Palo Alto

Hospital from October 1, 1924, to November 8, 1924, and said Palo Alto Hospital did not produce the same and gave no reason therefor.

"(i) That the commission erred in its ruling limiting the evidence of contacts of deceased with patients in the Palo Alto Hospital to the month of October, 1924, and excluding all evidence of contacts prior thereto.

"(j) That the commission erred in rejecting documentary evidence submitted by the petitioner."

Having stated her grounds as quoted above, the petitioner proceeds to elucidate each one. Except as hereinafter stated, the grounds stated by petitioner under the letters (a), (c), (d), (e), and (f) are conclusions of the petitioner; that is, they are but additional statements of the legal effect of the matters which we will take up specifically in considering the other grounds of attack. Under the claim that the order, decision, and award were procured by fraud, the petitioner does not even contend that there was committed by any one any extrinsic or collateral fraud before the defendant commission or otherwise, as such fraud is defined in Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. Except as may hereinafter be stated, that contention is also the conclusion of the pleader and is based on the matters which will presently be enumerated.

Dr. Harvey M. Slater was called as a witness before the defendant commission. Among other things, he testified that he was called to attend Miss Coll in her last illness and that he made his first call on November 9, 1924. At that time he propounded to the patient certain questions regarding the history of her case. He also testified that the decedent told him of an attack of rheumatism she had had while she was in training and that she told him of the nature of the attack. Furthermore, he testified that she stated that she had the attack "while she was away, during her period of training." He said that he got the history of the rheumatism from Miss Coll herself and her mother volunteered some of the information.

The petitioner executed a certificate which was received by the commission as evidence wherein she certified:

> That she had "never told Dr. Slater of Palo Alto that my daughter, Lois Coll, ever had an attack of rheumatic fever; that my daughter, the said Lois Coll, never had an attack of rheumatic fever or of articular rheumatism; that she was a strong, robust, and healthy girl until taken down with her last illness."

There is nothing in the record to the effect that the petitioner is a physician or surgeon or that she was at the bedside of the deceased while the deceased was sick when the deceased "was away, during her period of training." There is evidence in the record that the deceased was in training at the Alta Bates Sanatorium of Berkeley, Cal. There is also evidence in the record that the petitioner resides at 152 Emerson street, city of Palo Alto, but there is no evidence in the record that she was ever in Berkeley or that she was there when her daughter was sick while attending the Alta Bates Sanatorium.

Certain doctors rendered opinions in writing or stated them orally, based on the history of the case as the history was stated by Dr. Slater. The petitioner strenuously contends that the commission should have taken the history of the case from the evidence tendered by the petitioner and not from the testimony given by Dr. Slater. The power of determining what witness should be believed and what weight should be given to the testimony of any witness, or any particular part of the testimony of that witness, of course, rested with the commission to be determined in the exercise of a sound discretion.

There is evidence that Dr. L. E. Phillips had been the family physician of the petitioner and of her daughter. The record shows that 10 days or two weeks after the decedent had taken to her bed Dr. Phillips was called in consultation with Dr. Slater. Thereupon the petitioner contends that as a matter of law his testimony should have been accepted by the defendant commission instead of the testimony of Dr. Slater. There are several answers to that contention. The first answer is that the record does not disclose that the medical opinion of Dr. Phillips was distinctly different from the medical opinion expressed by Dr. Slater. In the next place, Dr. Slater and not Dr. Phillips appears from the evidence to have been the physician attending in the last illness. Again, it was for the commission to weigh the testimony of the witnesses, and the court may not say, as a proposition of law, that the commission was bound to place greater weight on the testimony give by one witness instead of a different witness.

Edward P. Cashel testified that when Dr. Slater called on the decedent after the report of the bacteriologist had been received, and after it was known that the patient was suffering from streptococcic infection, he said to Dr. Slater, "Where in the world did she get anything like that?" He said, "Why, no doubt, she got it at the hospital." Dr. Slater testified that to the best of his knowledge he never made any such statement. In other places in his testimony he testified to facts and opinions showing that the decedent had not contracted the disease at the hospital. Again, the power to weigh and determine the probative force and effect of the evidence rested with the commission.

Closely allied to the last point is another element which the petitioner strenuously presents for our consideration. She quotes a passage from Text-Book of Bacteriology by Hiss-Zinsser Russell, and claims that the defendant commission should have been guided by the opinion stated by the author of that book and not by the opinion of Dr. Slater. It seems to us clear that the power rested with the commission to determine whether the opinion of Dr. Slater was more convincing to the commission than the opinion of the author of the text-book. Furthermore, as we understand the testimony of Dr. Slater, it was not in conflict with the opinion stated by the author of the text-book when other sentences contained in the text-book are read in connection with the passage quoted by the petitioner.

The attacks stated above and lettered by the petitioner (h), (i), and (j), and all facts connected therewith, are contained in the petition. However, when the record was certified up such attacks were found to be wholly unsupported by the record. As to those matters, the record is wholly silent.

We have cited item by item the attacks made by the petitioner for the purpose of showing the length and breadth of the attack. Conceding, without deciding, that as to the subject-matter of any one of the attacks the commission erred, nevertheless, we think it is clear beyond controversy that as to no one of the alleged errors did the commission exceed its jurisdiction.

It follows that the petition should be denied. It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

---

80 Cal. App. 109

BOSSE v. MARYE et al. (Civ. 5462.)*

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1926.)

1. Automobiles 🔑247—Father signing application for daughter's license to operate automobile held liable for pedestrian's injuries, though verdict was silent concerning daughter's liability (Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14).

In personal injury action by pedestrian who was struck by automobile, father of girl operating car, who had signed application for daughter's license to operate car, under Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, *held* liable, though verdict against him was silent as to liability of daughter or her companion who was driving car.

2. Negligence 🔑15—Where two persons are jointly and severally liable for negligence, plaintiff may sue one or both.

Where liability of two parties for actionable negligence is joint and several, it is optional with plaintiff whether he sues one or both.

3. Automobiles 🔑200—Father signing application for daughter's license to "operate" automobile held liable for injuries to pedestrian, while daughter allowed another to "drive"; "operating" (Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14).

Father, who signed application for daughter's license to operate automobile, under Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, *held* liable for injuries to pedestrian while daughter allowed another to drive car, since daughter was "operating" car within statute and was primarily responsible jointly with driver; "to drive" meaning to impel motion and quicken, while "to operate" means to direct or superintend.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Drive; Operate.]

4. Automobiles 🔑243(11)—Application for automobile operator's license held admissible, where question whether one of defendants signed it was in issue.

In pedestrian's personal injury action, license application of operator *held* properly admitted, where question whether one of defendants had signed such application was put in issue by pleadings.

5. Appeal and error 🔑1033(5)—Instruction favorable to appellant, if erroneous, held not prejudicial.

Instruction, if erroneous, *held* not prejudicial where it was favorable to appellant.

6. Trial 🔑252(1)—Instructions inapplicable to facts held properly refused.

Instructions *held* properly refused where they were inapplicable to facts of case.

7. Automobiles 🔑217(5)—Pedestrians' negligence in failing to stop, look, and listen before crossing street depends on circumstances, including amount of automobile traffic.

There is no positive duty on pedestrians about to cross street to stop, look, and listen, and their negligence must be determined in light of all attending circumstances, including amount of automobile traffic.

8. Damages 🔑132(7)—$15,000 held not excessive where 58 year old night watchman received fractured leg, ankle and toe, dislocated arm, shock and contusions.

$15,000 *held* not excessive damages where night clerk and watchman at country club, 58 years old, receiving $85 per month, received fractured leg, ankle and toe, dislocated arm, shock resulting in lowered blood pressure and weakened heart action, and contusions of face and side, and contracted bills by reason of injuries in sum of $1,753.

---

*Hearing denied by Supreme Court January 27, 1927; Langdon, J., voting for a transfer.

9. Appeal and error ⚷1004(1)—Verdict which is result of dispassionate discretion of jury cannot be set aside as excessive.

Verdict may not be set aside as excessive on appeal, unless it is shown not to be result of dispassionate discretion of jury.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Louis Bosse against George T. Marye, Jr., and others. From a judgment for plaintiff, and an order denying his motion for judgment notwithstanding the verdict, defendant Rudolph Spreckels appeals, and plaintiff appeals from an order denying his motion for judgment against defendant Helen Marye and another notwithstanding the jury's failure to find a verdict as to them. Affirmed.

Ross & Ross, of Redwood City, for appellant Rudolph Spreckels.

Rufus H. Kimball, and Theodore Hale, both of San Francisco, and J. E. McCurdy, of San Mateo, for respondent.

KNIGHT, J. Three appeals are presented herein, two being taken by defendant Rudolph Spreckels against whom the judgment in the action was rendered, the other by plaintiff, from an order made after verdict and prior to entry of judgment. The action was for damages on account of personal injuries suffered by plaintiff, as a result of being struck by a roadster automobile, occupied by Rudolph Spreckels' daughter Claudine and a companion named Helen Marye, each being 17 years of age at the time of the accident. The automobile was being driven by Helen Marye, but was owned by Claudine Spreckels, her father being named in the certificate of registration as legal owner thereof.

The complaint was filed originally against Helen Marye and her parents, Mr. and Mrs. George T. Marye, Jr., but was afterwards amended, and by permission of the court Rudolph Spreckels and his daughter were brought in as additional parties defendant. The amended complaint charged, in substance, among other things, that the accident was caused by the careless and negligent operation of said automobile by Miss Marye, who was driving the same pursuant to the invitation and with the permission of Miss Spreckels, who occupied the automobile jointly with Miss Marye, and remained in control thereof, and that at the time of the accident Miss Spreckels held a license to operate an automobile, granted to her upon the written application of her father.

The defendants answered jointly, placing in issue all of the allegations above mentioned, and the action went to trial before a jury. A nonsuit was granted as to Mr. and Mrs. George T. Marye, Jr., but denied as to the remaining defendants. At the conclusion of the evidence, motions for directed verdicts in favor of defendants were also denied. The cause was then submitted to the jury, and it returned a verdict against the defendant Rudolph Spreckels for the sum of $15,000, but found no verdict as to his codefendants, Helen Marye and Claudine Spreckels. No request was made by any of the parties for a resubmission of the cause to the jury for further action, and the jury was thereupon discharged. The following morning, before judgment was entered, the defendant Rudolph Spreckels moved for the entry of judgment in his favor and against the plaintiff, notwithstanding the verdict, but his motion was denied. At the same time plaintiff moved for the entry of judgment in his favor and against Helen Marye and Claudine Spreckels, notwithstanding that no verdict had been rendered as to either of them, which motion was likewise denied. Judgment was thereupon entered in accordance with the verdict, following which a motion for a new trial made on behalf of defendant Rudolph Spreckels was denied, and plaintiff's motion for a new trial as against the defendants Helen Marye and Claudine Spreckels was also denied. The defendant Rudolph Spreckels has appealed from the judgment; also from the order denying his motion for judgment in his favor, notwithstanding the verdict; and plaintiff has appealed from the order denying his motion for entry of judgment as against defendants Helen Marye and Claudine Spreckels, notwithstanding the failure of the jury to find a verdict as to them.

It appears from the evidence that the accident occurred on the evening of August 6, 1923, between 6 and 7 o'clock, while plaintiff was attempting to cross Florabunda avenue near the stables of the Burlingame Country Club in Hillsborough, at which club plaintiff was employed as night clerk and watchman. Earlier in the day Miss Spreckels, accompanied by Miss Marye, drove to San Francisco and on the return trip invited Miss Marye to drive the car. After stopping at the Spreckels home in Burlingame, they proceeded on down Florabunda avenue, intending to go to a candy store in Burlingame, but on the way there collided with plaintiff, severely injuring him. The testimony regarding the cause of the accident is conflicting, but the evidence adduced by plaintiff sufficiently shows that the automobile was being driven around a curve at an excessive rate of speed on the wrong side of the street, Miss Marye being at the wheel and Miss Spreckels sitting beside her. The evidence further shows that Miss Spreckels at that time held a state license to operate an automobile, granted on the application of her father.

[1] The sole liability attached to defendant Rudolph Spreckels, who will be hereinafter referred to as appellant, is conceded by plaintiff to be a statutory one, incurred by reason of his having signed the application for the issuance to his daughter of a license, under the provisions of section 24 of the Motor Vehicle Act of this state, as amended, which provides that it shall be unlawful for any person to permit his or her child or ward to operate or drive a motor vehicle upon the public highway without having first obtained a license, as specified in said act, provided that the application of said minor for such license shall not be granted unless the parent or guardian shall have joined in the said application by signing the same; "and provided, further, that any negligence of a minor, so licensed, in operating or driving a motor vehicle upon the public highway, whether as chauffeur or operator, shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence." Stats. 1919, p. 223, § 14.

Appellant contends that the failure of the jury to find a verdict against either Miss Marye or Miss Spreckels absolves him from responsibility, or, at least, is sufficient to demand a reversal of the judgment. With respect thereto, he contends that the liability imposed upon him by the statute in question is a secondary one in that it holds him accountable only for the negligence of another, the measure of his liability being the same as that imposed upon a master in a case based upon the doctrine of respondeat superior, and that therefore he cannot be held responsible here for the alleged negligent acts of his daughter, because there has been no verdict finding her to be negligent, citing as supporting cases Fimple v. Southern Pacific Co., 38 Cal. App. 727, 177 P. 871, and Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171, and to which might be added Tolley v. Engert, 71 Cal. App. 439, 235 P. 651. In furtherance of his contention, appellant argues that only in the cases of joint tort-feasors may the jury legally find a verdict against one defendant and omit to find against the other (Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948); and that under neither the provisions of the statute hereinabove referred to, nor the facts of this case, as they were proved, at the trial can he be held to be a joint tort-feasor, for the reason that the statute in terms holds him responsible only for imputed negligence, and the evidence shows without dispute that he was not an active participant in the actionable negligence upon which plaintiff's cause of action is founded.

Assuming, as appellant contends, that his legal status under said statute is not that of a joint tort-feasor, but is analogous to that of a master in a case involving the application of the doctrine of respondeat superior, and that therefore his liability is merely secondary, still the cases relied upon by him are not in point, because in each of them the party primarily liable was exonerated by the verdict of the jury, while here the parties charged with primary liability were not exonerated, the jury having merely failed to return a verdict as to them. The verdicts of the juries in the cases cited by appellant were manifestly "self-stultifying," as was said in Tolley v. Engert, supra, and in the instant case, if the jury by its verdict had exonerated either or both of those charged with direct responsibility for the accident, the verdict against appellant necessarily could not be upheld. But, as already shown, such is not the case.

The precise situation presented here has not been ruled upon in this state, so far as our attention has been called, the nearest approach to it being in cases of joint tort-feasors wherein it has been held that the failure to find a verdict as to one is not to be construed as an affirmative or as a negative finding as to the other upon the charge of negligence constituting the ground of the action. Benson v. Southern Pacific Co., supra; Rankin v. Central Pacific R. Co., 73 Cal. 93, 15 P. 57. But the question has arisen and been directly passed upon contrary to appellant's contention in the case of Melzner v. Raven Copper Co. & McPherson, 47 Mont. 351, 132 P. 552. There the action was against the principal and the agent, predicated solely upon the negligence of the agent named McPherson, plaintiff seeking to hold the principal responsible under the doctrine of respondeat superior. The verdict was against the principal, but silent as to McPherson, and the verdict was upheld, the court saying in part:

> "McPherson has not been acquitted of negligence, but the case as to him stands as though it had not been tried. This being true, it also follows that the failure of the jury to find as to McPherson cannot be seriously considered in the light of an irregularity in the proceedings by which the Raven Company [his principal] was prevented from having a fair trial. Even if it was an irregularity in the sense of the statute on new trials, we do not see how the company was prejudiced by it; the company still has whatever right of action it ever had against McPherson. It never did have any absolute right to his presence as a defendant in this particular case. That was optional with the plaintiff. Had McPherson not been joined in the first instance, the cause would have proceeded without him, its merits would have been exactly the same, it would have been supported by substantially the same evidence, and the fairness of the trial, wherever had, would have been entirely unaf-

fected. How, then, is it affected by the circumstance that no adjudication was made as to McPherson, who, though made a party, was not a necessary one?"

[2] And so here. The effect of the issuance of the operator's license to Claudine Spreckels upon the application of appellant, pursuant to the provision of the Motor Vehicle Act mentioned, was to charge appellant with joint and several liability for actionable negligence on her part while operating a motor vehicle on a public highway. Idemoto v. Scheidecker, 193 Cal. 653, 226 P. 922. It was optional with plaintiff whether he sued one or both for the tort committed (Fimple v. Southern Pacific Co., supra); but having sued both, appellant as principal was nevertheless liable severally. He had not the legal right to demand, as a necessary party defendant, the presence of the one for whose negligent acts the statute holds him accountable; and keeping in mind the fact that the doctrine of respondeat superior is founded largely upon the right of the principal to recover over from the agent in case the former be held liable (Bradley v. Rosenthal, supra), the omission of the jury herein to find against the persons primarily liable does not deprive appellant of the right mentioned, if he chooses to exercise it. Therefore it seems clear that appellant has suffered no prejudice by the omission of the jury herein complained of.

It may be said in passing that the decision in Melzner v. Raven Copper Co., supra, is, to a certain extent, based upon an earlier case in that state, which appears to have been one of joint tort-feasors, but such fact does not affect the reasoning of the court therein by which it arrived at the conclusion above mentioned.

We find nothing in the case of Doremus v. Root, 23 Wash. 710, 63 P. 572, 54 L. R. A. 649, cited approvingly in Fimple v. Southern Pacific Co., supra, which is at variance with the views expressed herein. In that case, it is true, the court used the expression "and no recovery can be had [in a case of respondeat superior] unless it be proven, and *found by the jury*, that the employee was negligent" (italics ours), but the expression quoted was qualified by the next sentence, the court saying:

> "Stated in another way, if the employee who causes the injury is free from liability therefor, his employer must also be free from liability,"

—indicating clearly that the court had in mind a verdict exonerating the agent, such as was rendered in that case, and not a situation where the jury failed to find a verdict at all as to the agent, which was the case here. Moreover, in a case of respondeat superior, a failure to find a verdict as to the employee does not "free" him from responsibility. He is still liable to his employer, in case the jury find against the employer; and if it were held essential to the recovery of a judgment against the employer, in a case of respondeat superior, that a verdict be first obtained against his employee, the injured party would be deprived entirely of his right to proceed against the employer upon the latter's several liability, which the Washington case expressly says he may do.

The question of appellant's waiver by reason of his failure to ask, at the time the jury returned its verdict, that it be sent out again to find upon the liability of the remaining defendants (Benson v. Southern Pacific Co., supra), becomes immaterial in view of the conclusion we have reached on the main issue.

For the foregoing reasons, we are of the opinion that the failure of the jury to find a verdict as to appellant's codefendants does not nullify the verdict rendered against appellant.

[3] Appellant further contends that in no event can he be held responsible for plaintiff's injuries, because it appears from the evidence, without dispute, that his daughter Claudine, for whose negligence alone he was accountable, was not driving said automobile at the time of the accident.

The liability of a parent under the statute mentioned is not limited, however, to negligent acts of the minor resulting from "driving" an automobile, the statute employing the broader term "operating or driving," showing a clear intention to include within such liability any negligent act which is the direct result of the privilege extended by the state to said minor, under his or her operator's license to operate an automobile upon a public highway. "To drive" is defined as meaning "to impel the motion and quicken"; whereas, "to operate" means "to direct or superintend." Century Dictionary.

In speaking of the purpose and effect of this particular statute allowing minors to operate automobiles on public highways, it was said in Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42:

> "The Legislature has now declared that under a given state of facts a liability exists where none existed before. The right of action here provided for is, in effect, a modification of the common-law rule exempting a parent from liability for the torts of his minor child, joined with the other rule that a parent may become liable for an injury caused by the child, and made possible and probable through the parent's negligence. * * *"

Under the law as declared by the provisions of the Motor Vehicle Act, the operation of an automobile over and upon a public highway is unlawful at any time unless it is done under the legal authority of an operator's license. On the day of the accident Miss Spreckels' automobile was being driven upon and operated over the public highway exclusively under the authority of the license granted to her, it being shown by the evidence that Miss Marye was not the holder of an operator's license; and while being so driven and operated, plaintiff was negligently struck by it and injured. The fact that Miss Spreckels may have temporarily intrusted the operation of the motive power of the automobile to Miss Marye while she sat beside her cannot be said to have relieved Miss Spreckels of the responsibility for the negligent handling of the automobile, because it was still legally under her control and was being driven and operated under the authority of her license.

In this respect, we think the responsibility of a licensee is no different from that of an owner who turns over the wheel of his automobile temporarily to another, but continues to ride with the person intrusted with the driving. In such a case, it is said:

> "Again, if the owner of an automobile lends his machine to another and on invitation becomes a passenger therein, in the absence of any agreement to the contrary, the owner has the right, and, indeed, it is his duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner and in violation of law. He cannot sit idly by and refrain from remonstrance, at least, while knowing that the driver is thus endangering the lives of others. If he has the opportunity to restrain the driver and fails to take advantage of it, he should be held responsible for the consequences. This is the just view, and it is supported by the authorities. The general rule is stated in 28 Cyc. 38, as follows: 'Where an injury is inflicted by the use or operation of a motor vehicle, upon the public highway, the owner thereof is liable to respond in damages therefor, if the vehicle was being operated by such owner or was under his control. * * * In all cases where the owner is present he will be responsible for injuries sustained by third persons, unless the operator disobeys instructions as the owner is in law in control of the vehicle.'" Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358.

The same principle was applied in Masterson v. Leonard, 116 Wash. 551, 200 P. 320, cited approvingly in Pope v. Halpern, 193 Cal. 168, 223 P. 470. And the liability of an owner, under the circumstances above described, is doubtless a primary one, as much so as that of a railroad company which permits its motorneer to operate its trains, under orders, at an excessive rate of speed. Benson v. Southern Pacific Co., supra.

We therefore conclude that, although not driving the automobile at the time of the accident, Miss Spreckels was nevertheless in control of its movements, and was operating the same over the highway under the authority of her license; and that being so, that she was primarily responsible jointly with Miss Marye for its negligent operation. If we are correct in this conclusion, it follows that her negligence was, under the statute, imputed to appellant, for which he became jointly and severally liable.

[4] The trial court properly admitted in evidence the application of Claudine Spreckels for an operator's license, for the reason that the question of fact as to whether or not appellant had signed such application was directly put in issue by the pleadings.

[5, 6] We find no error in the giving or refusing to give instructions to the jury, such as calls for a reversal of the case. The instructions given by the court, relating to the amount of compensation plaintiff received under the provisions of the Workmen's Compensation Act, were justified in view of the fact that appellant, contrary to the express provisions of the act mentioned, elicited the testimony upon that subject, which testimony in the absence of the instruction complained of may have led the jury to the erroneous belief that plaintiff by this action was seeking a duplicate recovery of the amount received by him under the act mentioned. The instruction given by the court of its own motion, with reference to appellant's liability, was favorable to appellant, and therefore, if erroneous, was not prejudicial. Instructions XIX, XX and XXII proposed by appellant, relating to the subject of contributory negligence, were properly refused, we think, because they were inapplicable to the facts of the instant case. Appellant states that they were copied word for word from the case of Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493, but the facts of that case show that plaintiff, at the hour of 1 o'clock in the afternoon, attempted to cross Powell street in the middle of the block between Geary and O'Farrell streets, in San Francisco, a congested business district, while the street was heavy with traffic, by taking a short cut at an acute angle and by a long diagonal, and was struck by an automobile and injured. In the case before us, the street where the accident occurred was more of a country road with no established crosswalks and carrying little traffic.

[7] As stated in the beginning of appellant's instruction XIX, "ordinary care, or its opposite, neglect, are not absolute terms, but they have reference to times, places, and circumstances," and, therefore, as was said in Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125:

> There is "no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and that the question of negligence, under the usual rule of ordinary care that devolved on pedestrians, must be examined and applied in the light of all the attending circumstances."

[8] Finally, appellant urges that the verdict is excessive. Appellant's statement of

plaintiff's injuries, as set forth in his brief (omitting the transcript references), is as follows:

> "The plaintiff was a night clerk and watchman for the Burlingame Country Club, receiving a salary of $85 per month, and of the age of 58 years. In the accident he received a fracture of the right leg, a fracture of the left ankle, a dislocation of the head of the left arm bone at the shoulder, and a fracture of the right big toe. He suffered shock with very much lowered blood pressure, weakened heart action, and contusions and black and blue areas of the face and along the left side of the body. He underwent several operations and suffered a great deal of pain and suffering. He was in the hospital from August 6, 1923, to January 27, 1924. At the time of the trial he could not raise his left arm above the horizontal; that is, instead of having 180 degrees of rotation of the shoulder, he had 90, but he could bend his arm and with the shoulder girdle, could get around his neck and reach his tie and put his hand in his pocket. From his injuries he then had a total disability for a year, probably 50 per cent. disability for another year, and 25 per cent. permanent disability. The severe accident has shortened his life. He contracted bills by reason of his injuries in the sum of $1,753 and two small drug bills."

[9] Accepting as correct appellant's narrative of the testimony relating to plaintiff's injuries, we think it cannot be fairly said that the amount of damages awarded plaintiff is so disproportionate to the injuries sustained by him as to justify the conclusion that the verdict was not the result of the dispassionate discretion of the jury; in which event, only, may the verdict be set aside on appeal. Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601.

The judgment and order appealed from by the defendant Rudolph Spreckels are affirmed. The order appealed from by plaintiff is also affirmed, plaintiff urging the appeal only in the event of a reversal of the judgment.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

---

79 Cal. App. 682

PEOPLE v. FRANCO. (Cr. 1338.)

(District Court of Appeal, First District, Division 1, California. Nov. 10, 1926.)

1. Burglary ⚷4.

"House," in sense of burglary statute, is any structure which has walls on all sides covered by roof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, House.]

2. Burglary ⚷9(2)—Entry of place where stairway showcases were located held sufficient entry to constitute statutory offense of second degree burglary.

In burglary prosecution arising out of defendant's breaking into showcase placed on wall along stairs leading to basement shoe store, entry of place where showcases were situated *held* sufficient entry to constitute statutory offense, showcases being covered by roof.

3. Criminal law ⚷1170½(1).

Refusal to permit impeachment of witness for prosecution by quizzing as to felony commission *held* harmless error, where testimony given was entirely within matters voluntarily admitted by defendant to officers.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Raymond Franco was convicted of burglary in the second degree, and he appeals. Affirmed.

Marlowe Bumpus, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

TYLER, P. J. Defendant was charged by information with the crime of burglary. He was tried and convicted. A motion for a new trial was made and denied. This appeal is from the judgment and order.

The evidence established the following facts: One H. R. Schucker was operating a shoe store in the city of Fresno. The store was situated in the basement of the building known as 1047½ Fulton street. In order to enter the store, it was necessary to proceed down some stairs leading from the sidewalk to the store proper. Along the walls and sides of the stairway some five showcases had been installed, in which were displayed numerous pairs of shoes. On the night of February 19, 1926, the lock on one of these showcases was broken open and six pairs of shoes taken therefrom. Early in the morning of the following day, defendant rented a room under an assumed name at a certain hotel in Fresno, at which time he left a box containing the stolen shoes with the proprietor. Later in the morning, accompanied by one Nick Rodriquez, he appeared at the hotel and asked that the box be delivered to him. In the meantime, the police officers of Fresno had ascertained that the box was at the hotel and a detective had stationed himself at the door thereof for the purpose of apprehending defendant. Rodriquez left the hotel with the box in his possession and proceeded to enter an automobile when he was arrested. Immediately afterwards, defendant was also taken into custody. They were brought before the assistant district attorney and questioned. Defendant admitted that Rodriquez was in no manner implicated in the affair and had merely agreed to take the box to the express office for the purpose of having it shipped. Rodriquez was subsequently released from custody. At the time of his arrest, defendant had a tire iron on his person which was capable of being used to commit the offense charged. Defendant offered no evidence in his own behalf. He was convicted of burglary in the second degree. In support of this appeal, it is first urged that, as there was no internal communication between the display cases and the store proper, the cases were not a part of the store, and, consequently, there was no entry of the store proved which would bring the offense within the contemplation of the statute defining burglary. The Penal Code, in defining this offense, provides that:

> "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary." Section 459.

[1, 2] It is clearly apparent that the statutory crime of burglary is much more comprehensive than the offense at common law. 4 Cal. Jur. 723. A house, in the sense of the statute, is any structure which has walls on all sides, covered by a roof. Ib. Here the roof of the building covers the showcases. They are, therefore, in legal effect, part of the store proper, and the entry of the place where they are situated must be held a sufficient entry to constitute the statutory offense. It has been uniformly held, under burglary statutes, that the word "house" has the very broadest significance and meaning and is very comprehensive. Williams v. State, 72 Tex. Cr. R. 371, 162 S. W. 838. In this case, a showcase was broken open and certain shoes taken therefrom. The showcase, as here, was outside of the store and there was no entrance to it from the inside of the store proper. It was there held that it was a part of the house so as to constitute a sufficient entry. See, also, Lewis v. State, 72 Tex. Cr. R. 377, 162 S. W. 866.

[3] To the same effect is Hahn v. State, 60 Neb. 487, 83 N. W. 674, where it is held that the breaking into the hallway in the basement of a building, where such basement was not connected internally with other portions of the building, was burglary of a house, as it was part of a building under the same roof, and the mere fact that there was an outer entrance did not change its character. There is, therefore, no merit in the claim. It is next contended that the trial court committed error in refusing to permit counsel for defendant to impeach the testimony of Nick Rodriquez, who testified for the prosecution, by asking him whether or not he had ever been convicted of a felony. This, no doubt, was error, but it was not of the character that justifies a reversal of the case. All that Rodriquez testified to was the fact of his meeting the defendant in a barber shop and being requested by him to carry the box of shoes to the express office in his automobile. It was already in evidence that defendant had voluntarily admitted to the officers that such was the fact. Under these circumstances, we fail to see how the rejection of the question affected defendant's substantial rights or resulted in a miscarriage of justice, as the entire testimony of the witness was unnecessary for a conviction. Defendant's possession of the stolen goods was proved by several witnesses.

And, finally, complaint is made that the trial court erred in refusing to give certain instructions as to what constituted a building. The conclusion we have reached with reference to the first point raised by appellant disposes of this question. To the objection that the court failed to properly instruct the jury in regard to circumstantial evidence, it is sufficient to say that we have read the instructions, and they fully and correctly informed the jury upon the law covering the subject.

There is no merit in the appeal.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

---

79 Cal. App. 611

ALLEN v. ELLIS. (Civ. 4496.)

(District Court of Appeal, Second District, Division 1, California. Nov. 4, 1926.)

1. Account stated ⚷19(3).

Evidence *held* to sustain finding that there was an account stated between parties and that defendant agreed to pay it.

2. Costs ⚷263.

Where appeal was for delay and judgment was affirmed, respondent *held* entitled to recover from appellant $50 damages in addition to costs of appeal.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by James L. Allen against Charles Ellis. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Simon and Harry B. Ellison, both of Los Angeles, for appellant.

James L. Allen, of Santa Ana, in pro. per.

CONREY, P. J. There was an outstanding account of plaintiff against the defendant for services rendered. Plaintiff testified that he had rendered a statement showing a balance due in the sum of $1,409.46; that the defendant brought the account to him and claimed that the amount was too large; that the plaintiff then offered to reduce the amount to $1,350; that the defendant then said, "All right, we will settle"; that thereupon the defendant gave plaintiff a check for $500, which was credited on the statement of account, and at the same time gave credit for $59.46; that the defendant said, "I will pay you the balance in two or three weeks."

[1] The only point raised by the appeal is that the evidence is insufficient to support the court's finding that there was an account stated, and that the defendant agreed to pay the same. In view of the fact that there is direct and sufficient evidence of these facts, the finding must be sustained, notwithstanding that there was opposing testimony of the defendant and others relating to those issues.

[2] It appearing that the appeal was made for delay, the judgment is affirmed, and it is ordered that respondent recover from appellant the sum of $50 damages in addition to the costs of appeal.

We concur: HOUSER, J.; YORK, J.

---

79 Cal. App. 655

G. CAVAGLIERI MORTGAGE CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5402.)

(District Court of Appeal, Second District, Division 2, California. Nov. 6, 1926.)

Garnishment ⚷148—Garnishee's denial of indebtedness to defendant precludes order by court out of which attachment issued directing payment to sheriff (Code Civ. Proc. §§ 719, 720).

Garnishee's denial, in return, of indebtedness to defendant is conclusive, and court out of which attachment issued cannot direct payment of money or delivery of property to sheriff, but can only authorize suit against garnishee to procure adjudication of question of indebtedness, in view of Code Civ. Proc. §§ 719, 720.

Application by the G. Cavaglieri Mortgage Company for a writ of prohibition prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles, William C. Doran and Albert Lee Stephens, Judges, and another, to prevent action upon a citation for contempt. Peremptory writ granted.

E. Burton Ceruti, of Los Angeles, for petitioner.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

WORKS, P. J. The petition in this proceeding alleges, among other things, that respondent Pacific Ready-Cut Homes, a corporation, brought suit in respondent court against Malcolm Smith Company, a corporation, for the purpose of recovering a certain sum of money; that in that action the plaintiff procured a writ of attachment and served it upon petitioner, together with a notice requiring petitioner "to pay over or transfer any personal property belonging to the defendant Malcolm Smith Company," and requiring petitioner "to make return of the amount of said property in its possession"; that thereupon petitioner returned "that it had no property belonging to the defendant Malcolm Smith Company," but that it did "have an open account with one Malcolm Smith, an individual"; that thereafter petitioner was again served with a writ of attachment in the action and with a notice "that all personal property in its possession * * * due, owing or belonging to or owned by Edwin R. Rockwell Company, but belonging to the defendant Malcolm Smith Company, was attached, and requiring said garnishee company to state in writing the amount of the same"; that petitioner thereupon made return that "it is not indebted to said defendant, Malcolm Smith Company, nor has this corporation in its possession or under its control any moneys or other personal property due, owing or belonging to or owned by Edwin R. Rockwell Company, a corporation, but, or, belonging to the defendant Malcolm Smith Company, a corporation. This corporation further states that it has purchased from one Malcolm Smith, an individual, a certain promissory note in the sum of $110,000, executed by Edwin R. Rockwell Company, a corporation, in favor of Malcolm Smith, which said note was assigned by said Malcolm Smith to this corporation, the consideration therefor to be paid to the assignor subject to and in accordance with, the terms of a certain contract between said Malcolm Smith and this corporation"; and that thereafter respondent Doran made an order reciting that it had appeared that petitioner, at the time of the service of the writ of attachment, had "in its possession and under its control the sum of $17,895 the property of Malcolm Smith Company, a corporation, and same is capable of manual delivery," and commanding petitioner "forthwith to pay to sheriff of the county of Los Angeles" the sum named, "subject to the further order or orders of this court appertaining thereto." It further appears from the petition that petitioner has not complied with this order; that petitioner has been cited to show cause, by its president, why it, by and through its president, should not be punished for contempt of court for its noncompliance with the order; and that respondent court, unless it be restrained, will punish petitioner and its president for contempt. Upon the allegations of the petition we issued an alternative writ of prohibition.

The answer of respondents alleges in part that, after petitioner had been served with the writ of attachment, "and had made answer thereto, denying that it had in its possession or under its control any money or property or thing in action owing to or belonging to the defendant, Malcolm Smith Company," such proceedings were had that petitioner was cited before respondent court to answer concerning the same matters; that the citation was based upon an affidavit in which it was alleged in part, that after the service of the writ of attachment petitioner filed its return, "alleging and claiming that it had no moneys or personal property, of any description or character, in its possession, belonging to the defendant, or in which said defendant had any interest"; and that at the hearing held pursuant to the citation the president of petitioner testified "*that petitioner had* in its possession and under its control the sum of * * * $17,985 owing and belonging to the defendant Malcolm Smith Company, a corporation, and at the time of the service of the writ of attachment * * * it had said * * * money in petitioner's possession and under its control, which belonged to and was the property of the *defendant Malcolm Smith Company*." The italics at the beginning and end of this quotation are ours, and they are employed for convenience, as will hereafter appear.

The petition and the answer thereto are of considerable length. In order to avoid a reference for the purpose of determining the issues raised by them, petitioner and respondent were able to enter into a stipulation settling the facts involved in the proceeding. The stipulation was to the effect that the "allegations of fact of the petition and of the answer herein" are true, with the exception of the allegation of the answer above quoted and beginning and ending with our italics, and that "as to such statement, the testimony was that it had such sum payable to Malcolm Smith," under a certain contract.

It appears from the record, then, that in making return to the garnishment petitioner denied that it was indebted to the Malcolm Smith Company, and that it has persisted in that denial to the end. The stipulation between the parties will bear no other construction. It is undoubtedly the law that, where a garnishee makes such a denial as was made by petitioner here, the denial is conclusive, and the court out of which the attachment issues has no power to make an order directing a payment of money or a delivery of property to the sheriff, but can only authorize suit against the garnishee for the purpose of procuring an adjudication of the question of indebtedness or no indebtedness. Code Civ. Proc. §§ 719, 720; Hartman v. Olvera, 51 Cal. 501; William Deering & Co. v. Richardson-Kimball Co., 109 Cal. 73, 41 P. 801. The principal questions presented by respondents here are those which are cognizable only in such an action. The order of respondent court requiring petitioner to pay the sum named to the sheriff was therefore invalid, and petitioner was not bound to obey it.

A peremptory writ of prohibition will issue as prayed.

We concur: CRAIG, J.; THOMPSON, J.

---

79 Cal. App. 639

In re KEPLER. (Civ. 5465.)

(District Court of Appeal, Second District, Division 2, California. Nov. 6, 1926.)

1. Attorney and client ⚷61.

Evidence relative to moral qualifications of one seeking readmission as attorney at law after judgment of disbarment *held* insufficient to entitle him to reinstatement.

2. Attorney and client ⚷61.

False allegation in petition for readmission as attorney at law after judgment of disbarment *held* sufficient of itself to preclude reinstatement.

Original application by Leland S. Kepler for reinstatement as a member of the Bar of the State of California. Petition denied.

Leland S. Kepler, of Tracy, in pro. per.

Arthur L. Levinsky, of Stockton, for respondent San Joaquin County Bar Ass'n.

H. J. Forgy, A. W. Rutan, and Clyde Bishop, all of Santa Ana, for respondent Orange County Bar Ass'n.

WORKS, P. J. For some time prior to February 24, 1925, petitioner was an attorney at law, practicing his profession principally in the county of San Joaquin. On that date a judgment of disbarment was pronounced against him because of certain moral delinquencies incident to his conduct in connection with a certain action in the superior court of the state, in and for the county mentioned. Soon after his disbarment he removed to the county of Orange. He petitions for a reinstatement in the ranks of the profession. The petition is vigorously resisted by the bar association of each of the counties named, in lengthy answers which allege a variety of reasons why the petition should not be granted.

At the hearing before us petitioner was called to the witness stand. As a result of his examination we are enabled to pass upon the merits of his application without the necessity for the reference contemplated by the general rules of procedure which we have recently laid down in our opinion in Re Cate

(Cal. App.) 247 P. 231, for the conduct of matters of a nature similar to that which now lies before us.

[1] The facts presented to us upon the examination of the applicant as a witness are such that the proceeding may be terminated with great brevity. In the action which led to the disbarment of petitioner a judgment for $650 was rendered against him. In his petition for reinstatement he alleges that: "The said sum of $650 * * * has been fully paid and satisfied." The allegation that the amount named has been "paid" is false, although it is true that the judgment for it has been "satisfied." The testimony of petitioner shows that his indebtedness under the judgment was compromised, and that he paid but $500 for a satisfaction of the judgment. Not only so, but it is fairly inferable from his testimony that he induced the settlement by threats that he would go into bankruptcy if a payment in full were insisted upon. The judgment, with interest and costs, amounted to more than $700 at the time the settlement was made. Moreover, petitioner testified that at the time of the compromise he had enough money to pay the judgment in full.

[2] Under all these circumstances it is plain to us that petitioner has not the moral qualifications entitling him to a reinstatement. It is enough, without saying more, that he incorporated a false allegation in the petition by means of which he has sought to bring about his restoration to the ranks of the legal profession.

Petition denied.

I concur: CRAIG, J.

Justice THOMPSON, not having been a member of the court at the time this proceeding was submitted for decision, does not participate in the determination of it.

---

79 Cal. App. 629

LUSTIG v. SUPERIOR COURT OF STATE OF CALIFORNIA, WITHIN AND FOR LOS ANGELES COUNTY, et al. (Civ. 5397.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1926.)

1. Justices of the peace 🔑166(2).

Code Civ. Proc. § 954, providing when appeal may or may not be dismissed, relates entirely to appeals from superior court.

2. Justices of the peace 🔑166(2)—Appeal from justice court with undertaking executed by one surety only held properly dismissed (Code Civ. Proc. § 978).

Appeal from justice court with undertaking executed by appellant and one surety only *held* properly dismissed, even though appellant produced an additional surety who was ready, able, and willing to qualify, in view of Code Civ. Proc. § 978, that appeal from justice court is not effectual unless an undertaking be filed with two or more sureties.

3. Statutes 🔑243.

Where statuory remedy or proceeding is specially provided, it cannot be enlarged by construction, nor made available or valid except by strictly following directions of act.

Application by J. S. Lustig for writ of mandate to be directed to the Superior Court of Los Angeles County, Frank C. Collier, Judge, to compel the vacating of an order dismissing appeal from the Justice's Court and the restoration of the cause to the calendar for trial. Writ denied.

A. P. Michael Narlian, of Los Angeles, Joseph W. Beardslee, and H. K. Lockwood, for plaintiff.

Irvin C. Taplin and Clifford Crail, both of Los Angeles, for defendants.

CRAIG, J. The plaintiff in this proceeding appealed to the superior court of Los Angeles county from a judgment rendered against him in the justice's court of Los Angeles township on July 21, 1925. Said appeal was perfected in the usual form, except that the undertaking therein was executed by the appellant and by one surety only. The case was called for trial de novo in the superior court on May 19, 1926, whereupon motion was made to dismiss the appeal upon the ground that it had not been perfected, in that the undertaking did not conform to section 978 of the Code of Civil Procedure. The plaintiff herein, appellant below, produced an additional surety who, it is alleged, was ready, able, and willing to qualify, and asked permission to forthwith amend the undertaking complained of by furnishing the requisite number of sureties, or to execute and file a new undertaking. The matters were submitted, and after consideration the motion last mentioned was denied, and the appeal was dismissed. This is a proceeding in mandamus, praying that said superior court be directed to vacate its order of dismissal, and to restore the cause to the calendar for trial.

[1-3] The plaintiff in this proceeding contends that the undertaking in controversy was merely defective, but not void, and that under such circumstances section 954 of the Code of Civil Procedure expressly afforded him the right to correct his error by furnishing sufficient sureties. Authorities construing section 954 are cited, which so hold. Said section, however, relates entirely to appeals from the superior court, and the cited cases so indicate. This appeal was attempted to be taken pursuant to section 978 of the Code of Civil Procedure, enacted in 1915, which provides, in part, that:

> "An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal, or, if a stay of proceedings be claimed, in the sum of one hundred dollars plus a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money. * * *"

The question here presented has not heretofore been decided in this state, to our knowledge, but in jurisdictions having statutes embodying the exact language above quoted it has repeatedly been held that they are mandatory and cannot be enlarged by construction.

In Brickner v. Sporleder, 3 Okl. 561, 41 P. 726, the same contention advanced in the instant case was under consideration, and it was said by the Supreme Court of Oklahoma:

> "It is a well-recognized canon of construction in these cases that, where a statutory remedy or proceeding is specially provided, it cannot be enlarged by construction, nor made available or valid except on the statutory conditions; that is, by strictly following the directions of the act. Suth. St. Const. sec. 392, and cases cited. This rule is applied to the mode of taking a case to an appellate court, when prescribed by statute. Id. sec. 394; Ricard v. Smith, 37 Miss. 644; Humphrey v. Chamberlain, 11 N. Y. 274. Applying this doctrine of the strict construction to the case before us, it appears that the requirement of two or more sureties is essential and mandatory as a condition precedent, and cannot be enlarged or expanded to mean a single surety. Indeed, the language of the statute itself, which is the first principle of interpretation, is clear and unambiguous."

The same question arose under a South Dakota statute in Smith v. Gale, 13 S. D. 162, 82 N. W. 385, wherein the following language was used:

> "We are of the opinion that the undertaking cannot be regarded as a statutory undertaking, for the reason that it is executed by only one surety. Section 6133, Comp. Laws, provides that 'the appeal from the justice's court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in the sum of,' etc. To constitute a valid statutory undertaking, therefore, there must be at least two sureties."

In Johnson v. Superior Court, 28 Cal. App. 618, 153 P. 404, the District Court of Appeal of this state for the Third District construed section 981 of the Code of Civil Procedure, which requires that a party appealing from a justice's court must pay to the justice of the peace all fees necessary to such appeal, including the amount required for placing the cause upon the calendar in the superior court, which there amounted to $9. The appellant in that case paid $7 for appealing, but failed to pay the calendar fee for the appellate court. It might well have been argued that there was ample time after the transfer of the record to have paid the $2 calendar fee to the clerk of the superior court, and that such a mere oversight could not prejudice the rights of any of the parties. It was held, however, that the superior court did not acquire jurisdiction of the case because of such deficiency, the court saying:

> "Section 981 is in language so plain and unambiguous that its meaning cannot be mistaken or misapprehended. And the language seems to be mandatory. Indeed, we can think of no reason for holding it to be otherwise. * * * We cannot perceive how language could be plainer or its meaning more manifest. Nor is it possible to conceive of language more peremptory or mandatory. When it is declared that an act authorized by law shall not be effectual for any purpose unless accompanied or preceded by certain prescribed formalities, it is obviously meant that such act, in the absence of observance of the formalities so required, is absolutely nugatory or of no force or effect for any purpose. Indeed, it is not the act at all contemplated or prescribed and required by the law."

The writ of mandate herein prayed is therefore denied.

We concur: WORKS, P. J.; THOMPSON, J.

---

79 Cal. App. 598

LOWDER v. UNION TRANSFER CO. OF SAN FRANCISCO. (Civ. 5656.)

(District Court of Appeal, First District, Division 2, California. Nov. 3, 1926.)

1. Carriers 🔑110—"Silk," as used in statute requiring consignor to give notice to carrier of nature of shipment, to claim additional value, includes silk or silk cloth in its manufactured state; "raw silk" (Civ. Code, § 2200).

Civ. Code, § 2200, requiring consignor to give notice to common carrier of "silk" and other articles to be transported, in order to make carrier liable for additional value, does not apply to raw silk alone, but includes silk or silk cloth in its manufactured state; "silk" meaning fine, soft thread produced by various species of caterpillars, etc., and "raw silk" meaning silk as it is wound off from cocoons and before it is manufactured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Raw; Silk.]

2. Statutes 🔑181(1).

Intention of Legislature at time of enacting statute controls construction.

3. Appeal and error 🔑907(3).

Where appeal is on judgment roll without a bill of exceptions, reviewing court must assume, in support of judgment, that evidence supports finding on which judgment was based.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Sunny Lowder against the Union Transfer Company of San Francisco. Judgment for plaintiff for less than sued for, and she appeals. Affirmed.

Chas. A. Wetmore, Jr., of Marysville, for appellant.

Milton Marks, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover for the loss of personal property intrusted to the defendant for transfer as a common carrier. Plaintiff had judgment for $238.50, but, being dissatisfied with the amount awarded, has appealed on the judgment roll alone.

The trial court found that the plaintiff delivered to defendant a suitcase containing various articles of wearing apparel and personal belongings of the reasonable value of $817.50; that the suitcase and its contents were lost through the negligence of the defendant; that the defendant was not informed that the suitcase contained money or papers of value, or that it contained silverware, silk, or any valuable writings. From the conclusions of law, it appears that the sum of $238.50 covered the "reasonable and fair market value of all the articles of personal property * * * except those articles which consisted of silk, silver in a manufactured or unmanufactured state, money, and other papers of value."

[1] The appellant claims that the trial court erred in refusing to allow for the loss of the silk clothing and the purse containing money. As to the first item, it is argued that the statute covers "silk" only and does not include clothing made of silk. As to the second, it is argued that the statute covers a package having the form of a letter containing money and does not include a purse.

With respect to the first item, the trial court found that the appellant had failed to give to the respondent the notice required by section 2200 of the Civil Code to be given by a consignor to a common carrier of "gold, silver, * * * in a manufactured or unmanufactured state; * * * of pictures, glass, or chinaware; of statuary, silk, or laces." The argument is that because the statute does not mention articles manufactured of silk, but merely uses the word "silk" in the singular, it must be taken to refer to silk in its unmanufactured state only.

[2] The words "of statuary, silk or laces" were added to the statute by amendment of 1873, and the intention of the Legislature at that time is what controls. The settled purpose of the statute was to protect the carrier from the fraud of the shipper, in respect to articles of unusual value which the carrier is not permitted to inspect before assuming the risk. When the section was amended in 1873, the use of silk in the manufacture of articles of wearing apparel was not as common as it is to-day, and articles of that kind were regarded as of unusual value.

In Webster's American Dictionary of the English Language (Ed. of 1870), the one in general use at the time of the passage of the amendment to section 2200, the word "silk" was defined as follows:

> "The fine, soft thread produced by various species of caterpillars; * * *" and "(2) hence, thread spun, or cloth woven, from the above-named material."

In the same dictionary, the words "raw silk" were defined to mean "silk as it is wound off from the cocoons, and before it is manufactured."

The Legislature certainly did not intend to use the word "silk" as applying to raw silk alone, but it must have intended to include silk or silk cloth in its manufactured state as well. Among the items for which the trial court denied recovery are two dresses valued at $100 and $150 each; hose valued at $5 a pair; one pair of pajamas valued at $75; handkerchiefs, underwear, and a silk robe of similar values. From these items we may conclude that the silk cloth was cut and fashioned in appropriate shapes and fastened or joined together by thread, buttons, or other kind of fasteners, as might suit the convenience of the owner. If silk cloth as sold by the yard was covered by the statute, there is no reason for saying that the same cloth when fashioned into dresses, pajamas, robes, or other garments should be excluded. All we need to say is that silk is silk, and that it is none the less so because of the peculiar shapes into which it has been cut or because it is prepared for any particular purpose. The fact that cloth so fashioned would ordinarily have a greater value, particularly to the shipper, and that the true value would be more difficult of ascertainment than the value of raw silk or of unfashioned cloth would support the conclusion that such articles were intended to be included rather than excluded.

[3] The appeal being on the judgment roll without a bill of exceptions, we must assume in support of the judgment that the evidence supported the finding that the articles for which no recovery was allowed "consisted of silk, silver * * * money and other papers of value." This finding precludes any argument on the item of the purse and its contents.

Judgment affirmed.

I concur: STURTEVANT, J.

79 Cal. App. 637

CHURCH MFG. CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

(Civ. 5367.)

(District Court of Appeal, Second District, Division 2, California. Nov. 6, 1926.)

New trial 🔑155—Motion for new trial is denied by operation of law two calendar months after service of notice of entry of judgment (Code Civ. Proc. § 17, subd. 4, and section 660).

Where notice of entry of judgment was entered on December 31, motion for new trial could not be granted on March 1, since it was denied by operation of law at least as early as February 28, in view of Code Civ. Proc. § 17, subd. 4, and section 660, notwithstanding that February 28 was Sunday.

Petition by the Church Manufacturing Company for certiorari to review an order of the Superior Court of the State of California in and for the County of Los Angeles, granting a new trial. On demurrer. Demurrer overruled, and order annulled.

Thomas A. Wood, of Los Angeles, for petitioner.

Ernest B. Coil, of Los Angeles, for respondent.

WORKS, P. J. Petitioner was plaintiff in an action in respondent court and procured judgment against the defendant. On December 31, 1925, petitioner here, plaintiff there, served upon the defendant in the action notice that the judgment had theretofore been entered. In due time thereafter, the defendant served upon petitioner a notice of intention to move for a new trial of the action, and respondent court, on March 1, 1926, made its order purporting to grant a new trial. February 28, 1926, fell on a Sunday. Petitioner filed, in this court, its petition asking for the writ of review for the purpose of annulling the order attempting to grant a new trial. The writ issued, and respondent interposed demurrer to the petition.

Section 660 of the Code of Civil Procedure contains the following:

> "The power of the court to pass on motion for a new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said two months, the effect shall be a denial of the motion without further order of the court."

Subdivision 4 of section 17 of the same Code reads:

> "The word 'month' means a calendar month, unless otherwise expressed."

Under these enactments, we think the motion for a new trial in the action above mentioned was denied, by operation of law, at least as early as the close of February 28, despite the fact that the date fell on a legal holiday. Respondent had the judicial days of the two calendar months of January and February within which to rule on the motion for a new trial and no longer. This view is forced by the language of section 660. It has been expressed already by another division of the District Court of Appeal. See Shepherd v. Superior Court, 54 Cal. App. 673, 202 P. 466. The view has received the apparent approval of the Supreme Court in United Railroads v. Superior Court, 242 P. 701.

Demurrer overruled. Order annulled.

We concur: CRAIG, J.; THOMPSON, J.

---

79 Cal. App. 685

NAU v. SANTA ANA SUGAR CO.*

(Civ. 4658.)

(District Court of Appeal, Second District, Division 1, California. Nov. 12, 1926.)

1. Liens 🔑7—Written executory agreement, indicating intent to make described property or fund security for debt or containing promise to convey, assign, or transfer it as security, creates equitable lien thereon.

Every express executory agreement in writing, sufficiently indicating intent to make particular property or fund, therein described or identified, a security for debt or other obligation, or containing promise to convey, assign, or transfer property as security, creates an equitable lien thereon, enforceable against it in hands of original contractor, his heirs, representatives, voluntary assignees, and purchasers or incumbrancers with notice.

2. Landlord and tenant 🔑243—Lease held to create lien on crops, not merely right to demand mortgage as security.

Lease providing for payment of yearly sum, to be secured each year by first mortgage on crops to be given whenever lessor demanded it, *held* to indicate intent to create a lien thereon for lessor's benefit, not merely a right to demand a mortgage.

3. Landlord and tenant 🔑252(5).

In lessor's suit to establish priority of his claimed equitable lien as against defendant to whom lessee's assignee mortgaged and sold crop, evidence *held* to sustain finding that defendant had notice of such lien.

4. Principal and agent 🔑177(6)—Knowledge of crop mortgagee's field superintendent, who examined lease, under which lessor claimed prior lien, held imputable to mortgagee.

Where crop mortgagee's general manager told its field superintendent to contract with tenant to purchase crop and make advances secured, with knowledge that superintendent had examined lease, under which lessor claimed prior lien, and, pursuant to contract, participated in execution of mortgage by making mortgagee's affidavit, superintendent's knowledge was that of general manager and mortgagee, having been acquired by latter's agent within scope of his duties.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court January 10, 1927; Waste, C. J., and Shenk, J., dissenting.

5. Parties 🔑84(3)—Nonjoinder of necessary parties cannot be first raised by amended answer, unless justice requires that they be brought in.

Defense of nonjoinder of necessary parties defendant is in nature of demurrer, and cannot be first raised by amended answer, unless nature and condition of case require that they be brought in in interest of justice.

6. Landlord and tenant 🔑252(5).

Tenant and his assignee, executing crop mortgage, *held* necessary parties for full protection of defendant mortgagee, in lessor's suit to establish priority of his lien, as against defendant to whom assignee mortgaged and sold crop.

7. Pleading 🔑129(1).

Defendant admits fact pleaded in petition by not denying it in answer.

8. Parties 🔑29.

Persons whom defendants have such interest in having made parties as to authorize defendants to object to proceeding without them are necessary parties.

9. Equity 🔑39(1)—Lessor's suit to establish priority of lien held in nature of equity suit, in which equitable principle as to settlement of whole controversy applied.

Landlord's suit to establish priority of lien against defendant, to whom lessees mortgaged and sold crop, is in nature of suit in equity, wherein principle that equity does not act piecemeal, but will settle whole controversy, if reasonably possible, may be applied.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Samuel Nau against the Santa Ana Sugar Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

O'Melveny, Millikin, Tuller & Macniel, of Los Angeles, for appellant.

Head, Rutan & Scovel, of Santa Ana, for respondent.

CONREY, P. J. The plaintiff, as owner of the land, on or about May 27, 1920, leased the land to Sherman Buck for a term of three years, commencing January 1, 1921. The annual rental was to be $4,400, payable on October 1st during each year of the term. On October 29, 1920, Buck assigned the lease to J. W. Culver, subject to the terms and conditions of the said lease, and said Culver agreed to carry out all of the terms and conditions of the lease. This transfer was made with consent of the lessor. On November 15, 1920, a contract in writing was entered into between defendant company and J. W. Culver for the production of sugar beets by Culver on the leased land, from seed to be furnished by defendant, and for the sale and delivery of the beet crop to defendant. At the same time Culver executed to defendant company "a crop and chattel mortgage" as security for advances made and to be made by the company to Culver. This mortgage, duly executed, was recorded as a chattel mortgage in the office of the county recorder of Orange county on said 15th day of November, 1920.

On June 20, 1921, Culver executed to the plaintiff his promissory note due October 1, 1921, for the sum of $4,400, and executed a crop mortgage on said crop of beets, which was then a growing crop, and this mortgage was, on June 23, 1921, duly recorded as a chattel mortgage in said Orange county records. This mortgage was executed to the plaintiff by Culver in response to the demand of plaintiff as lessor that said mortgage be executed as security for the rental which would fall due on the 1st day of October, 1921. Said crop of sugar beets was harvested by Culver and delivered to the defendant. The value thereof was in excess of said sum of $4,400. The defendant, however, after converting said sugar beets into sugar, applied the proceeds of the sale wholly to the indebtedness of Culver to itself without in any manner recognizing or satisfying plaintiff's mortgage or the indebtedness secured thereby, and without satisfying the lien claimed by plaintiff as lessor under said lease, or any part of the indebtedness included in plaintiff's said claim of lien. The indebtedness of Culver to the defendant for money advanced to Culver for the purpose of planting, raising, and harvesting sugar beets upon said premises and upon certain other land leased by Culver from another landowner exceeds the sum of $17,000, of which only $10,000 has been paid. The indebtedness of Culver to the plaintiff, being the rental provided for in said lease of plaintiff's land, is wholly unpaid.

In this action, the court having found the facts, of which we have endeavored to state the circumstances so far as necessary to the consideration of this appeal, determined that plaintiff's lien by reason of the lease contract made by plaintiff to Buck and assigned to Culver and under the chattel mortgage made by Culver to plaintiff in accordance with the provisions of said lease, is prior in right to the said chattel mortgage made by Culver to the defendant; that the defendant having converted said crop of beets to its own use and received the proceeds thereof, the plaintiff is entitled to judgment against defendant in said sum of $4,400, with interest, etc. It is from this judgment that the defendant appeals.

The lease made by plaintiff to Buck and signed by both lessor and lessee contained, among other things, an agreement relating to security for payment of the annual rental, as follows:

"Said payment of said yearly sum to be secured each year by a first mortgage on all of the crops growing on said land, said first mortgage to be given by the party of the second part to the party of the first part at any time said party of the first part shall demand the same."

It was further agreed therein that the leased land (with certain stated exceptions) shall be planted each year to beets, and provisions were made concerning the methods of care, etc., required. The lease then proceeded:

> "It is further agreed that, if said party of the first part shall hold a mortgage on any crops harvested from said land, that they shall be sold in the name of the party of the first part herein, said party of the first part to handle all moneys from the proceeds thereof and pay the balance to said party of the second part after deducting the rentals due him from said party of the second part and any necessary work or labor that he has been compelled to hire."

In its findings of fact the court found that on or about November 15, 1920, when Culver stated to defendant that he wished to raise a crop of sugar beets on said demised premises, the said Culver "for the purpose of showing his right to raise said crop on said premises, then and there caused defendant, its officers, and agents, acting within the scope of their authority, to read and examine the said lease, and then and there verbally informed defendant, its officers, and agents, acting within the scope of their authority, that plaintiff herein, as lessor under said lease, was entitled under the terms and conditions thereof to demand and receive a first mortgage on any crop of sugar beets raised on the demised premises as security for the yearly rental of the same as provided for in said lease, and the said defendant, its officers, and agents, acting within the scope of their authority, then and there read the said lease, and particularly the terms and conditions relating to the mortgage and the harvesting of the crop of sugar beets to be grown on said land, and the disposition of the proceeds from the sale thereof, as set forth in paragraph II of plaintiff's complaint, and then and there, and while acting within the scope of their authority, informed the said J. W. Culver that they had read said lease and the terms and conditions relating to said mortgage hereinbefore referred to, and then and there, and while acting within the scope of their authority, informed the said J. W. Culver that plaintiff, as lessor, was entitled to a first mortgage on the crop of sugar beets to be raised on the demised premises during the cropping season of 1921; that it is true that immediately thereafter, at said place, defendant, acting through its proper officer or agent, prepared a contract for the purchase by it from J. W. Culver of sugar beets to be raised by him on the said demised premises during the cropping season of 1921, which agreement was then and there duly executed by the said J. W. Culver and the proper officers of defendant; that it is true that thereupon a copy of said agreement, properly signed, was delivered to the said J. W. Culver, and at all times since said time said agreement has been, and now is, a valid and binding agreement as between the parties thereto."

It will be noted that the execution and recording of plaintiff's chattel mortgage is subsequent to the execution and recording of the defendant's chattel mortgage. The theory on which plaintiff's priority must be maintained, if such priority can be maintained at all, rests upon the proposition that by reason of the terms of agreement contained in the lease, the lessor had at all times an equitable lien on the growing crops of beets and other produce of said land for the purpose of securing the payment of the annual rental, and that this equitable lien was not created, but was only further evidenced, in accordance with the lease contract, by the chattel mortgage subsequently executed by Culver to the lessor.

In support of its appeal herein, appellant contends, first, that the lease did not give to the lessor an equitable mortgage on the crops thereafter to be grown on the leased premises; and, second, that the finding that defendant had notice of plaintiff's claimed equitable lien is not sustained by the evidence. There is a further claim by appellant that there is a fatal defect of parties, in that neither Culver nor Buck were made parties to this action.

[1] On the principles which underlie the doctrine of equitable liens, a clear statement was made, and illustrated by leading cases, in Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, at pages 200, 201, 152 P. 542, 554. The substance and effect of those decisions is found in the court's quotation from 3 Pomeroy's Equity Jurisprudence (3d Ed.) § 1235, as follows:

> "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice."

[2] Not denying the validity of the rule thus declared, appellant says that this establishes nothing except the principle that equity will carry out the intent of the parties where the intent to create a lien clearly appears. But appellant contends that the provisions of the lease disclose only an intention that the lessor shall have the power to demand and receive a mortgage, and that only upon the execution of the mortgage, or, at least, only when the demand was made, the lien would become effective; that the lease contract created, not a lien, but only

the power to demand a lien; that the lien was contingent upon the exercise of that power. It is our opinion, however, that the terms which we have quoted indicated a clear intention to create a lien on the crop for the benefit of the lessor. When the lease provided, "said payment of said yearly sum to be secured each year by a first mortgage," a vested right to such prior lien was established. The subsequent clause concerning the demand for execution of the mortgage determined the time when that formal instrument in evidence of the lien should be executed.

[3] Appellant next contends that the court's finding that the defendant had notice of plaintiff's claimed equitable lien is not sustained by the evidence. Defendant's negotiations with Culver were conducted primarily through its field superintendent, Mr. Gerheart, who acted with and under the general direction of the company's manager, Mr. Smiley. It is admitted that before any contract was made with the defendant, the lease made by plaintiff to Buck and assigned to Culver had been submitted to Gerheart and was read by him. According to Gerheart's testimony, he not only read the lease, but took particular notice of the provisions therein relating to the security for payment of the rent. The contention of appellant is that this knowledge of Gerheart cannot be imputed to the general manager, Smiley, and that without knowledge by Smiley of the contents of the lease, the defendant cannot properly be held to have had notice of the lien claimed by the lessor.

Smiley testified, among other things, as follows:

> "Mr. Gerheart had authority to sign these contracts as agent for the company. He had authority to enter into negotiations with the growers or land owners or tenants leading up to the purchase of their beets and to sign contracts when they were purchased. * * * He was supposed to look after the interest of the company, and that necessarily, I suppose, would require him as his duty to read over the leases and see in what manner they held."

Gerheart testified:

> That at the time Mr. Culver came to see him on November 15, 1920, he saw the lease and read it over; that on the same day and prior to entering into the contract he had a conversation with Mr. Smiley regarding the lease. "I told him the amount Mr. Culver would require, and if my memory is right I stated there was a clause in this lease providing for a first mortgage if Mr. Nau required it—if he asked for a first mortgage on the crops. * * * Mr. Smiley said if I considered it safe to go ahead with the contract."

[4] Mr. Gerheart afterward testified that it was possible that he was mistaken in his prior testimony about what he had told Mr. Smiley, and further said that he did not think that Mr. Smiley grasped the conditions; and Mr. Smiley testified that so far as he knew he had no knowledge of the terms of the lease at the time when the mortgage to the company was executed. Nevertheless, the first testimony as given by Gerheart is sufficient to have warranted the court in believing and determining, not only that Gerheart knew the terms of the lease, but that the general manager knew that Gerheart examined the terms of the lease on that subject and was satisfied to accept Gerheart's conclusions upon the matter without a further and more direct investigation by the general manager himself. When Smiley under those conditions told Gerheart, if he considered it safe, to go ahead with the contract, and when Smiley himself, pursuant to that contract, participated in the execution of the chattel mortgage by making the mortgagee's affidavit thereto, as required by law, the knowledge which Gerheart had thus obtained of the terms of the lease was the knowledge of Smiley and of the corporation. It was knowledge acquired by the corporation's agent within the scope of the duties imposed upon him by his employer. Smiley testified also that in the transactions relating to the making of contracts of defendant with the beet growers, and in making arrangements for cash advances and for mortgages, Mr. Gerheart was the one that usually made the deal, although it was subject to the approval of the general manager, who always represented the corporation in the actual execution of the mortgage. He further admitted that this particular mortgage made by Culver to the defendant was made after joint consultation of himself and Mr. Gerheart concerning the moneys advanced.

[5-8] Finally, appellant claims that there is a defect of parties, in that neither Culver nor Buck were made parties to the action, and that the court erred in its failure to require that they be brought in as defendants. There was no demurrer to the complaint. At the opening of the trial the defendant objected to the taking of any testimony, on the ground that Buck and Culver had not been made parties to the action. This objection was overruled. Later in the trial the defendant was allowed to file an amendment to its answer, alleging as a separate defense "that there was a nonjoinder of necessary parties defendant, in that neither Sherman Buck nor J. W. Culver are parties to this action." This defense, although thus pleaded in the answer, is in the nature of a demurrer, and plaintiff's objection that the question should have been raised by demurrer, "and when not so raised, it is not a proper amendment at this time," should have been sustained, unless the nature and condition of the case, as then before the court, was such that the court in the interests of justice should have caused said parties to be brought in. We think that the situation was such that it was appropriate and just that those parties should be brought in, and therefor that there was no abuse of discretion in

permitting this defense to be presented. The defendant had admitted, by not denying the fact, the plaintiff's allegation that Culver was indebted to it in the stated amount, and that the same remained unpaid. But a judgment based upon proof or admission of such existing indebtedness of Culver was not binding upon Culver. In the present state of the case the result of such judgment would be that the defendant, upon paying the amount of the judgment, might be defeated in any action which he might bring against Culver, since that party would have an unlimited right to defend the action, because that party's right to defend the action would not in any manner be affected or limited by the judgment herein. Under such circumstances Culver came within a class of necessary parties, not because of his interest nor that of the plaintiff, but because his presence as a party in this action is necessary for the full protection of the defendant. Perhaps Buck also is in the same class—assuming that his liability to the lessor had not been released. Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann. Cas. 1916E, 830. If the defendant actually before the court may be subjected to undue inconvenience, or to danger of loss, more extensive than if the parties were before the court, that will in many cases furnish a sufficient ground to enforce the rule of making the absent persons parties. Persons are necessary parties where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties. London, etc., Bank v. Smith, 101 Cal. 415, 422, 35 P. 1027.

[9] In this action, however, the court, after permitting this defense to be made, as above stated, did not order Culver or Culver and Buck to be brought in, and made a finding "that it is untrue that there is a nonjoinder of necessary parties defendant, in that neither Sherman Buck nor J. W. Culver are parties to this action." This, although made as a finding of fact, was merely a ruling upon a question of law, and upon the facts then and there before the court was an erroneous conclusion of law. For it seems clear that by failure to bring in those parties the defendant is subjected to an inconvenience and danger of future litigation with Culver, or with Culver and Buck, all of which would be avoided by establishing as against them in this action the fact and amount of their indebtedness to the plaintiff. This action is in reality an action in the nature of a suit in equity, and the court might well apply the principle that equity does not act piecemeal, but where it reasonably can be done will settle the whole controversy. Code Civ. Proc. § 389.

At the oral argument counsel for respondent filed stipulations signed by Culver and by Buck, consenting to be bound by the judgment as entered in the superior court, and agreeing that the amount therein found due as unpaid rental is the correct and true amount unpaid thereunder, and that said amount has never been paid, but is due, owing, and unpaid to the plaintiff. Counsel for respondent in their brief refer to the case of Mitau v. Roddan, 149 Cal. 1 (particularly at pages 9 and 17), 84 P. 145, 6 L. R. A. (N. S.) 275, wherein a somewhat similar condition arose. In that case the court decided that there was no merit in the appeal except that certain persons should have been made parties to the action, and that by reason of the failure to make them parties they were not bound by the judgments appealed from. The Supreme Court therefore ordered that the judgments appealed from be reversed; that said persons be brought in as parties; that if by proper pleading or stipulation filed they shall elect to be bound by the findings and conclusions as already made, that no further retrial or consideration of the case need be had except as to a certain matter relating to attorney fees. It was directed that upon a proper finding being made as to said matter of attorney fees and said new parties having signified their election to be bound by that and the other findings and conclusions theretofore made, the court should thereupon direct judgment to be entered on the findings and conclusions without further trial of any issue, and that if said new parties should raise issues between the parties as to any matter not previously tried, or new issues, then the court should proceed to a new trial only upon the facts involved under such pleadings. We think that a similar judgment may rightly be granted by this court in the present case.

It is therefore ordered that the judgment be and the same hereby is reversed and the case remanded, with directions to the lower court to proceed with the disposition thereof under the directions contained herein; that is to say, that the superior court order that the said Buck and Culver be brought in as parties to the action, under such appropriate pleading as the defendant shall file against them; that if by proper pleading or stipulation filed they shall admit the truth of the facts so alleged, and shall elect to be bound by the findings already made, that no further retrial or consideration of the issues in the case need be had; that should said Buck and Culver, or either of them, upon their appearance file pleadings which raise issues between the parties as to any matter affecting their liability in the action, and particularly as to any amount unpaid and due from them or their liability over to the defendant Santa Ana Sugar Company, upon payment by it to the plaintiff of the judgment to be entered herein, then the court shall proceed to a new trial only of the issues involved under such pleadings. Upon the determination of those issues and findings thereon, in addition to the findings heretofore made, the lower court shall enter its judgment.

Costs of appeal are allowed to appellant.

We concur: HOUSER, J.; YORK, J.

---

79 Cal. App. 641

MANLEY v. PACIFIC MILL & TIMBER CO.
(Civ. 3189.)*

(District Court of Appeal, Third District, California. Nov. 6, 1926.)

1. Sales 🔑87(3)—Conversation and letters adjusting price of lumber sold outside terms of contract held to raise inference that both parties understood contract in accordance with statement furnished buyer unobjected to.

Conversation and letters between buyer and seller of lumber adjusting price, outside terms of contract, for small part of lumber not up to quality, raised inference that both parties understood contract as shown by statement furnished buyer, which was not objected to by buyer.

2. Account stated 🔑6(2)—Failure to object within reasonable time to statement of account constitutes admission that it is true (Civ. Code, § 1641).

Where creditor sends statement setting forth amount claimed to be due, debtor's failure to object thereto within reasonable time raises an implied acquiescence which will be taken as an admission that account is true, in view of Civ. Code, § 1641.

3. Sales 🔑77(1)—Contract for sale of lumber held to require increase or decrease in basic price of entire quantity purchased for each 5 per cent. in excess or under guaranteed percentage of upper grades.

Contract for sale of lumber requiring rebate to buyer of $4 per thousand if grading is 5 per cent. less than guaranteed 30 per cent. of uppers and advance of same price to seller if grading exceeds guaranteed percentage of uppers and "$8 per thousand feet of any excess of 35 per cent. and, etc., allowing leeway of at least 5 per cent. before any change in price appears," construed as requiring increase of $4 per thousand feet in basic price for every 5 per cent. excess over guaranteed percentage of uppers, and reduction in basic price if percentage of uppers was reduced and not as requiring increase in price only for percentage of uppers in excess of guaranteed percentage, *held* proper.

4. Sales 🔑87(3)—Giving of $5,000 bonds by buyer and seller to each other to guarantee advance or reduction of price held to evidence proper construction of provision for increase or reduction.

Giving of $5,000 bond by buyer and seller of lumber to each other guaranteeing payment of additional price to seller and refund to buyer, to be determined by quality of lumber furnished, *held* to show intention to construe contract on basis of change in basic price, which would make difference of over $4,000 and not merely change, which would make only a small difference in price.

5. Appeal and error 🔑1008(1)—If construction of contract by trial court is tenable, appellate court cannot set aside judgment because another construction is also possible.

If construction of contract given by trial court is tenable and consistent with true intent of parties, it is not within province of appellate court to set aside judgment simply because another interpretation is also possible.

6. Appeal and error 🔑907(1).

Where no testimony was produced showing that price of lumber was exorbitant, it may be assumed on appeal that no such testimony existed.

7. Sales 🔑187—Interest on amount due under sales contract is payable from date of completion of performance and demand for payment, where all items making up amount due existed, and total was readily ascertainable (Civ. Code, § 3287).

Where all items in contract for sale of lumber making total sum due from buyer to seller existed, and whole amount due was readily ascertainable, interest on amount due was payable on date on which performance was completed and payment demanded, in view of Civ. Code, § 3287.

8. Sales 🔑187.

When items making up total sum due under sales contract do not exist, and whole amount is not readily ascertainable, interest is not to be allowed prior to entry of judgment.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by James M. Manley against the Pacific Mill & Timber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sterling Carr, of San Francisco (Maurice T. Dooling, Jr., of San Francisco, of counsel), for appellant.

B. K. Collier, of Yreka, and Eugene P. Jones, of San Francisco, for respondent.

PLUMMER, J. Plaintiff recovered judgment for the sum of $5,252.20, balance alleged to be due on a certain contract for the sale and purchase of lumber, together with interest thereon at the rate of 7 per cent. per annum from the 20th day of June, 1921. From this judgment the defendant appeals.

On the 28th day of April, 1920, the plaintiff, as the party of the first part, and the defendant, as the party of the second part, entered into a written contract for the sale by the plaintiff to the defendant and purchase by the defendant from the plaintiff of certain lumber to be manufactured by the plaintiff according to specifications to be thereafter furnished to the party of the first part by the party of the second part in said con-

---

*Hearing denied by Supreme Court January 3, 1927; Seawell and Richards, JJ., dissenting.

tract. The contract specifies the kind of lumber to be furnished, the length, width, and thickness for the sawing of said lumber, and after providing for the quality of the same, contains the following provision:

> "Said party of the second part agrees to pay for such lumber at the rate of forty-one dollars per thousand, f. o. b. Gregory, Oregon, said lumber to be tallied or graded on to the car. Said party of the first part guarantees that said lumber shall consist of at least thirty per cent. upper grades and the foregoing price is made on that basis. In the event that said lumber should not grade at least thirty per cent. uppers or shall grade at least five per cent. less that amount, then said party of the second part shall be entitled to a rebate from the said party of the first part of four dollars per thousand for such loss; that in the event that such percentage shall exceed thirty-five per cent. of uppers then said party of the second part shall pay to said party of the first part at the rate of four dollars per thousand for the first five per cent. in excess of said thirty per cent.; eight dollars per thousand for all in excess of thirty-five per cent., etc., thus allowing a leeway of at least five per cent. before any change in price."

The contract then provides that the lumber is to be paid for as follows: Immediately upon obtaining bill of lading, a sight draft, together with such bill of lading, shall be forwarded to the party of the second part, and a discount of 2 per cent. allowed for cash payments.

The trial court found that the plaintiff had delivered to the defendant 372,296 feet of lumber, of which 46.12 per cent. consisted of uppers, and construed the contract as fixing the price for all the lumber delivered at $53 per thousand feet. It is here contended on the part of the appellant that such construction of the contract is erroneous, and that its true construction only admits of an increased payment for the percentage of uppers in excess of the guaranteed quantity of 30 per cent. One computation gives the total value of all the lumber delivered at $19,731.68; the other at $15,669.87. To illustrate it a little more clearly, according to the plaintiff's calculation, if the total shipment ran 35 per cent. uppers, an additional compensation to be paid therefor would amount to the sum of $1,489.18, while the defendant's computation would permit an additional increase in the price of only $74.45. Again, according to the plaintiff's calculation, according to the fact found by the court, that the whole shipment of lumber ran slightly in excess of 46 per cent. uppers, the additional price to be added to the tentative basis price mentioned in the contract would be the sum of $4,467.54, while according to the appellant's construction the total purchase price would be advanced only in the sum of $405.73.

No parol testimony was introduced upon the trial relative to the construction of the contract, or of such contracts, by lumber dealers, or of what was meant by the parties entering into the same. However, it may be observed that the whole tenor of the case and theory of the trial, so far as the same can be ascertained from the transcript, would appear to be to the effect that the construction of the contract given by the trial court was within the contemplation of the parties until after judgment was finally entered herein. The complaint sets forth the quantity of lumber delivered, its quality as being in excess of 45 per cent. uppers, and then the amount due thereon according to the construction of the contract given by the trial court. The answer put in issue the quantity and quality of lumber delivered, denies that it exceeded 35 per cent. uppers, and based upon its allegation that the lumber did not exceed 35 per cent. uppers, set forth the value of the lumber delivered. Only inferentially can it be said that any question was raised as to the construction of the contract. When we come to the testimony we find by an examination of the transcript that practically all that was submitted to the trial court involved the quality of the lumber and slight objections as to the quality based upon erroneous foot calculations as to the number of feet contained in certain pieces of lumber. The testimony shows that the lumber shipped by the plaintiff was delivered at certain places designated by the appellant; that some of the lumber was delivered to the Pioneer Box & Lumber Company, at Sisson; that the Pioneer Box & Lumber Company had the cars of lumber delivered to it regraded or tallied; and that such regrading or tallying did not correspond exactly with the grading and tallying of the person who had graded and tallied the lumber under the contract at Gregory, Or. The testimony also shows that there was some weather-stained lumber shipped and a small quantity of lumber which did not come up to the required grade. An examination of the correspondence relating to such lumber shows that such questions were settled by discounts from the agreed price, and the findings of the court show the amount thereof and credit was given to the defendant by the trial court for such amounts; also for certain items of expenditure incurred by the appellant as well as the amount of cash discount computed according to the terms of the contract. The transcript also shows that on March 2, 1921, the plaintiff submitted to the appellant a statement of the amount and quality of lumber delivered under the contract as of that date, including therein a statement of the basic price allowed under the contract based upon the quality of the lumber running above 45 per cent. uppers. Some weeks after the receipt of this statement the appellant wired to the plaintiff to ship the remainder of the lumber agreed to be delivered under the contract. This shipment was made on or about the 4th day of June, 1921.

This statement likewise included a calculation of the amount claimed to be due on account of the lumber running over 45 per cent. uppers. The amount of increased price set forth in this statement was the sum of $4,467.55. No objection appears to have been made to this statement so far as any questions presented upon this appeal are concerned. The only testimony in the transcript relating thereto is that given by Mr. Davenport, president of the appellant, as follows:

> "Q. Have you any testimony to give in reference to that first shipment? * * * A. I objected to that statement.
>
> "Q. You have not fixed the time? A. Between March and this last shipment. * * * A. The principal part of the talk that I had was about this stained lumber, talking about this stained lumber, and Mr. Manley told me he would stop off on his way home and take that matter up.
>
> "Q. In reference to the first statement, did you have any talk in reference to this first statement between March and June, 1921? A. Yes. * * * At the time I saw Mr. Manley I don't believe that I had received his last statement. It was only the first statement that I had received."

[1, 2] The conversation referred to and the letters set out in the transcript relative, as we have said, to some of the lumber that was stained and to a small quantity of lumber which was not of the quality and grade called for by the contract, the price of which was adjusted outside of the terms of the contract, and need be considered only so far as it shows that the interpretation to be put upon the various clauses of the contract appear not to have been questioned until after the trial of this cause had been concluded. This of itself is very persuasive in favor of the construction given the contract by the trial court, and raises the inference that both parties had a common understanding of the meaning of the contract entered into by them, and that it meant just what the plaintiff, in his statement, claimed it meant. It is very similar in its nature to an implied assent given to an account where one person sends to another a statement setting forth the amount claimed to be due and the opposite party does not within a reasonable time make any objection thereto. His acquiescence will be taken as an admission that the account is truly stated. 1 Cal. Jur. 197, § 54. Section 1641, Civil Code, requires a contract to be construed so as to give effect to every part thereof, if possible. The same rule is set forth in 6 California Jurisprudence, p. 259 et seq.

[3-5] With this in view, let us examine the contract, particularly the paragraph which we have quoted in full. The contract provides for the kind of lumber to be shipped, that the grading shall be done by a person mutually agreeable to the parties to the contract, that the grading shall be done at Gregory, Or., that the lumber shall be placed upon the cars f. o. b., that the second party agrees to pay for the lumber at the rate of $41 per thousand, the party of the first part guaranteeing that the lumber shall grade at least 30 per cent. uppers and the price of $41 per thousand is made on that basis. It is then agreed that in the event said lumber should not grade at least 30 per cent. uppers, or shall grade at least 5 per cent. less, then said party of the second part shall be entitled to a rebate from the party of the first part, in the sum of $4 per thousand for such loss. The phrase $4 per thousand for such loss, we think, should be held to mean $4 per thousand feet for such loss, that is, if the lumber graded 25 per cent. uppers, then and in that case, the basic price would be reduced from $41 to $37 per thousand feet. If the appellant's contention were correct, then and in that case, the appellant would only be entitled to a rebate in the sum of $74.45; whereas, under the construction given by the court, the amount of the rebate in price would be something over $1,400. The contract then sets forth that in the event such percentage shall exceed 35 per cent. uppers, the party of the first part is entitled to an advance in the price of $4 per thousand. Here again the word "feet" is omitted, but we think means $4 per thousand feet. Then following this agreement are the words "$8.00 per thousand feet of any excess of 35 per cent., etc., allowing a leeway of at least 5 per cent. before any change in price appears." The court construed this language to mean that for each 5 per cent. excess in the quantity of uppers delivered there shall be an increase in the basic price of $4 per thousand feet. The last clause in the contract seems to indicate that such was the intention of the parties. The abbreviation "etc." in the clause of the contract would indicate also that the parties had fixed a 5 per cent. change in the quality of the lumber as a standard by which there should be a change in the basic price in the lumber purchased by the defendant from the plaintiff. In support of this construction given to the contract by the trial court and that such was the true interpretation and meaning intended to be given thereto by the parties executing the same, it appears that the plaintiff and the defendant gave to each other a bond in the sum of $5,000 to cover any variation in price. The lumber was to be billed by the plaintiff to the defendant at the basic price of $41 per thousand feet upon a guaranteed quality. If the quality ran below that guaranteed, the plaintiff's bond guaranteed a refund to the defendant to the extent of at least $5,000. On the other hand, if the quality ran above the guaranteed 30 per cent. payment being made only at the rate of $41 per thousand feet. The defendant's bond to the plaintiff insured that the plaintiff would receive additional payment up to the sum of $5,000. As we have shown, the excess in the quality of the lumber above that agreed to be delivered advanced the price above the basic price of $41 per thousand feet to $53 per thousand feet, thus making due to the plaintiff the additional sum of $4,467.54, to insure which the bond given by the defendant in favor of the plaintiff guaranteed the payment thereof. If the appellant's contention that only $405.73 is the change in the basic price of the lumber provided for in the contract, it is hardly conceivable that a bond would have been executed in the sum of $5,000 to guarantee such insignificant payment. The actions of the parties to which we have referred herein leads us to the conclusion that the trial court gave a correct interpretation of the disputed paragraph. On the other hand, if the contract is ambiguous, so that there might be two possible constructions, then we agree with the respondent that the law as set forth in 6 California Jurisprudence, 327, and also in the case of Slama Tire Proctor Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25, applies. Hence, if the construction given by the trial court is one which is tenable, and one which appears to us consistent with the true intent and meaning of the parties, it would not lie within the province of an appellate court to set aside the judgment of the trial court and substitute its own interpretation, simply because another interpretation thereof is also possible.

[6] We may here state that there is not a single word of testimony in the transcript showing or tending to show that the market value of the lumber agreed to be purchased from the plaintiff by the defendant was not the sum found by the trial court as the price agreed to be paid therefor in the contract involved herein. Had the wholesale price of the lumber of the quality found to have been delivered by the plaintiff to the defendant differed materially from that stipulated in the contract, interpreted as we have herein stated, then and in that case it would have been proper for the trial court to consider the same in determining the true construction to be given to the language employed by the contracting parties. There being no such testimony introduced, it is fair to conclude that no such testimony existed, and if the price for the lumber was exorbitant, as now claimed by the appellant, it could easily have been shown and presented to the court as extrinsic evidence bearing upon the meaning of the language used by the plaintiff and the defendant. As we have heretofore stated, however, the only extrinsic evidence in the contract that tends to show the understanding of its terms and the construction given thereto by the contracting parties is the fact that statements were rendered by the plaintiff to the defendant exhibiting a construction of the contract as given by the trial court and that no objections or exceptions were taken thereto, that the only difference which arose between the contracting parties related to the quality of an inconsiderable shipment, of which adjustment in price other than that stipulated in the contract was readily acceded to by the plaintiff. This difference related to a small quantity of red fir which was rained upon after being loaded, and came under the classification of green or wet lumber.

[7, 8] Objection is further urged that the trial court allowed interest upon the amount found due from the date on which performance was completed and demand for payment. Section 3287, Civil Code, provides that every person is entitled to interest where the demand is certain or capable of being made certain by calculation. In the case at bar it was agreed that the quality and quantity of the lumber should be determined by a grader selected by both parties and paid for by them. This appears to have been done. The reports of this grader showing the quantity and character of the lumber were made coincident with the shipments. The amounts and character of the lumber were thus fixed and known to the defendant. As found by the trial court, the plaintiff, during the course of the shipments of the lumber, readily consented to the deductions claimed by the appellant on account of failure of certain small quantities of the lumber to come up to the grade called for in the contract. It thus appears that all the items entering into and making up the total sum due from the defendant to the plaintiff existed and the whole amount due was readily ascertainable. The cases cited by both appellant and respondent show that when these conditions exist, interest should be allowed, and when they do not exist, interest cannot be allowed prior to the entry of judgment. McFadden v. Crawford, 39 Cal. 662; Mix v. Miller, 57 Cal. 356; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164. Easterbrook v. Farquharson, 110 Cal. 311, 317, to which we may add the recent case of Cal. Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, decided August 2, 1926.

Our conclusion is that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

79 Cal. App. 659

Ex parte FINK. (Cr. 1430.)

(District Court of Appeal, Second District, Division 2, California. Nov. 8, 1926.)

1. Criminal law 🔑982.

Where defendant was convicted of felony and placed on probation, order requiring defendant to be placed and kept in psychopathic ward of county farm *held* illegal.

2. Criminal law 🔑982.

Pen. Code, § 1203, *held* to mean that defendant, while on probation and conforming to terms thereof, shall be at large and not in confinement.

3. Habeas corpus 🔑1.

Habeas corpus is a proper remedy when one is unlawfully restrained of his liberty.

Application by Louis E. Fink for a writ of habeas corpus to be directed to the Probation Officer of Los Angeles County to secure the release of petitioner from the psychopathic ward of the county farm. Writ granted.

Light & Lane, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIG, J. The defendant was convicted of a felony. The trial court granted probation and directed that the defendant be placed in the charge and under the supervision of the county probation officer, and requiring that he, the defendant, be placed and kept in the psychopathic ward of the county farm.

[1,2] Under the law as stated in People v. Mendosa, 178 Cal. 509, 173 P. 998, we think the contention of the petitioner that the last requirement of the court's order was illegal is correct. Having announced its entire satisfaction with the statement of the law contained in the opinion written by the District Court of Appeal in that case, it must be assumed that the Supreme Court fully considered all of the language of that opinion, including the declaration that section 1203 of the Penal Code "clearly contemplates that the defendant, while on probation and conforming to the terms thereof, shall be at large and not in confinement." In adopting this statement of the law contained in the opinion of the District Court of Appeal, the Supreme Court has left no room for doubt upon the matter, and there appears no reason for further judicial contribution upon the subject, although it is suggested by counsel for the respondent that the duty and authority of the judges of the superior court in such cases should be made plain. It is well where the views of the Supreme Court are thus clearly expressed to accept them without analysis or discussion, lest we create confusion where clarity exists.

[3] Habeas corpus is a proper remedy where one is unlawfully restrained of his liberty. The defendant should be discharged from confinement at the county farm, and remain in the charge and under the supervision of the probation officer, subject to the lawful orders of the superior court.

It is so ordered.

We concur: WORKS, P. J., THOMPSON, J.

---

199 Cal. 773

Ex parte LORD. (Cr. 2922.)

(Supreme Court of California. Dec. 11, 1926.)

1. Poisons 🔑9—Complaint against Physician for unlawfully prescribing narcotic drug need not negative good faith (St. 1907, p. 124, § 8, amended by St. 1913, p. 696, and section 8½, added by St. 1919, p. 1279).

Under St. 1907, p. 124, § 8½, added by St. 1919, p. 1279, prescribing and delivering more than four grains of morphine as daily treatment to habitual user of narcotic drugs is offense despite good faith of physician and provision of section 8, amended by St. 1913, p. 696, that physician may prescribe in good faith for habitual users, and hence complaint need not negative good faith.

2. Poisons 🔑9—Complaint against physician for unlawfully prescribing narcotic drug need not allege patient was incurable (St. 1907, p. 124).

Complaint for violation of St. 1907, p. 124, charging that physician prescribed and delivered more than four grains of morphine as daily treatment to patient who was habitual user of narcotic drugs, need not negative defense that patient was suffering from incurable ailment or injury, since exceptions not descriptive of or defining offense, need not be pleaded nor proven by prosecution.

In Bank.

Application by F. K. Lord for a writ of habeas corpus, to be directed to the sheriff of Stanislaus County to secure release of petitioner from custody after conviction of violating the Poison Law (St. 1907, p. 124). Writ discharged, and petitioner remanded to custody.

Frederick M. Shipper and Clifford D. Good, both of San Francisco, for petitioner.

W. B. Brown, Dist. Atty., of Los Angeles, and H. L. Chamberlain, Deputy Dist. Atty., of Modesto, for respondent.

Geo. C. W. Egan, of San Francisco, for California State Board of Pharmacy.

CURTIS, J. The petitioner was found guilty by a verdict of a jury in the justice court of Modesto township, in the county of Stanislaus, upon a complaint charging that he was on or about the 30th day of December, 1925, a "licensed and practicing physician and authorized to prescribe certain narcotic drugs, including morphine, and did then and there willfully, wrongfully, and unlawfully prescribe and deliver to Mrs. Nellie Nash under said prescription more than four grains of morphine, to wit, approximately five grains of morphine, for one daily treatment of said Mrs. Nellie Nash, said Mrs. Nellie Nash being then and there a habitual user of narcotic drugs, to wit, of morphine."

The judgment upon said verdict was affirmed on appeal to the superior court of said county. Having been delivered into the custody of the sheriff of said county under said judgment, petitioner now seeks to be dismissed from said imprisonment by means of habeas corpus proceedings instituted herein.

The sole contention of petitioner is that the complaint filed against him in said justice court does not state facts sufficient to constitute a public offense. The statute under which the action against petitioner was instituted is that certain act entitled, "An act to regulate the sale and use of poisons in the state of California and providing a penalty for the violation thereof," approved March 6, 1907 (Stats. 1907, p. 124), as amended at various times thereafter.

Section 8 of said act, amended by St. 1913, p. 696, provides that it shall be unlawful for any practitioner of medicine to furnish to or prescribe for the use of any habitual user of the same or of any one representing himself as such any morphine or other narcotic substance mentioned in said section or any salt derivative or compound of the foregoing substances, and it shall also be unlawful for any practitioner of medicine to prescribe or give any of the foregoing substances for himself or any person not under his treatment in the regular practice of his profession; "provided, however, that the provisions of this section shall not be construed to prevent any duly licensed physician from furnishing or prescribing in good faith as their physician by them employed as such, for any habitual user of any narcotic drugs who is under his professional care, such substances as he may deem necessary for their treatment, when such prescriptions are not given or substances furnished for the purpose of evading the purposes of this act."

By section 8½ of said act, added by St. 1919, p. 1279, it is provided that:

> "Any licensed physician treating any habitue under section eight of this act shall not prescribe for or furnish such habitue more than * * * four grains of morphine, * * * for each daily treatment * * * provided, however, that any licensed physician may prescribe for or furnish his patient as their physician employed by them as such, and who is suffering with some incurable disease, ailment, or injury, any of the narcotic drugs mentioned in section eight, in such quantity as may be necessary for a reasonable length of time."

[1] It is now contended by petitioner that the complaint is fatally defective in failing to allege that Dr. Lord did not furnish or prescribe said morphine in good faith, and that said Nellie Nash, his patient, was not suffering from an incurable disease, ailment, or injury.

As to the claim that said complaint should negative the good faith of the physician in prescribing said morphine for the use of an habitual user thereof under his care, we think it is without merit. The prohibition against furnishing or prescribing narcotic drugs to habitual users thereof is found in section 8 of said act, and the effect of this section is to permit a licensed physician to furnish or prescribe in good faith narcotic drugs to any habitual user thereof under his professional care, provided that such prescriptions are not given or substances furnished for the purpose of evading the provisions of said act. Nothing is said in said section 8 as to the amount of narcotic drugs that may in good faith be furnished or prescribed by a physician to habitual users of narcotic drugs under his care. The limitation as to the amount of narcotic drugs that may be so furnished or prescribed is found in section 8½ of said act. By this section a physician is prohibited from prescribing or furnishing more than four grains of morphine as a daily treatment. The good faith and intent with which the morphine is furnished or prescribed has no relation to the amount of the drug so furnished or prescribed to the person for whom it is prescribed by the physician. If the morphine is prescribed in good faith to a habitual user of narcotic drugs under the professional care of the physician and, without any intent to evade the purposes of said act, then said physician has not offended against the provisions of section 8 thereof. But, if in so prescribing or furnishing the same, even though he comply with all the terms of said section 8, he exceed the amount called for by section 8½ as a daily treatment, he has violated the prohibition contained in the last named section and subjected himself to the penalty prescribed by the statute. Therefore, in charging the petitioner with a violation of section 8½ of said act, as the complaint herein attempts to do, it was not necessary to allege therein that the petitioner had also offended against the provisions of section 8 thereof, nor to show in any manner whatever his failure to meet the requirements of said last named section. The complaint accordingly is not subject to the criticism of petitioner that it is defective or fails to state a public offense in not alleging that petitioner had not acted in good faith or that he had acted with the intent to violate the purposes of said act.

[2] The further contention of petitioner that there is a radical defect in said plead-

ing by reason of the absence therefrom of an allegation that the said Nellie Nash was not afflicted with an incurable disease, ailment, or injury is equally unfounded. The provision of said section 8½ permitting more than four grains of morphine to be prescribed or furnished to a patient suffering from an incurable disease, ailment, or injury is an exception to the general rule laid down by section 8½ of said act making it an offense to prescribe or furnish more than four grains of morphine as a daily treatment, and is contained in a proviso to the definition of said offense as contained in said section 8½. The authorities in this state are without conflict "that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely they are to be relied on in defense." Ex parte Hornef, 154 Cal. 355, 360, 97 P. 891, 893; Ex parte Greenall, 153 Cal. 767, 96 P. 804; Matter of Application of Lieritz, 166 Cal. 298, 135 P. 1129; People v. H. Jevne Co., 179 Cal. 621, 178 P. 517.

Petitioner appears to concede that this is the unquestioned law in this state, but contends that it has no application to the present case for the reason, so petitioner asserts, that the complaint failed to allege that he had committed any act prohibited by the terms of the statute and therefore stated no public offense against him. The offense denounced by section 8½ was that of furnishing by a physician to his patient of more than four grains of morphine as a daily treatment, and the complaint in apt language charges this offense, and, according to the authorities above stated, this was all that was required. If there were any exceptions to this rule within which petitioner might come and thus excuse himself from the charge so alleged, the authorities already cited declare that he may show such excuse as a matter of defense. The complaint accordingly was sufficient and not subject to the attack that it did not state a public offense.

We might show by way of illustration a case where the complaint failed to show that the defendant charged therein had committed any act which he had not a legal right to perform, and yet was held to be a valid pleading, by reference to one of the above cited cases. The petitioner in the Matter of Application of Lieritz, supra, 166 Cal. 298, 135 P. 1129, was charged with a violation of the so-called Wylie Act (St. 1911, p. 599), by the provisions of which it was made unlawful to sell intoxicating liquor in "no license territory." The act contained an exception to the effect that its provisions did not apply to certain classes, including pharmacists. The information charged the petitioner simply with selling intoxicating liquor in prohibited territory without alleging that he did not furnish such liquor as a pharmacist. If the petitioner therein had been a pharmacist and had furnished said liquor as such, he would not have been guilty of any offense under said statute. The information therefore did not charge him with doing any act which as a pharmacist he was prohibited by the statute from doing. This court, however, held that the pleadings stated a public offense for the reason that it charged him with the offense defined in the statute, and that it was not necessary for the complaint to show that he did not come within any of the exceptions contained in the statute. So, in the present proceedings, the complaint filed against petitioner in the justice court does not charge him with administering more than the amount of morphine which under the statute he was permitted to administer to a person with an incurable disease. Yet it does charge him with a violation of the offense defined in section 8½ of said statute—that is, furnishing more than four grains of morphine for one daily treatment—and if he had committed the acts thus charged the only condition under which he could be innocent of the offense so charged was by showing that he had administered said morphine to a person afflicted with an incurable disease. As we have already seen, it was the right of petitioner to show as a defense that such exception applied to him, but it was not the duty of the prosecution to either plead or prove that he was not within the permissive scope of such exception.

The writ is discharged and the petitioner remanded to custody.

We concur: WASTE, C. J.; SEAWELL, J.; SULLIVAN, J.; SHENK, J.; FINLAYSON, J.; RICHARDS, J.

199 Cal. 694

DIAMOND DRILL CONTRACTING CO. et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 11909.)

(Supreme Court of California. Nov. 15, 1926.)

1. Master and servant ⇨361—General and special employers may both be liable under Workmen's Compensation Law for injury to employee under control of both.

Employee may at same time be under general and special employer, and when both general and special employers assert some control over him at time of injury, both may be liable under Workmen's Compensation Law (St. 1913, p. 279, as amended).

2. Master and servant ⇨361—Employee of independent contractor injured while under control of other party to contract is entitled to compensation from both general and special employers.

Where employee of independent contractor under control of other party to contract is injured in course of and in consequence of such control, relation of general and special employer exists, and employee is entitled to compensation from both general and special employers.

3. Master and servant ⇨361—Facts held to show member of drilling crew furnished by drilling company was special employee of oil company.

Member of drilling crew furnished by drilling company to oil company to convert test hole into water well under direction of oil company's engineer *held* under special employment of oil company, and claimant was entitled to compensation award against both for employee's death while so employed.

In Bank.

Proceeding under the Workmen's Compensation Law by Elizabeth Winnifred Stanton on behalf of herself and her three minor children, claimant, opposed by the Diamond Drill Contracting Company, employer, the State Compensation Insurance Fund, insurance carrier, and others. The Industrial Commission of the state of California awarded compensation, and the employer named and the State Compensation Insurance Fund bring certiorari. Award annulled, and case remanded.

Frank J. Creede, Thomas W. Slaven, and B. E. Pemberton, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

R. C. Gortner, of Los Angeles, for respondents General Petroleum Co. and Hartford Accident & Indemnity Co.

WASTE, C. J. A claim was filed with the respondent Industrial Accident Commission by Elizabeth Winnifred Stanton on behalf of herself and her three minor children, seeking compensation for the death of her husband, James H. Stanton, which resulted from injuries received in the course of his employment. She joined as parties defendant the Diamond Drill Contracting Company and its insurance carrier, the State Compensation Insurance Fund, and the General Petroleum Corporation and its insurance carrier, the Hartford Accident & Indemnity Company. The commission found that Stanton was injured while employed as an oiler by the Diamond Drill Contracting Company, and that the General Petroleum Corporation was not the employer at the time. It made an award in favor of the applicants and against the State Compensation Insurance Fund, as insurance carrier, in the sum of $4,900, and relieved the Diamond Drill Contracting Company from liability. The defendants General Petroleum Corporation and Hartford Accident & Indemnity Company were dismissed from the action. A petition for a rehearing before the commission was denied, and the Diamond Drill Company and State Insurance Fund sought, and were granted, a writ of certiorari to this court to review the award, on the ground that the evidence is not sufficient to support the finding of the commission that the Drill Company was Stanton's employer at the time of his injury, and that there is no evidence supporting the finding that the Petroleum Corporation was not his employer.

General Petroleum Corporation and Diamond Drill Contracting Company entered into a contract for the drilling of three test holes, at a stipulated price per foot, the Petroleum Corporation to have the option of terminating the agreement at any time during the drilling of the first well on payment of an agreed price per foot for the depth drilled. The Drill Company installed its equipment and began the work of drilling. Prior to the completion of the first hole, drilling operations were terminated by mutual consent. The Petroleum Corporation then decided to convert the test hole into a water well, and it was arranged that Butler, the foreman of the Drill Company, and a portion of his crew, including Stanton, should remain to assist in this work. The Petroleum Corporation's engineer, Powers, and Richart, its expert perforator, assumed charge of the work of perforating the casing of the hole in the process of converting it into a water well. The perforating equipment was furnished by the Petroleum Corporation. There is, in effect, no conflict in the evidence as to who actually instructed and had direction of the work. Butler, the Drill Company's foreman, received his orders in connection with this particular perforating job from the Petroleum Corporation's experts. He, in turn, passed the instructions on to his men. If he happened to be away, the men received instructions direct from Powers or Richart. The men's wages were advanced by the Drill Company, which was reimbursed by the Petroleum Corporation for the actual amount paid. At the time of Stanton's injury the crew was engaged in making a test to determine whether the perforating job was satisfactory. Stanton was dumping the baler when he was struck by a falling block and received the injuries which caused his death. The work the crew was engaged in at the time was entirely apart from the drilling contract, which had been abrogated and set aside. Consequently the relation of the parties to that transaction has no bearing on the question involved in this proceeding.

[1, 2] It cannot be disputed that the decedent, Stanton, was an employee of the Drill Company. But an employee may at the same time be under a general and a special employer. When, at the time of the injury, both the general and the special employers exert some measure of control over the employee, through their respective foremen or employees, both may be held liable under the Workmen's Compensation Law (St. 1913, p. 279, as amended). Employers' L. A. Corp. v. Ind. Acc. Comm., 179 Cal. 432, 439, 177 P. 273. Where, either by the terms of the contract or during the course of its performance, the employee of the alleged independent contractor comes under the control and direction of the other party to such contract and suffers injury in the course of and in consequence of such direction and control, the relation of both general and special employer may be held to exist, and the injured employee is entitled to compensation from both the general and the special employer. Famous Players, etc., Corp'n v. Ind. Acc. Com., 194 Cal. 134, 136, 228 P. 5, 34 A. L. R. 765.

[3] The evidence taken before the commission established without question that, though Stanton was under general employment by the Diamond Drill Contracting Company at the time he received the injury, he was, at the same time, as clearly under special employment by the General Petroleum Corporation. There is no escape from that conclusion. Butler, foreman for the Drill Company, got together the men who were to do the perforating job, and with them reported to Powers, of the Petroleum Corporation, under instruction from the manager of the Drill Company "to do whatever Powers wanted done." As such foreman Butler had general charge and supervision of the men, but he was not familiar with the use of the tools employed in the work of perforating the casing, and Powers and Richart, the specially employed experts of the Petroleum Corporation, assumed direct control of the details of the work. They gave orders to the men, personally, as well as through Butler, as to how it should be done. While Butler was away Richart directed a rearrangement of a portion of the rigging used in the work in order that a "more direct blow" might be given the perforating tools. Under Butler's orders the change was made, and there is evidence in the record that such rearrangement "had a great deal to do with the accident" which subsequently happened.

On the facts, which admit of no dispute, the commission was in error in finding that the General Petroleum Corporation was not an employer of Stanton at the time he received the injury subsequently resulting in his death. The claimant below was entitled to an award of compensation against both the Diamond Drill Company and the General Petroleum Corporation, as general and special employers of the decedent. The dismissal of the General Petroleum Corporation and the Hartford Accident & Indemnity Company, its insurance carrier, from the proceeding was therefore unwarranted.

The award is annulled, and the case is remanded for further proceedings before the commission in keeping with the views herein expressed.

We concur: FINLAYSON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

199 Cal. 596

PATTIANI v. STATE INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 12110.)

(Supreme Court of California. Nov. 9, 1926. Rehearing Denied with Modification Dec. 6, 1926.)

1. Master and servant 🔑373—Injury in contracting typhoid fever while on trip, arising out of employment, during epidemic, held not compensable.

Employee's injury in contracting typhoid fever while in New York, on trip arising out of employment, at time of epidemic of such disease, *held* not compensable, where he was not shown to have been subjected to any special exposure in excess of that of commonalty.

2. Master and servant 🔑405(4)—Evidence held to warrant finding that typhoid fever contracted by employee was not caused by special exposure.

Evidence showing that epidemic of typhoid fever was not caused or aggravated by contaminated oysters *held* to warrant finding that typhoid contracted by employee was not caused by special exposure arising out of employment, where he showed no contact with epidemic, except through oysters.

3. Master and servant 🔑373—Epidemic of typhoid fever at place employee was sent held not to constitute exposure peculiar to employment.

That there was epidemic of typhoid fever at place employee was sent in course of employment *held* to constitute exposure of commonalty in general, and not one peculiar to his employment.

Finch, Justice pro tem., dissenting.

In Bank.

Application for certiorari by William L. Pattiani against the Industrial Accident Commission of the State of California and others, to review an order of the Industrial Accident Commission denying disability benefits. Order affirmed.

McCutchen, Olney, Mannon & Greene and Edwin S. Pillsbury, all of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, Attorney for Industrial Accident Commission, etc.; Frank J. Creede, of San Francisco, Attorney for State Compensation Insurance Fund; G. C. Faulkner, of San Francisco, for respondents.

RICHARDS, J. The petitioner herein applied for and was granted a writ of review, whereby he sought to have annulled an order of the Industrial Accident Commission denying him compensation. The petitioner was employed during the latter portion of the year 1924 by Langley & Michaels Company of the city of San Francisco, a corporation engaged in the maintaining and operation of drug stores. In the early part of November of that year the petitioner was sent by his employers upon a business trip, in the course of which he was to visit a number of eastern cities for the purpose of investigating the subject of new equipment to be installed in his employer's place of business in San Francisco, and to negotiate for the purchase of such equipment. In pursuance of his said instructions petitioner left San Francisco on November 2, 1924, on his way east, calling at Portland, Seattle, Minneapolis, Chicago, Cleveland, Albany, and New York, and thence returning home through New Jersey to Philadelphia, Indianapolis, St. Louis, Kansas City, Los Angeles, and finally to the place of his regular employment, San Francisco. He arrived home on the 2d of December, 1924. While in the city of New York he spent five days, during which he lived at a well-known hotel, and visited a number of business establishments within the scope of his instructions. He testified that while in said city and on or about the 17th of November, and also about three days later, he ate raw oysters at his hotel, and possibly at another place. After leaving New York and while upon his homeward trip he found himself ill, which illness continued until he arrived in San Francisco and thereafter for some time. He sought medical aid and it was finally determined that his ailment was that of typhoid fever. He applied to the Industrial Accident Commission for an award and a hearing was had upon his said application, whereupon the commission made the following finding:

"That the employment of the applicant was normally and generally in the city and county of San Francisco; * * * that upon the occasion of the alleged injury herein the applicant was temporarily in the city of New York, by reason of a trip or visit to said locality arising out of his employment; that while upon such trip or visit at New York the applicant contracted and became ill with typhoid fever; that at the time of said visit or trip by the applicant in New York City there was prevalent in said locality an epidemic of typhoid fever; that the evidence does not establish as a fact that said epidemic was caused or aggravated by contaminated oysters; that the fact that applicant was required by his employment to visit or sojourn in a locality where there was an epidemic of disease does not constitute a special exposure arising out of the employment, but was in fact an exposure or risk of the commonalty in general, and not peculiar to or characteristic of said employment."

The commission, basing its conclusion upon its foregoing finding as to the facts, denied an award, and also denied the petitioner's application for a rehearing, whereupon he applied to this court for a writ of review.

The only assignable connection with typhoid infection which the applicant undertook to show at the hearing before the commission was that of his having eaten contaminated oysters while in the city of New York. The commission found against that contention and by so doing must be held to have negatived the conclusion that the applicant contracted said disease because of the existence of such epidemic in said city, or by any contact with such prevailing disorder.

[1] The sole question presented in this proceeding is as to whether or not the injury of said employee is compensable in view of the findings of the commission with respect to the nature and circumstances and origin of his said injury, which finding is supported by the evidence presented to the commission. In the Matter of Dryden v. Lachman Bros., 8 Cal. I. A. C. 14, wherein a hearing upon application for a writ of review was denied by this court, the facts were these: The applicant for compensation, in the course of his employment and in the city in which he was employed, visited a home to take measurements for window shades. There had been scarlatina in this home prior to such visit, but the house had been fumigated. Subsequent to such visit a girl living in the home became ill of scarlatina, as did also the said applicant several days later. Compensation was denied, the commission saying:

> "It is not unreasonable to suppose that * * * applicant did contract scarlatina while at work measuring for or putting up the shades above mentioned, although he might have contracted the disease elsewhere. It is in evidence that there are at all times scarlatina in San Francisco and that the commonalty is likely to be subjected to contagion from that source. * * * It is certain that compensation could not be allowed for an injury sustained in the form of a contagious or infectious disease where the risk of such contagion or infection was a risk of the commonalty. There must be as a justification for an award for compensation for such an injury a very special exposure beyond that to which the commonalty is subjected. Of course, the commonalty did not have access to No. 314 Locust street, San Francisco, but the risk of infection from that source was a risk participated in by every person who for any reason did enter that home during the interim between the two periods of quarantine, and therefore and for that reason the risk was not a very special one appertaining to the industry in which applicant was engaged."

In denying the application for a writ of review in the above matter, this court apparently approved the conclusion of the commission that, in order to the recovery of compensation for an injury arising out of the contraction of an infectious or contagious disorder while engaged in the performance of the duties of the employee in the place of his regular employment, "there must be as a justification for an award for compensation for such an injury a very special exposure beyond that to which the commonalty is subjected." In the matter of Shepherd v. A. Schilling & Co., 11 Cal. I. A. C. 57, the husband of the applicant for an award was employed as a sales manager of his employer, the principal place of business of which was the city of Oakland. In the course of his employment, and on November 4, 1922, he left Oakland, traveling through the northwest, and thence to Denver and other towns in its region, and thence to Albuquerque, at which latter place smallpox developed, and from its effects he died on December 13, 1922. The evidence before the commission showed that a smallpox epidemic was prevalent in Denver from September 1, 1922, into December, 1922, and that the deceased, who was in Denver part of that period, interviewed between 50 and 100 people. It is a fair intendment from the findings of the commission that the deceased probably contracted said disease while in Denver; but there was neither allegation nor proof before the commission that he was exposed there to any extent beyond that of the general public, nor was there any evidence to the effect that any of the people interviewed were afflicted with said disease. The commission held that—

> "The evidence was insufficient to establish that the employment caused an exposure in excess of that of the commonalty, and that in the absence of such a showing of special exposure the illness and death could not be said to have been proximately caused by injury arising out of the employment."

The effect of the denial by this court of a writ of review in each of the foregoing proceedings is that of holding that in order to a recovery of an award by an employee who, in the course of the performance of his duties as such, whether in the immediate place of his employment or in whatever place he may be in pursuance of his employer's directions, contracts a contagious or infectious disorder, he must, in order to such recovery, establish the fact that he was subjected to some special exposure in excess of that of the commonalty, and that in the absence of such showing of special exposure the illness or death of the employee cannot be said to have been proximately caused by injury arising out of his employment. In the case of San Francisco v. Industrial Accident Comm., 183 Cal. 273, 191 P. 26, the subject of occupational diseases or disorders, and also of those diseases and disorders which are not occupational, but are the result of exposure to contagious or infectious diseases, is given exhaustive consideration by this court, and it is there held that both classes of such injuries come within the provisions of the Workmen's Compensation Act (St. 1917, p. 831). The injury which the husband of the applicant for an award in that case sustained was that of his contraction of influenza in the course of his employment, and from which he died. The contention of the respondent in that case was that the disease contracted was one in respect to which an epidemic was prevalent in the place of the deceased's employment at the time, and that his risk of contagion was no greater than that of the commonalty, and hence that his injury was not compensable. It was pointed out, however, in that case that the employee at the time he contracted such disorder was engaged in the occupation of a nurse, and that in the course of his duties as such nurse he had been required to handle and had been exposed to at least 12 developed cases of influenza, and that his exposure, because of his work, was far greater than that of the average person; the preponderance of the medical testimony being that the employee contracted the disease as a result of his peculiar exposure to it incidental to his employment.

This court, in affirming the award in that proceeding, based its conclusion, not upon the proven fact that an epidemic of influenza was prevalent in the place of his employment, but upon the fact of his peculiar exposure thereto. In so doing the court reviewed with approval the case of United Paper Board Co. v. Lewis, 65 Ind. App. 356, 360, 117 N. E. 276, 277, wherein the subject of industrial or occupational diseases, and also of those which are the result of contagious or infectious disorders, was given exhaustive consideration, with much citation of authority, and wherein that court held that as to the latter class of disorders the injury arising therefrom was compensable when "contracted as a direct result of unusual circumstances connected therewith." In the case of Larson v. Industrial Accident Comm., 193 Cal. 406, 224 P. 744, while the injury for which recovery was sought in that case did not arise out of a contagious or infectious disease, but did arise out of the fact that the employee was exposed to an injury in the place where he was required by his employer to be, this court said:

> "There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence."

In the Matter of Miller v. Simon-Newman Co. et al., wherein this court denied a writ of review (no opinion) and by so doing affirmed the decision of the Industrial Accident Commission rendered December 21, 1925, the facts were that the injury to the applicant for an award in that case arose out of his special exposure to the bites of mosquitoes while sleeping in a bunkhouse infested with mosquitoes and by having been bitten by them; his infection with the disorder from which he suffered being directly traceable to the mosquito bites; and the decision of the commission granting him an award being based upon his special exposure in that regard. It will thus be seen that this court has not thus far in its recent decisions seen fit to broaden the rule adopted by it in its approval of the action of the commission in the cases of Dryden v. Lachman Bros. and Shepherd v. A. Schilling & Co., supra. It has not been made to appear to this court that its action and attitude in so doing is at variance with the rule which has been declared in other jurisdictions, wherein the statutes relating to workmen's compensation are similar to our own. Among these may be cited Brodin's Case, 124 Me. 162, 126 A. 829, wherein an employee, while working for a highway commission, and required to be in a construction camp, drank water supplied by the employer, and which was shown to be infected with typhoid germs, and as a direct result thereof contracted typhoid fever. It was held that the employee, upon proof of such special exposure, was entitled to compensation on the authority of Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293, and Wasmuth, etc., Co. v. Karst, 77 Ind. App. 279, 133 N. E. 609, in each of which cases the recovery allowed and proved was predicated upon the direct connection between the infection and the injury which the evidence before the commission disclosed.

[2, 3] In the instant case, however, no such direct connection between the employee and his infection with the disease of typhoid was shown; on the contrary, his attempted proof of such connection was negatived by the commission in its finding that the evidence did not establish the fact that the epidemic of typhoid in New York was caused or aggravated by contaminated oysters. No other direct contact between the petitioner herein and the existing epidemic of typhoid in New York during the brief period of his visit there being shown, we are of the opinion that the commission was correct in holding that the evidence before it was insufficient to show a special exposure arising out of the employment, and that the mere fact that there was an epidemic of typhoid fever in said city during the period of the petitioner's visit there constituted an exposure or risk of the commonalty in general and was not peculiar to or characteristic of his employment, and for that reason compensation to the applicant was properly denied.

The attention of this court has been called to the decision of the commission in the matter of Biscailuz v. County of Los Angeles, 11 Cal. I. A. C. 121, wherein an award was made to the applicant therefor upon a showing that he had been sent into a district in the tropics wherein a contagious fever was raging, upon a mission peculiar to his special employment. It appeared, however, in that proceeding that the employer, through its officials, was fully aware of the prevalence of such contagious disorder in the place to which it sent its employee, and in the face of such knowledge directed its employee to go to said place. There were other peculiar circumstances connected with that proceeding which might have sufficed to support the award made therein. However, that matter was not brought to this court upon application for a writ of review.

In arriving at our conclusion in the instant case we are not to be understood as announcing a rule which might be applicable to the case wherein an employer directs his employee to go to a place wherein, within the knowledge of the employer, there is prevalent an infectious or contagious disease. There was no such showing made in the case before us.

The order of the commission is affirmed.

We concur: WASTE, C. J., SHENK, J.; CURTIS, J.; FINLAYSON, J.

FINCH, Justice pro tem. I dissent. According to my understanding of the record the petitioner in substance alleged in his application for compensation and undertook to show before the commission that he contracted typhoid fever by exposure to that disease during an epidemic thereof in New York. Evidence was introduced tending to show the existence of the epidemic and the cause thereof. The commission found that "there was prevalent in said locality an epidemic of typhoid fever," but "that the evidence does not establish as a fact that *said epidemic* was caused or aggravated by contaminated oysters." I am at a loss to understand in what manner the latter part of the finding tends to negative the allegation that the applicant contracted the disease because of the epidemic thereof. It is not even a finding that the applicant did not contract the disease by eating contaminated oysters; and, if the issue is whether the disease was contracted by eating contaminated oysters, then the commission failed to find upon that issue. If, as I believe to be true, the issue is whether the disease was contracted because of the epidemic, then the commission either found that the disease was so contracted or failed to find upon that issue. It is the duty of the commission "to make and file its findings upon all facts involved in the controversy." Workmen's Compensation Act, § 20; Shipbuilding Co. v. Indus. Acc. Com., 70 Cal. App. 495, 497, 233 P. 392.

It appears clear to me, however, that the reasonable interpretation of the findings is that the applicant contracted the disease during the epidemic thereof in New York and because of the existence of such epidemic. The finding that "the evidence does not establish as a fact that said epidemic was caused or aggravated by contaminated oysters" is immaterial. The eating of raw oysters by petitioner and the infection of oysters then being sold in the New York market are not ultimate, but evidentiary, facts, tending to prove the ultimate fact found by the commission that the disease was contracted in New York during the existence of the epidemic in that city. The finding that "the fact that applicant was required by his employment to visit or sojourn in a locality where there was an epidemic of disease does not constitute a special exposure arising out of the employment," in my opinion, refutes itself. It is axiomatic that to go from a place of safety into a place of danger is to incur a special risk, and, if one's employment requires him to incur such risk, any injury resulting therefrom certainly arises out of the employment. The language of the majority opinion implies that, if the commission had found that the disease was contracted by eating contaminated oysters, the petitioner would be entitled to compensation. I am unable to distinguish between such a case and that disclosed by the findings. Typhoid fever is not communicable by mere personal contact with a person afflicted with that disease as in many infectious diseases, such as smallpox or scarlet fever, but is contracted only by taking the germs of the disease into the alimentary canal, usually by means of food or drink. Under petitioner's contract of employment, he was furnished his traveling expenses, including his board and lodging. The situation is the same as if these necessaries had been supplied by the employer on the latter's premises, and eating and drinking, as well as sleeping, were incidental to the employment, and any injury therefrom arose out of the employment. Brodin's Case, 124 Me. 162, 126 A. 829; Frankamp v. Fordney Hotel, 222 Mich. 525, 193 N. W. 204; Ames v. Lake Independence Lumber Co., 226 Mich. 83, 197 N. W. 499; Wasmuth-Endicott Co. v. Karst, 77 Ind. App. 279, 133 N. E. 609; Scott & Howe Lumber Co. v. Industrial Commission of Wisconsin, 184 Wis. 276, 199 N. W. 159; Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293. See, also, State Comp. Ins. Fund v. Indus. Acc. Com., 194 Cal. 28, 35, 227 P. 168; Associated Oil Co. v. Industrial Acc. Com., 191 Cal. 557, 559, 217 P. 744; Judson Mfg. Co. v. Industrial Acc. Com., 181 Cal. 300, 302, 184 P. 1; Harivel v. Hall-Thompson Co., 98 Conn. 753, 120 A. 603; Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N. W. 977, 20 A. L. R. 316.

It seems to me to be immaterial whether the germs of the disease were contained in one kind of food or another or that it was impossible to determine what particular food or drink was contaminated. Such proof is rarely possible. The disease does not become manifest for several days after the germs have been taken into the system. Where one goes into a place in which a communicable disease is epidemic, from a place where such an epidemic does not exist, and at the end of the normal period of incubation thereafter the presence of the disease in his system becomes manifest, from these facts, in the absence of a showing of any other exposure, the mind naturally, and at first blush, logically draws the inference that the disease was contracted at the place of and because of such epidemic, even though it might be conjectured that the disease was otherwise contracted from some unknown source.

It is true that an injury by disease, claimed to have been contracted during an epidemic thereof, like an injury caused by the elements, is not compensable in the absence of a showing of a special risk, but this means no more than that the risk or danger must be materially greater than that of the general public. McManaman's Case, 224 Mass. 554, 113 N. E. 287; Central Illinois Pub. Serv. Co. v. Industrial Commission, 291 Ill. 256, 126 N. E. 144, 13 A. L. R. 967. The term "general public," however, is flexible. It may include the inhabitants of a large territory or only those of a small area, depending upon the connection in which it is used. If petitioner's regular employment had been in New York City, then, under the findings, he would not be entitled to compensation, because his risk would have been no greater than that of the general public of that city of which he would have been a part. But since his regular employment was in San Francisco, where there was not an epidemic of typhoid fever, and he was required to go, on a temporary and special mission, to New York, where typhoid fever was epidemic, the general public whose risk is to be compared with that of petitioner should, in my opinion, include the people of San Francisco as well as those of New York. If that be true, there is no escape from the conclusion that petitioner incurred a special risk by going to New York. If it were established in any case that an employee was required in the discharge of his duties to go into a home in which a patient was afflicted with a contagious disease, and that he there contracted the disease from such patient, it would not be contended, I take it, that the injury was not compensable. I can see no difference in principle between such a case and one where the employee is required to go from a place of safety into a place where a contagious disease is epidemic and there contracts the disease. It is true that the cause of the infection in the latter case would probably be more difficult of proof, but, being satisfactorily proved, as is shown by the findings in this case, the rule should be the same. If, under the circumstances of this case, the petitioner had suffered a physical injury through violence, as in a railroad or street car accident, no one would contend that he was not entitled to compensation. Why should the rule be different where the injury is by disease, the effects of which may be more serious and lasting than those of an injury through violence?

Prior to the enactment of the Workmen's Compensation Act it was held that—

> "If the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information. * * * The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule; * * * and if the employer have such information or knowledge and withhold it from the employee and the latter afterwards be injured in consequence thereof, the employer is liable to him in damages therefor." Baxter v. Roberts, 44 Cal. 187, 192 (13 Am. Rep. 160).

If an employee is set to work, without warning, in a room in which a patient is sick with typhoid fever and the employee thereby contracts the disease, "he being ignorant of the danger, and unable to know of it by the exercise of ordinary care, the master is liable if he either knew, or in the exercise of ordinary care ought to have known, of the danger." Kliegel v. Aitken, 94 Wis. 432, 69 N. W. 67, 35 L. R. A. 249, 59 Am. St. Rep. 901. It will probably be conceded that if the employee had been sent, under similar circumstances, into a place where an epidemic of a contagious disease was prevalent, and had there contracted the disease, the rule would be the same. If, under the facts and circumstances stated, an injured employee would have had a cause of action for negligence, it would seem to follow that, under the terms of the Workmen's Compensation Act, he would be entitled to compensation upon proof of all of such facts and circumstances except that of the employer's knowledge or negligence; the right to compensation under the act being in no manner dependent upon such knowledge or negligence.

While the questions here presented may, in some respects, be distinguishable from those in the Dryden and Shepherd Cases, I prefer to place my dissent frankly, though with the greatest respect, upon the ground that, assuming the effect of those decisions to be as stated in the majority opinion, they are erroneous and ought to be overruled. In the opinion of the commission in the Dryden Case it is said:

> "It is certain that compensation could not be allowed for an injury sustained in the form of a contagious or infectious disease where the risk of such a contagion or infection was a risk of the commonalty. * * * Of course, the commonalty did not have access to No. 314 Locust street, San Francisco, but the risk of infection from that source was a risk participated in by every person who for any reason did enter that home during the interim between the two periods of quarantine, and therefore and for that reason the risk was not a very special one appertaining to the industry in which applicant was engaged."

A very small percentage of the inhabitants of a large city ever have occasion to enter any one particular home and the comparatively few who do enter it in no sense constitute the general public. Under the rule stated by the commission, an employee whose duties take him into a home in which there is a contagious disease can never recover compensation for injury resulting from the exposure, however clearly it may be proved that he contracted the disease there, because all other persons who enter the home take the same risk. The fallacy of the argument is in comparing the employee's risk, not with that of the general public, but with the limited number thereof who may enter the home. Applying the same rule to injuries through violence, it would preclude a recovery in all accidents incident to travel. Excluding cases involving epidemics, the right to compensation in cases of injury by disease should be determined, in my opinion, upon the principles which are applicable to other accidents which occur through human agencies. Since the means and sources of infection must usually be based upon observed conditions, inferences from which may or may not be correct, it is reasonable to require clear proof of such means and sources, but, when satisfactorily established, no different rule should be applied than in other cases. Where the disease is contracted during an epidemic thereof, a different rule applies, and an employee claiming compensation must show that his employment exposed him to a materially greater risk of contracting the disease than that of the general public. But this rule, as it appears to me, presupposes that the employee was a part of such general public. The reasoning of the commission in the Shepherd Case, in my opinion, is fallacious, in that it compares the risk of the employee, who was in Denver temporarily and for a special purpose, with that of the general public of Denver, where the epidemic of smallpox was raging. But for his employment, the employee would not have been in Denver or have incurred the risk, and therefore his risk was special.

It has been said that the theory of the Workmen's Compensation Act "is that the risk of injury to workmen in the industries governed by the law should be borne by the industries, rather than by the individual workman alone." Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 694, 151 P. 398, 401. Section 69 of the act provides:

> "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

It appears to me that, without resorting to a liberal construction of the act, the petitioner is entitled to compensation under the facts found by the commission. To award compensation in a case such as this is not to make a health insurance law out of the act. To be compensable, the injury must arise "out of and in the course of the employment." This limitation will prevent a recovery on account of diseases generally.

79 Cal. App. 697

PEOPLE v. HUGHES. (Cr. 1323.)*

(District Court of Appeal, Second District, Division 2, California. Nov. 13, 1926.)

1. Embezzlement 🔑5—Time that criminal intent was conceived determines whether agent converted property of trust or proceeds of its sale.

Whether agent can be said to have converted property of his trust or proceeds of sale thereof depends on point in time when criminal intent was first conceived.

2. Embezzlement 🔑47—Evidence of defendant's criminal intent to convert proceeds of trust deed at time of receiving deed held for jury.

In prosecution for embezzlement of a trust deed, evidence of defendant's criminal intent at time of receiving trust deed to appropriate proceeds thereof to his own use *held* to raise question of fact for jury.

3. Embezzlement 🔑44(1)—Evidence held to sustain conviction of embezzlement of trust deed intrusted to defendant for sale, under specific directions as to proceeds.

Evidence *held* to warrant conviction of embezzlement of trust deed as against contention that embezzlement was of proceeds of lawful sale of trust deed intrusted to defendant for that purpose, with specific directions as to proceeds.

4. Embezzlement 🔑23—Bailor's indebtedness to bailee on other transaction is no defense to charge of embezzlement of proceeds of property delivered for sale and delivery of proceeds.

Under implicit instructions of bailor to bailee for sale of personal property and delivery of proceds to former, mere fact that bailor is indebted to bailee on some other transaction is no defense to charge of embezzlement of such proceeds by latter.

5. Criminal law 🔑763, 764(7)—Instruction enumerating elements proof of which required verdict of guilty held not erroneous as directing conviction.

Instruction that upon proof beyond reasonable doubt that defendant received trust deed in trust, and willfully, unlawfully, and fraudulently appropriated it to his own use and did dispose of it, contrary to his trust, jury should find him guilty, *held* not erroneous as direction of verdict.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

T. C. Hughes was convicted of embezzlement, and he appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

---

*Hearing denied by Supreme Court January 10, 1927.

CRAIG, J. The appellant was convicted upon an information filed by the district attorney of Los Angeles county charging that:

> "The said T. C. Hughes * * * was the agent and bailee of Frank Powell, * * * and then and there by virtue of his trust as such agent and bailee came into the care, possession, custody, and control of him, the said T. C. Hughes, one trust deed of the value of twenty-five hundred dollars ($2,500). * * * And he, the said T. C. Hughes, after the said personal property of the value aforesaid had come into his possession, custody, care and control, as aforesaid, * * * did then and there * * * convert, embezzle and appropriate the said personal property to his own use, and to uses and purposes not in the due and lawful execution of his said trust as agent and bailee and person so entrusted therewith, as aforesaid."

It appears that the defendant telephoned the prosecuting witness Powell and inquired as to whether or not he would be willing to dispose of the trust deed here in controversy, and that as a result of the telephonic conversation which then ensued Powell delivered to Hughes certain documents, including the deed of trust. This occurred on April 20, 1925. At the time of such delivery the parties executed an agreement in writing, which provided, in part, as follows:

> "I herewith hand you Title Guarantee & Trust Company's deed of trust and accompanying note dated January 16, 1925, for $2,500 made by E. S. Frease in favor of M. Stanhope and recorded January 16, 1925, at 4 p. m. in book 4304, page 385 of official records. * * * These documents are placed with you in trust for the purpose of sale of same. You are to sell the deed of trust and note for me on or before April 30, 1925, for a sum to net me $2,123, and the proceeds of this sale are to be delivered to me on or before that date and at the time the sale is consummated. In the event of failure to make the sale, all the above-mentioned documents are to be returned to me upon demand.
>
> "Frank Powell.
>
> "I hereby acknowledge the receipt of the above-described documents and accept the trust.
>
> "T. C. Hughes."

The evidence tended to show that Frease and Hughes were associated in business, and that they had authority to use Miss Stanhope's name in certain business transactions; that they had previously had dealings with Powell, and were familiar with the status of the property upon which the deed of trust here involved constituted a lien. It further was made to appear that as a pretext for obtaining possession of the securities in question appellant represented to Powell that the owners of said premises were desirous of refinancing them. We quote from appellant's brief the following statement of Powell's testimony:

> "I telephoned to Hughes almost daily after turning the trust deed over to him, inquiring if he had used or sold it, and about the 27th or 28th he told me over the telephone that the trust deed was sold, and that I would get my money within a day or two; that the money was not yet up, but that it was all disposed of. On the evening of April 30 he telephoned me about 6 o'clock and told me the sale had fallen down. I told him I would be down in the morning to get my papers, and he said I wouldn't get them. I asked 'Why not?' and he answered, 'Because I won't give them to you until you straighten up that matter of the Mierau trust deed.' I asked for an explanation, and he said he couldn't give me the trust deed yet. The following day I went to his office. No one else was present. I had consulted my attorney prior to going to the office, and there demanded that Hughes give me $2,123 or return the papers He said he couldn't, or wouldn't, and I told him I would go to the district attorney with the matter. He answered, 'Well; I might as well go to the penitentiary for this as for anything else.'"

One Roy C. Kellogg testified that the defendant sold and delivered to this witness the trust deed in question on April 27, 1925—three days prior to Powell's demand—for a total consideration of $1,920. Documentary evidence consisting of receipts signed by the defendant indicated, and Kellogg also testified, that $1,204.66 was paid to appellant in cash, $125.34 was credited to Kellogg on other transactions, on the date last mentioned, and that the balance of $590 was paid to appellant on May 6, 1925. Although it was testified that appellant stated to Deputy District Attorney Works that Powell was indebted to him in the sum of $895, Powell denied this upon the trial, and two of appellant's checks, payable to Powell, for $895 and $105, respectively, were offered in evidence, which the latter swore were given him by Hughes on April 21, 1925, in lieu of a former worthless check for $1,000. The defendant testified before the jury that he had given the check for $895 to the prosecuting witness on April 23, as a payment on account toward the $2,500 trust deed described in the information. The witness Powell positively averred that at no time had he ever received a return of his securities, or any sum of money, in whole or in part payment therefor. The record thus presented a question of fact, with which we are not here concerned.

The principal question of law urged by appellant at this time is as to whether or not the offense, if one was committed, was an embezzlement of the trust deed, as alleged, or an embezzlement of the proceeds derived from its sale. It is urgently insisted that the evidence was insufficient to warrant a conviction herein because the defendant was intrusted with the document in question, with full power of sale, and that it appears that the defendant sold and disposed of the same pursuant to such power, and not otherwise. Section 507 of the Penal Code provides as follows:

> "Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them

with a fraudulent intent to convert to his own use, is guilty of embezzlement."

We do not question the many authorities cited by appellant, holding that one who as bailee for sale legally disposes of property in strict accordance with the conditions of his trust cannot be held to have embezzled the property, but that he may thereafter, nevertheless, embezzle the proceeds of such sale by converting them to his own use without the consent of the bailor.

[1] At first blush the question as to whether an agent may be said to have converted the property of his trust or the proceeds of a sale thereof frequently will appear difficult of determination, but the consensus of authority consistently holds that the solution of the question depends upon the point in time when criminal intent was first conceived. As said in 20 C. J. p. 431, § 18: "Authority to do the act relied upon as a conversion is no defense, if it was done with felonious intent." And in Agar v. State, 176 Ind. 234, 94 N. E. 819, where it appeared that the defendant, in lawful custody of public warrants, passed them to the auditor and received credit for the proceeds, it was said:

> "Authority to do the act relied on as conversion is no defense if it was done with felonious intent. The intent with which the act was done was the vital question in the case.
>
> "The rule is that when an agent or employee does with money or property in his possession only what he is authorized to do by the terms of his employment, having no felonious intent, he is not guilty of embezzlement. But the authority to sell property or to otherwise deal with it is no defense to a charge of embezzlement, if the agent or employee converts the same to his own use with a fraudulent intent. Therefore when an agent or employee has authority to sell or otherwise dispose of property, and does sell or otherwise dispose of it, not for the purpose authorized, but with the fraudulent intent to appropriate it or its proceeds to his own use, he is guilty of embezzling the property itself, as much as if he had no authority to sell or otherwise dispose of it, for the sale or disposition of the property with said fraudulent intent is a conversion. Leonard v. State, 7 Tex. App. 417; United States v. Sander, 6 McLean, 598, Fed. Cas. No. 16,219; 98 Am. Dec. 134, note; 2 Bishop's Crim. Law (5th Ed.) § 371; 2 Bishop's Crim. Law (7th Ed.) § 371; 2 Bishop's New Crim. Law, §§ 370, 371; Clark & Marshall on the Law of Crimes (2d Ed.) p. 520; 10 Am. & Eng. Ency. of L. 995, 996."

Again, in State v. Baumhager, 28 Minn. 226, 9 N. W. 704, it is said:

> "The distinction must be kept in view between the offense and the evidence of it. The first possession being lawful, the act of embezzlement consists, in a certain sense, in a mere act of the mind, without any outward and visible trespass, as in the case of ordinary larceny. That this mental act of fraudulent appropriation has taken place has to be inferred from the conduct of the defendant. Roscoe's Cr. Ev. 453."

[2] In the instant case it appeared that at the time of receiving the securities from Powell, Hughes was in financial straits, his bank account had been attached, and he had given a check which the bank returned; he offered various deceptive excuses for his failure to return the trust deed or to deliver the proceeds of its sale; it was shown by documentary evidence that he had disposed of the property prior to the time of his statement to Powell that the transaction had failed of consummation. As to whether or not the defendant obtained the trust deed from Powell with criminal intent was therefore purely a question of fact. It lay solely within the province of the jury to believe the testimony of the defendant, or to believe the evidence adduced by the people, and to conclude that the defendant did not tell the truth in those respects wherein he contradicted the people's oral and documentary evidence.

The doctrine announced in the authorities cited above upon this point is not inconsistent with the principle contended for by appellant as stated in certain cases referred to by him, holding that a conviction of embezzlement will not be sustained where there is a material variance between the description of the property as contained in the indictment and as established by the proof; consequently that an indictment for embezzlement of money will not be sustained by proof of embezzlement of drafts, county warrants, or stocks. In the instant case the question is not one of variance, but, the defendant having been charged with embezzling a trust deed, we are called upon to decide whether or not the evidence is susceptible of the construction that he did embezzle that instrument.

Nor is anything said in the case of People v. Borchers (Cal. Sup.) 247 P. 1084, in conflict with the proposition that one may be guilty of the embezzlement of property even though he had authority to sell the same, which he did, if while doing so he entertained the fraudulent intent to withhold it and its proceeds from his principal. Neither in the Borchers Case nor in any authorities cited therein upon the rule of law "that where property, including commercial paper, is intrusted to one with authority to transmute it into property of another kind, including cash, to the use of the one who deposits with the trusted person, the property so intrusted cannot be the subject of embezzlement, if the transmutation is made, but only the property which results from the change," is there any statement at variance with the rule which we have outlined as a test in determining the character of the offense committed in instances such as those presented here. Neither in that case nor in any of the cases cited by it to which we have referred was any question presented as to when the intent to convert was first conceived. In none of them was there any suggestion that at any time while the defendant was still dealing with the property as authorized he possessed an intent to deprive the lawful owner of his property or of its proceeds. For aught that is contained in these decisions, the intent to defraud came into existence after the transmutation of the property occurred. Since the issue here under discussion was not presented, no occasion arose for a pronouncement of the principles which must govern when it arises. Here the evidence strongly suggests and is entirely sufficient to justify the belief that the defendant from the beginning of the transaction, and particularly while he still retained possession of the trust deed, definitely intended to deprive the complaining witness thereof, as well as of any money which might be obtained from its sale. By the written authorization which he had received he was expressly directed under certain conditions to return the documents delivered to him by Powell. The jury were justified in concluding that the defendant, even when accepting such documents, had determined that he would never comply with that provision of the agreement. Under such circumstances the defendant's felonious intent was coupled with the possession of the deed, and the offense was then consummated. Indeed, it was as complete as though the defendant while still in possession had made an oral declaration that he would not carry out the trust nor return the documents. The difference would be only one of proof. In this case, accepting the theory that the defendant possessed the fraudulent intent to convert while still holding the deed of trust, each of the five elements required by the opinion in People v. Borchers, supra, to exist in making out a case of embezzlement, was present: (1) Agency; (2) ownership by the principal; (3) lawful possession by the accused when embezzlement took place; (4) conversion by the accused; and (5) intent to convert and to deprive the principal of his property unlawfully.

In an opinion recently written by this court the distinction which we have pointed out above was recognized. In People v. Keller, 250 P. 585, where the question of venue was under discussion, it is said that no offense was shown to have been committed in Los Angeles county. The defendant was charged with embezzlement of money. He had received a check on a bank in Los Angeles county, deposited it to the account of his principal in an Orange county bank, and had drawn on said account to pay an obligation of his own. After holding that the defendant was properly charged with embezzlement of money, on the question of venue it was said:

> "And it doubtless is true that when delivering the check to Bixler at Los Angeles he then and there fully intended that the sum of money represented by the check should be misappropriated in the manner already described. But at that time appellant did not have possession of the money. *His fraudulent and felonious intent was not coupled with possession.*" (Italics here supplied.)

But, as we have said, in the instant case the evidence was sufficient to support the belief that the defendant's possession of the deed of trust was coincident and coupled with his felonious intent to convert it.

In all of this discussion we must not lose sight of the fact that the defendant had no general authority to sell as his judgment might direct or his discretion dictate, but he was authorized to sell only within a time limitation, and for a certain sum. The sale was for less than the amount required, and in that particular he violated his authority as clearly as though instead of having sold the deed he had exchanged it for property of less value. Agar v. State, supra. Though given until April 30 to sell, it was agreed that if the property should be sold before that date, he should remit the proceeds "at the time the sale is consummated." The sale was consummated on the 27th, when he denied that a sale had been made, and at no time thereafter did he inform his principal of the true situation. The jury was instructed that if they should "find from all of the evidence beyond a reasonable doubt that the defendant did receive the trust deed upon such trust, and did willfully, unlawfully and fraudulently appropriate said trust deed to his own use and did dispose of the same contrary to the terms of said trust," they should find him guilty. And at the request of his counsel they were further instructed as follows:

> "You are instructed that an essential element in the crime charged in this case is a felonious intent, and, before you can convict the defendant, you must find from the evidence that he intended to appropriate to his own use or to a use and purpose not in the due and lawful execution of his right as agent and bailee the trust deed in question, and to cheat, wrong and defraud the complaining witness out of the same."

The precise question vital to the determination of the issues having been twice called to the attention of the jury, we must presume that they considered it in determining whether he was guilty or innocent of the offense charged If the jury concluded, as they may well have believed, that the defendant did not obtain the $2,500 trust deed in good faith, intending to sell it and to remit the proceeds to Powell as prescribed by his written instructions, but that he obtained the same intending to replenish his own depleted purse, sold it for much less than the amount required of his trust obligation, and retained the proceeds, then and in that event he was justly convicted of embezzlement of the instrument, and not of the proceeds. The first possession being lawful, the act of embezzlement is in a sense a mere act of the mind. That this mental act of fraudulent appropriation has taken place must of necessity be inferred from the conduct and statements of the defendant.

State v. Baumhager, 28 Minn. 226, 9 N. W. 704, 706. We think there was an abundance of oral, documentary and circumstantial evidence which, if believed by the jury, as we assume that it was, fully justified them in finding the defendant guilty.

[4] A great many rulings, assigned as error, excluded evidence offered for the asserted purpose of showing that Powell was indebted to the defendant, presumably as a reason for the withholding of the proceeds of the sale or the deed of trust. Under implicit instructions of a bailor to a bailee for the sale of personal property and the delivery of the proceeds to the former, the mere fact that the bailor is indebted to his bailee upon some other transaction is no defense to a charge of embezzlement of such proceeds by the latter. State v. Lewis, 31 Wash. 75, 71 P. 778; Clark v. Com., 97 Ky. 76, 29 S. W. 973; Campbell v. State, 35 Ohio St. 70; State v. Brooks, 85 Iowa, 366, 52 N. W. 240; Com. v. Smith, 129 Mass. 104; People v. Hanaw, 107 Mich. 337, 65 N. W. 231. From what has been said above regarding the check for $895, however, this point requires but slight if any consideration, since the jury were amply warranted in concluding that such indebtedness had no semblance of reality.

[5] The only remaining point urged by appellant is that by giving the instruction from which we have first quoted in part, the trial court directed a conviction, and People v. Conboy, 15 Cal. App. 97, 113 P. 703, is cited in support of this contention. In the cited case it appeared that after extended deliberation the jury returned to the courtroom and requested further instructions. The trial court there stated that it had read about all the instructions that the jury desired, and that there was no reason why they should not as honest, intelligent, reasonable men reach a conclusion; and they were told that they should consider the evidence and the law, regardless of personal observation, relations, or experience, and were ordered to "go out and do your duty." In the instant case it nowhere appears that any such circumstance or instruction is presented. The instruction here complained of stated the elements of the offense charged, and concluded with the statement that if the jury should find them all present, they should return a verdict of guilty. In response to the defendant's request they were likewise instructed that if certain of several enumerated elements were found to be absent, the jury should find the defendant not guilty. Both instructions stated the law of the case, and we see no error or inclination to persuade the jury in either of such instructions.

The judgment and order denying a motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

79 Cal. App. 713

PEOPLE v. EPHRAIM. (Cr. 1262.)*

(District Court of Appeal, First District, Division 1, California. Nov. 18, 1926.)

1. Criminal law 🔑1159(3)—Jury verdict based on conflicting evidence is controlling.

Where defense, under Pen. Code, § 511, to charge of embezzlement of note was based on conflicting evidence, verdict of jury is controlling.

2. Embezzlement 🔑44(5)—Evidence held to support conviction for embezzlement of note received by defendant as agent.

Evidence establishing that defendant received note, as agent, in part payment of principal's property sold by him, to be used for benefit of principal, and that defendant did not act in good faith in appropriating note to own use, *held* sufficient to sustain conviction for embezzlement.

3. Brokers 🔑94—Writing signed by broker as to terms of sale, differing from those authorized by owner, held not binding on owner.

In absence of evidence that broker was authorized by owner to accept different terms of sale than originally given, any writing signed by broker to the contrary was not binding on owner.

4. Criminal law 🔑1037(2)—Conduct of district attorney, not assigned as error nor requested to be disregarded, held not grounds for reversal.

Language and conduct of district attorney is no basis for charge of misconduct warranting reversal, where not assigned as error and no request was made for instruction to disregard same.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge,

W. K. Ephraim was convicted of embezzlement, and he appeals. Affirmed.

See, also, 72 Cal. App. 479, 237 P. 801.

Thos. T. Califro, John D. Harloe, Julian H. Biddle, and R. C. Young, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant herein was found guilty of embezzlement and has appealed from the judgment of conviction and the order denying his motion for a new trial, urging as grounds for reversal insufficiency of the evidence and misconduct of the district attorney.

The property alleged to have been embezzled was a promissory note for the payment of the sum of $500, signed by Morris Chernow and wife, and delivered to appellant in part payment of the purchase price for the sale to Chernow and one Belan of an apartment house business in Oakland, owned and operated by Mrs. Nellie Keach, the information charging that said note came into

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court January 17, 1927.

appellant's possession as agent and bailee of Mrs. Keach and was by him fraudulently and feloniously appropriated to his own use. The fact that appellant received the note from Chernow is not controverted, nor is there any claim made that the same was not afterwards converted by appellant to his own use, but the ownership of said note is disputed. With respect thereto, appellant contends that the evidence fails to establish any agency between himself and Mrs. Keach relating to the sale of her interests in said apartment house, but, on the contrary, shows that he was acting as principal and, as such, acquired said note in a transaction had with Chernow, separate and distinct from his business relations with Mrs. Keach; and, moreover, that it shows that he appropriated the note "openly and avowedly, and under a claim of title preferred in good faith;" and that, therefore, under the provisions of section 511 of the Penal Code, he cannot be held to be guilty of embezzlement, even though his claim of title be untenable.

[1] After reviewing the evidence, we are satisfied that the propositions thus advanced by appellant as absolving him from the commission of any criminal act are founded upon conflicting testimony, and that being so, the verdict of the jury must be held as controlling. The evidence supporting the conviction, as it is revealed by the record, may be stated as follows:

In June, 1924, Mrs. Keach was lessee of the Coronado apartments in Oakland and owner of the furniture and equipment therein, subject to a chattel mortgage. Desiring to sell her interests, she listed the same with real estate brokers, among them being one Spencer. Appellant was not a licensed real estate broker, but claimed to have been engaged in the business of buying and selling property on his own account. He inspected the Coronado apartments at Spencer's invitation, but, after such inspection, informed Mrs. Keach that he "could not do anything" with the property. A few days later, however, he found two prospective purchasers, Chernow and Belan, who examined the apartments in company with appellant and Spencer, but were unable to agree with Mrs. Keach upon terms of sale. They were about to leave, but, after holding a brief conference among themselves outside of the house, appellant, accompanied by Spencer, returned into the house and at appellant's solicitation Mrs. Keach finally agreed to accept $2,500 in cash for her interests, and out of that sum to extinguish the chattel mortgage amounting to $500 and to pay appellant a commission of $300, leaving a net sale price to her of $1,700. Later, on the same day, at appellant's office, Chernow and Belan expressed themselves as being satisfied with the amount of purchase price, but stated that Mrs. Keach's lease, which was about to expire, contained an option calling for an extension of only two years, and that they wanted a lease covering a term of four or five years. Appellant replied that he believed such a lease could be obtained. Chernow also stated that he would be unable to pay the full amount of the purchase price in cash, being short $500, but that he was the owner of a promissory note for $1,875, payable in monthly installments of $25 each, secured by a trust deed to Oakland property, which he was willing to pledge as security for a loan of $500. Appellant said that, personally, he was unable to lend the money, but assured Chernow that the matter could be handled through the bank. Thereupon Chernow and Belan entered into a written agreement with appellant to take a five-year lease and to purchase Mrs. Keach's interests, and paid appellant a deposit of $400, in addition to the sum of $100 already paid to him. Appellant notified Mrs. Keach of the purchasers' acceptance, and thereafter obtained a satisfactory lease from the owners of the property, naming Chernow and Belan as lessees, for which service the lessors paid appellant $250. A bill of sale was then prepared by appellant, and executed by Mrs. Keach, transferring her interests to Chernow and Belan, and was placed in appellant's hands for delivery to the vendees upon the payment of the balance of the purchase price. On June 26, 1924, the sale was consummated by appellant, in the absence of Mrs. Keach, by accepting the note in question and the balance of the purchase price in cash, and from the cash received he deducted his commission of $300, the purchasers taking possession of the property on July 1st.

As to the circumstances surrounding the execution of the promissory note for $500 and its subsequent conversion by appellant, the evidence discloses that in order to prevent a collapse of the sale, and notwithstanding that Mrs. Keach had authorized only a cash sale, appellant accepted said note for $500 as part of the purchase price. The form of the note was prepared by appellant, naming himself as payee thereof, but, before it was signed, Chernow's attorney asked appellant, in Chernow's presence, as to his reason for naming himself as payee. Appellant replied that since Mrs. Keach demanded all cash he had made arrangements with the bank to loan $500 on the Chernow note, and that he would pay the money received from the bank to Mrs. Keach. At the same time, he agreed with Chernow and his attorney, upon the latter's demand, to deposit said note in escrow with the bank along with the security, consisting of the promissory note for $1,875 and the trust deed securing the same, also, the assignment to appellant of said trust deed, and a reassignment of the same to Chernow. As a matter of fact, appellant had not made any arrangements with the bank, nor did he afterwards attempt to do so; and the next morning, instead of completing the escrow as he had agreed, he deposited with the bank only a copy of the note for $500, along with the secured note for $1,875, and an assignment of the trust deed, and about a month later endeavored to dispose of the Chernow security to an investment broker, but, being unsuccessful, sold the original Chernow note for $500 to said broker, receiving therefor the sum of $232, no part of which he paid to Mrs. Keach.

With reference to appellant's business relations with Mrs. Keach subsequent to the date of the sale on June 26, 1924, the evidence shows that, as soon as the transaction with the purchasers was consummated, appellant notified her of that fact. He stated, further, that, owing to the inability of the purchasers to pay the entire amount of the purchase price in cash, he had accepted Chernow's note for $500 as part payment thereof, but that he would obtain a loan of $500 from the bank on said note and pay the amount received to her; that thereby she would be paid the full amount of the purchase price in cash, as demanded. Within a few days after the purchasers had taken possession of the property, Mrs. Keach called to collect the money due her and was informed by appellant that he was unable to borrow the money from the bank on the Chernow note, but that he would deliver the note itself to her, after retaining it five or six days so as to allow creditors to present claims. Mrs. Keach agreed to accept the note, believing, as she testified, that it would be paid to her as represented, at the rate of $25 a month, with interest. Thereupon appellant paid her $1,200 in cash, which was the net balance of the purchase price due her after deducting $500 for the release of the chattel mortgage and $300 for appellant's commission. Several days elapsed before Mrs. Keach again called, as instructed, to obtain the note, and appellant then told her, according to her testimony, that it was necessary to have the note recorded. At that time, however, he paid her $20.50, which he represented was the first $25 installment due on the Chernow note, after deducting $4.50 for recording fees.

During the interim, the exact time not being made clear, appellant, as a result of the repeated demands Mrs. Keach was making upon him for the delivery of said note, gave her a document which she claims he represented as being, and which she believed to be, the Chernow note, but that she afterwards discovered that she had been deceived, and that the document was, in fact, an assigned deed of trust given to appellant by one Harris, on June 24, 1924, to secure the payment to appellant of the sum of $500, the trust deed covering property in Tehama county of the value of $160; and that she also discovered that the sum of $20.50 previously paid to her as an installment on the Chernow note was, in fact, receipted for by her as an installment paid on the Harris note. Thereafter she made numerous efforts to secure the original Chernow note from appellant, but she was unable to get in touch with him until finally, when she did obtain an audience with him, he not only refused to give her said note, but peremptorily and profanely ordered her out of his office.

[2] The foregoing evidence, if true, is legally sufficient, in our opinion, to sustain the verdict of the jury, for it establishes an agency between appellant and Mrs. Keach for the disposal of her property for a commission and a consummation of the purpose of the agency. It also proves that the promissory note in question was received by appellant, as her agent, in the course of his employment, as part of the purchase price which legally belonged to her, and that said note was treated as her property at the time of its execution and delivery to appellant, the understanding being that it was to be used for her use and benefit; and, lastly, the evidence adduced by the prosecution, the essential features of which are hereinabove set forth, is legally sufficient, if true, to negative appellant's claim of good faith in appropriating said note to his own use, for it shows an intention to defraud both Mrs. Keach and Chernow.

Many of the facts above narrated, it is true, were established by the testimony of Mrs. Keach, which appellant, in the exhaustive briefs filed in his behalf, severely arraigns as being false and discredited, and he argues that the evidence offered in his behalf in contradiction thereof, particularly his own testimony, was more than sufficient to show that the testimony of Mrs. Keach was inherently improbable. Assuming that her testimony was not given with the same degree of clearness and exactness which characterized the giving of the testimony of other witnesses in the case, still it has not been demonstrated that the material portions thereof are inherently false or even improbable, and the jury has declared by its verdict that she told the truth; and, furthermore, the ownership of said note was not established by her testimony alone, but was proved mainly by the testimony of Chernow and of his attorney.

[3] We find nothing in the testimony of appellant as to his business dealings with Spencer to change the situation. The latter's testimony was not available because of his sudden death before trial, it appearing from the record that he committed suicide; but there is no evidence to show that Spencer was authorized by Mrs. Keach to make or accept

terms of sale for her different from those already referred to, and, consequently, any writing which may have been signed by him to the contrary was not binding upon her.

[4] With reference to the charge of misconduct on the part of the district attorney, we think the transgressions complained of are not of sufficient importance to demand a reversal of the case, but, even if they were, the record discloses that appellant made no assignments of error, nor did he request the court to instruct the jury to disregard the language or conduct now complained of, and consequently, the judgment could not, in any event, be reversed on that ground. People v. Warr, 22 Cal. App. 663, 136 P. 304; People v. Shears, 133 Cal. 159, 65 P. 295.

Appellant has also devoted much argument in his briefs to a discussion of the constitutional rights of appellant, but we fail to see where there are any constitutional questions even remotely involved. The ownership of the property alleged to have been embezzled and its fraudulent appropriation constituted the determinative questions, both of which were resolved against appellant upon substantial evidence. It is therefore our conclusion that the judgment of conviction and the order appealed from must be affirmed. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

79 Cal. App. 709

PEOPLE v. WILSON. (Cr. 1328.)

(District Court of Appeal, First District, Division 2, California. Nov. 16, 1926.)

1. Criminal law 🔑200(7)—Incest prosecution based on act used in rape case to show defendant's conduct held not former jeopardy.

Plea of former jeopardy in incest prosecution *held* not sustained in spite of fact that, in former rape acquittal, act, for which defendant was now being prosecuted, had been introduced for purpose of showing defendant's general conduct.

2. Criminal law 🔑1158(4) — Ruling of trial court in conflicting evidence admitting confession will not be disturbed.

Admission on conflicting evidence of confession of guilt by defendant *held* not to be disturbed.

3. Criminal law 🔑1036(1) — Admissibility of evidence admitted without objection will not be reviewed.

Admission of evidence as to parentage of child born to prosecutrix in incest case *held* not subject to review on appeal, no objection having been made at time of admission.

4. Incest 🔑13—Defendant's offer of proof of possibility of illicit relation between prosecutrix in incest case and another held properly rejected.

Refusal by trial court of defendant's offer to prove, in incest prosecution, that prosecutrix might have had illicit relations with boy of her acquaintance, *held* proper.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

J. F. Wilson was convicted of incest, and he appeals. Affirmed.

N. Lindsay South, of Fresno, for appellant.
U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

NOURSE, J. Defendant was tried and convicted upon an information charging incest upon his daughter—a girl of 15 years of age. From the judgment following the verdict and from the order denying his motion for a new trial, he has appealed on a typewritten record.

On August 31, 1925, the district attorney of Fresno county filed an information against the defendant charging him with the crime of incest upon his daughter, alleged to have been committed on July 19, 1925. On September 8, 1925, this information was dismissed, without the assignment of any reason therefor, after the grand jury of the county had indicted defendant on two counts, one charging incest, the other charging rape, but both alleged to constitute different statements of the same act. On September 23, 1925, a new indictment was filed containing six counts. This indictment specified three separate criminal acts alleged to have been committed on or about January 27, 1925, July 11, 1925, and July 16, 1925. Two counts covered different statements of each act—one charging incest and the other rape. The defendant was tried on this indictment, and the jury returned a verdict of acquittal. Thereafter a new information was filed against the defendant charging the crime of incest upon his daughter and specifying June 2, 1925, as the time of the commission of the criminal act. It was upon this information that the defendant was convicted.

When the defendant was brought to trial on this last information he entered three separate pleas—of former acquittal, once in jeopardy, and not guilty. When the trial opened he objected to the introduction of any evidence on the part of the state upon the grounds of former acquittal and former jeopardy. This objection was overruled, and evidence was taken showing defendant's guilt of the crime charged beyond a peradventure of a doubt. At the same time the state was permitted to offer evidence of numerous other acts of the same nature running over a period of 2½ or 3 years, including the acts of which he had been acquitted on the former trial. At the conclusion of the testimony the trial judge instructed the jury to find for the state on both of the special pleas of former acquittal and jeopardy.

On this appeal four grounds are urged by the appellant for a reversal: (1) That the trial judge should have decided the plea of former acquittal in his favor; (2) that the instruction to the jury to find for the state on the two special pleas was error; (3) that the purported confession of the appellant was inadmissible because obtained by duress; and (4) that the evidence relating to the child born to the prosecutrix was inadmissible.

[1] 1. The act of June 2, 1925, was a distinct and separate crime from the acts of January and July which were involved in the former trial and acquittal. People v. Williams, 133 Cal. 165, 168, 65 P. 323; McCreary v. Com., 163 Ky. 206, 173 S. W. 351,

355. Though evidence of the act of June 2 may have been offered in the former trial for the purpose of showing the general conduct of the appellant, he could not have been convicted of that act in that trial because the issue was clearly drawn to the three acts specified in the indictment. His acquittal of those charges was, therefore, merely an acquittal of the three acts specified, and was not a finding as to the truth of the charge covering the act of June 2. In the former trial the appellant was in jeopardy only as to the three specific charges relating to the three separate acts mentioned in the indictment. State v. Healy, 136 Minn. 264, 161 N. W. 590, 592, L. R. A. 1917D, 726. For these reasons the trial judge committed no error in refusing to sustain appellant's special pleas.

[2] 2. The appellant was given every opportunity to make proof of each of these pleas, but the only evidence offered demonstrated without any conflict that the former trial related to a separate and distinct crime, and the trial judge properly instructed the jury to find for the state on both issues.

3. When the appellant was arrested he fully confessed his guilt before the district attorney and peace officers of the county, and on the following morning went before the committing magistrate and pleaded guilty to the charge. Thereafter he repudiated his confession and changed his plea to not guilty. It is now argued that evidence of the confession should not have been admitted because it had been obtained through duress. The only evidence of this character is found in the testimony of the appellant to the effect that he was denied food and that one of the peace officers threatened to shoot him if he did not confess. All this testimony was denied by those present, and it was further shown that on the following day one of the district attorney's deputies, at the special request of the appellant, went to the latter's cell in the county jail and there received a voluntary confession of guilt from the appellant. The admissibility of this evidence was a matter for the trial judge to determine in the first instance, and, particularly, in view of the conflict in the testimony, we find no error in his ruling.

[3, 4] 4. Finally it is argued that the trial judge erred in admitting testimony as to the parentage of the child born to the prosecutrix. This testimony was patently damaging to the appellant, because it had previously been shown that the child was deformed, and medical evidence had been received showing that such deformity was common in cases of incestuous relations. But the testimony was all received without objection on the part of the appellant, and the point is not open to discussion on this appeal. The appellant argues, however, that, notwithstanding this, the trial judge erred in refusing his offer to prove that the prosecutrix was friendly with a boy of her acquaintance, the offer being for the purpose of showing the possibility of his having been the father of the child. Besides the mere suggestion of the possibility of this fact, the tender was nothing more than an offer to prove that the prosecutrix might have had illicit relations with another than the appellant and was, of course, inadmissible. People v. Stratton, 141 Cal. 604, 606, 75 P. 166.

We find no error in the record.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

79 Cal. App. 721

LINN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5398.)*

(District Court of Appeal, Second District, Division 2, California. Nov. 18, 1926.)

1. Attorney and client 🔑76(1)—Attorney should not be permitted to withdraw, if injustice to third party results.

Attorney, as officer of the court, should not be permitted to withdraw from a case, if withdrawal will work injustice on third party.

2. Attorney and client 🔑76(1)—Trial court held not to have abused discretion in refusing to permit withdrawal of attorney, notifying client 9 days before trial, and bringing motion on for hearing on day before trial (Code Civ. Proc. § 284, subd. 2).

Trial court *held* not to have abused discretion, under Code Civ. Proc. § 284, subd. 2, in refusing to permit attorney to withdraw case, after acting for more than 2½ years, and failing to notify client until the ninth day before trial or to bring motion on for hearing until day before trial.

Original proceeding in mandamus by Roy A. Linn against the Superior Court of the State of California, in and for the County of Los Angeles, and Hon. Edward T. Bishop, Judge, to require respondents to permit petitioner to withdraw as attorney of record, in a pending action. Writ denied.

Otto & Linn, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and R. C. McAllaster, Deputy County Counsel, both of Los Angeles, for respondents.

THOMPSON, J. This is an original proceeding in mandamus to determine whether or not a peremptory writ should issue, directing the respondent judge of the superior court of the state of California, in and for the county of Los Angeles, to permit the petitioner to withdraw as attorney of record in a pending action. This proceeding has been

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court January 17, 1927.

submitted upon a stipulation of the facts, from which it appears that Otto & Linn were attorneys for Louzena K. Bewley from November 13, 1923, until July 29, 1925, at which time Roy A. Linn, the petitioner, was substituted as sole counsel for Louzena K. Bewley; that during that time the firm of Otto & Linn and Roy A. Linn had spent approximately 16 days in the preparation and management of the action; that prior to July 29, 1925, the firm of Otto & Linn received the sum of $165, on account of attorney's fees; that since July 29, 1925, petitioner has been paid the sum of $200 on account of attorney's fees; that on March 19, 1926, petitioner rendered a statement to Mrs. Bewley on the basis that she had agreed to pay $75 per day for the time spent in the preparation and trial of the action; that she has wholly failed to pay Linn any sums except the $365 already mentioned; that on May 24 the petitioner informed Mrs. Bewley that, unless she paid to him the moneys due him, he would not proceed with the litigation; that thereafter and on May 26, 1926, petitioner served his notice of motion to be permitted to withdraw as counsel of record and delivered to Mrs. Bewley all of the papers in reference to the said action; that the action entitled Bewley v. Bewley on February 23, 1926, had been advanced on the calendar and set down for trial on June 2, 1926, and petitioner's motion was noticed to be heard on June 1, 1926, and on June 2, 1926, the motion was denied by the respondent court.

It is of this order denying petitioner the permission to withdraw of which he complains and urges that section 284 of the Code of Civil Procedure, in subdivision 2 thereof, gives him the absolute right to retire where there has been a breach by his client of his contract for compensation. The material portion of section 284 of the Code of Civil Procedure reads as follows:

> "The attorney in an action or a special proceeding may be changed at any time before or after judgment or final determination, as follows: (1) * * * (2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

Counsel has called our attention to several California cases from which it appears that the client has the right to change attorneys at will, in the absence of an interest in the subject-matter of the litigation, among which is the case of Lee v. Superior Court, 112 Cal. 354, 44 P. 666, in which it was held that mandamus will lie to compel the substitution. He has also cited authorities to the effect that failure of the client to pay the fees agreed upon, or a failure to pay a reasonable amount as the litigation progresses, in the absence of an agreement for a specific sum, is just cause for the attorney to withdraw from the client's cause. We have not, however, been referred to a case, and our research has discovered no case, in which it has been held that it is an abuse of discretion or the arbitrary exercise of discretionary power for the court to permit counsel to withdraw, nor have we been referred to a case in which it has been held that counsel has the unqualified right to withdraw.

Numerous authorities have been cited by respondent, nearly all of which are to the effect that service may be made upon counsel of record where there has been no withdrawal by leave of court, even though, as between client and counsel, counsel's labors have ended. They are of little value in the determination of this question, except for general principles therein enunciated by way of dictum. In a very recent interpretation of section 286 of our Code of Civil Procedure, the Supreme Court, in the case of De Recat Corporation v. Dunn, 197 Cal. 787, 242 P. 936, 42 A. L. R. 1342, gives voice to the underlying ethics of our profession, and, quoting with approval from Branch v. Walker, 92 N. C. 87, says:

> "'It is a mistaken notion that an attorney can become counsel of record in an action, and cease to be counsel at his own will, pleasure, and convenience. He is, in an important sense an officer of the court, and under its direction and control in respect to matters affecting the court and the administration of public justice, and as soon as he is duly retained in an action or proceeding, he has, by virtue of his office, authority to manage and control the conduct of the action on the part of his client during its progress, subject to the supervision of the court, and he is the proper person on whom notice should be served in respect to matters pertaining to the conduct of any proceedings in it after it is brought; and his authority and responsibility continue until it is completely determined by the court wherein it is pending.'"

Section 286 of the Code of Civil Procedure, just referred to, provides as follows:

> "When at attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

In this action, the cause was for good reasons advanced on the calendar for hearing on June 2, 1926. The motion for withdrawal came on to be heard on June 1, 1926, which, if granted, might possibly have caused a continuance of the action, under the last section, so that this portion of the opinion in De Recat Corporation v. Dunn seems pertinent here:

> "In the case of McInnes v. Sutton, 35 Wash. 384 [77 P. 736], the Supreme Court of that state, in a situation substantially identical with that presented upon this appeal, held upon the authority of Coon v. Plymouth Plank Road Co.,

supra [32 Mich. 248], that the phrase in the Code provision of that state 'ceases to act as such,' did not relate to the voluntary refusal of an attorney for a party to proceed with a case when it is regularly called for trial and the adversary is prepared with his witness to proceed. 'If such were the meaning of the statute,' says the court, 'it could, by collusion between attorney and client, easily be used as a means of effecting at least a 20-day's delay, which, in some instances, might amount to a practical denial of justice. The relation of attorney and client, when once established in a case, is not to be so easily severed, when the rights of others depend thereon. The interdependent relation is such that what is the client's duty is often the attorney's duty, and the client cannot escape his obligation to the court and to his adversary to proceed with a trial, for the mere reason that his duly appointed confidential agent—his attorney—may have declined to act.'"

In the case of Vansandau v. Browne, 9 Bing. 402, which was an action brought by attorneys for services rendered, the defense being that the attorneys had declined to proceed in the action which they had been retained to conduct, to which counsel replied that they were justified on account of the failure of the defendant to pay the fees and costs, Chief Justice Tindal, in holding that counsel were entitled to recover, refers to a case in 1 Sid. 31, and says:

"It is said however, that there are authorities in support of the proposition for which the defendant contends. That in Siderfin is, no doubt, strong; but we must see whether it proceeds on just principles, and whether it will apply to the facts of the present case. Now, in the report in Siderfin, no facts are stated to explain the decision of the court. It may be, probably was, the fact, that the attorney on the very day of the assizes deserted the conduct of the cause, giving his client neither time nor opportunity to obtain other professional assistance; if so, the decision of the court was proper."

[1, 2] It is undoubtedly true that, in the great majority of instances, the attorney should be permitted to withdraw, but, as an officer of the court, he should not be permitted to withdraw, if his withdrawal will work injustice upon a third party. Such is not in keeping with the place that the profession holds in the machinery designed for measuring justice. Had the court granted petitioner's motion, it would have been under the necessity of determining, on the next day, whether to grant a continuance to Mrs. Bewley in order that she might secure other counsel and to enable him to prepare for trial, which continuance, if granted, might possibly have worked an irreparable injury upon a third party. The presumption is that there were important reasons moving the court to advance the case on the calendar, and the court was entitled to take into consideration all of these reasons, the status of the pending cause, the payments made to counsel, the length of notice given by counsel for the purpose of passing upon his motion Counsel had been acting for Mrs. Bewley for more than 2½ years. He did not notify her until the ninth day before the trial, nor bring his motion on for hearing until the day before the trial. This called for the exercise of judicial discretion of a high character. Under circumstances where the exercise of judicial discretion to the same degree was not involved, our Supreme Court denied the writ. Rundberg v. Belcher, 118 Cal. 589, 50 P. 670. The court had supervision and control of one of its officers, and we are of the opinion that we may safely rely in the sound discretion of the court that hardship may not be unnecessarily worked upon members of the profession by reason of the rule. From aught that appears, there was no abuse of that discretion in this case, nor an arbitrary exercise thereof.

Writ denied.

We concur: WORKS, P. J.; CRAIG, J.

MOSS v. CHRONICLE PUB. CO. et al.*
(Civ. 5542.)

(District Court of Appeal, First District, Division 2, California. Dec. 16, 1926. Hearing Granted by Supreme Court Feb. 14, 1927.)

Master and servant 🔑301(4)—Newspaper publisher held not liable for negligence of employee, while temporarily working for and under exclusive direction of independent contractor.

Newspaper *held* not liable for negligence of one of its mailing room employees, while performing work for and under exclusive direction and control of truck owner hauling newspapers as independent contractor, notwithstanding foreman of mailing room had, on other occasions, directed him to help contractor's man.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Charles Moss against the Chronicle Publishing Company and others for damages for personal injuries. From a judgment for plaintiff, the defendant named appeals. Reversed.

Percy E. Towne, of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche and Edward I. Barry, all of San Francisco, for plaintiff and respondent.

Ford, Johnson & Bourquin, of San Francisco, for defendant and respondent Mowry.

John Ralph Wilson, of San Francisco, for intervener, plaintiff and respondent.

STURTEVANT, J. This is an action brought by the plaintiff to recover damages for injuries sustained while loading newspapers on a motorboat at one of the wharves in San Francisco Bay. The case was tried by the court sitting with a jury; the jury brought in a verdict against the Chronicle Publishing Company, and it has appealed.

Without waiving other points contained in the record, the appellant presents the point that the plaintiff's injury, if any, was not the result of any act of omission or commission on the part of an agent or servant of the appellant. Before proceeding further, it may be stated, generally, that the Chronicle Publishing Company is a corporation engaged in publishing the San Francisco Chronicle. Papers for points outside of San Francisco are done up in bundles of about 50 pounds each, and the bundles are stacked in the mail room. The appellant has a contract with Charles A. Mowry, under the terms of which Mowry takes the bundles from the mail room and delivers them to the first connecting carrier. On the morning of June 1–2, 1922, a shipment of papers was being made from the mailing room to a gasoline launch, owned and operated by Harry Johnson, for the purpose of being transported to Oakland. When such shipments were made, a truck load of the papers would be taken to the edge of the wharf and at that point the bundles would be taken off and slid down a chute into the gasoline launch. On the date mentioned, the accident occurred at about 2 o'clock in the morning. The plaintiff was one of the persons operating the launch, and Robert Miotti was the person on the wharf sending down the bundles. This brings us to the question as to who Miotti was, and as to who is responsible for his alleged negligence. A determination of that question requires a consideration of the testimony of several witnesses.

Russell B. Leech, one of the witnesses for the defendant, testified that on August 9, 1919:

"I was the assistant business manager of the Chronicle Publishing Company. On that date the Chronicle Publishing Company and Charles A. Mowry executed a written agreement in the form of a letter duly accepted, in which Mowry stated: 'I hereby agree with the Chronicle Publishing Company to do all of the hauling of newspapers from their mail room in the Chronicle Building to ferries, depots, or post offices

*Superseded by opinion of Supreme Court 258 P. 88.

for transportation outside the city of San Francisco, also two loads to Oakland each week, for the sum of $512.50 per month; payable monthly. All express and ferry charges on papers for Oakland to be paid by me. This agreement to remain in effect for one year from August 10, 1919, at which time I am to have the option of renewing this agreement for two years. It is understood that the Chronicle Publishing Company may terminate this agreement at any time, should the service rendered not be satisfactory to them. It is also understood that I am to carry adequate compensation, public liability, and property damage insurance.' The agreement was subsequently extended by an oral bargain. The shipments increased in amount, and the compensation was increased in amount. Otherwise, there were no changes. The hauling naturally covered the loading and unloading of the truck loads. I never made it a part of our bargain or understanding that I would furnish him assistants to do any loading or unloading. Prior to June 2, 1922, I did not know that any assistance was being furnished to him. The business of making such bargains was a part of my position, and no one else connected with the Chronicle used to make such bargains. I know Robert Miotti. I first knew him after the accident. Before that I never had any contract with him at all. I never gave any instructions to anybody else to be transmitted to him. The foreman of the mail room handled the matter of distributing papers. His duties are finished when the papers are ready for transportation. He is under the circulation manager. The circulation manager is under me. I do not attend to all the details. I am not down in the mail room each night checking the manner in which the employees in the mail room usually work. I do not remember any conversation that was reflected in the written agreement. After the accident, I learned that Miotti was in the employ of the Chronicle in the mail room. The employment and work of Miotti was left under my instructions to one of my subordinates, Mr. Pirie, who was the immediate superior of Miotti. It was his duty to take his orders from Mr. Pirie. Not conceding that Pirie directed Miotti to assist in taking bundles of papers off the wagon, if the direction was given, it was the duty of Miotti to follow the instruction."

Charles A. Pirie, sworn as a witness for the defendant, testified:

"I am superintendent of the mail room and have been for 12 years. It is my duty to oversee the dispatching of papers to different destinations. I also have charge of the wrapping and packing of the papers, of arranging the bundles in proper size for shipment, and of putting the papers together; that is, of seeing that the sections are inserted. I employed Miotti. He was employed by me to insert papers when he first came to work for me. When the Chronicle did its own hauling, I used to give the driver a helper when the paper on a daily went over 26 pages. I remember when Mowry took charge of the work of hauling and transporting. That work consisted of the work that the Chronicle truck had previously done. That work included the actual operation of the truck hauling the papers to the different depots, and the driver did the loading and unloading. When he first took over the work, Mowry handled the truck himself quite a while. I never saw the contract dated August 9, 1919. Mowry did the work quite a while himself, then he engaged David Murphy to assist him. I think we had a large paper one night on the daily, 28 pages I think, and maybe bigger than that, and Mr. Mowry asked me for a man to give him a hand, and I did. Those were the circumstances under which I first sent a man to assist him. Subsequently, whenever it went over 26 pages, he asked me for a man. On one occasion I let him have a man, and the fellow was very small, and was not very strong or husky, and I think he sent the man back to me and asked for somebody that had a little more strength, and I just traded men with him. I gave a much stronger fellow. When I put a man to work on this truck, or when I allowed Mowry to take a man from the mail room, I did not give him any instructions at all, I just told him to go help the driver. Whenever any instructions are to be given as to the destination of papers, I gave those instructions to the driver. I never gave any instructions to the man whom I sent to help the driver. I do not follow up the helper whom I have furnished to see if he is doing his work properly. Whenever any of the boys in the mail room were sent out as helpers on the trucks I gave the order for him to go out. I had an assistant foreman, Mr. York. I cannot definitely state the date when I first sent Miotti or any other man in the mail room to work on the truck. When the company used horses and wagons, the drivers did not need helpers. The Chronicle bought automobiles, I think, in 1916. I cannot state definitely that I then sent men out. I did send them out before Mowry took over the contract, but I don't think it was before Miotti came to work. For those occasions in the week on which the paper was over 26 pages, it became the duty of Miotti to go out on the truck and to stay right with the driver. I told him to go on the truck with the driver. The first time I sent a man to assist Mowry, Mowry asked for a helper. He has asked me on several occasions, and so has his man, Mr. Murphy. Since then Mr. Mowry put on two machines. Since those two machines were put on, he has never asked me for a helper. Sometimes I would overlook it and forget it, and he would come down and ask me, 'Where is my helper?' so I would send up a man. When he asked for a man, I would send him one, when I overlooked or forgot. I told the helper to go out on the truck. The driver did not tell him. Sometimes I would send the driver to the ferry with four or five different separations. The driver knew the different ones, and he was the responsible party, and he gave to the helper the instructions what to do. I cannot say what instructions he gave the helper. I am in charge of dispatching the papers. That means getting them down to the point of destination as quickly as I can. Not on all occasions does that mean discharging them at the point of destination as quickly as possible. It is my duty and purpose to see that the papers get to the ultimate destination as soon as possible. Trains leave at a stated time, and mails close in the post office at a stated time—that is the only time we have to get anything to its destination in a hurry, to make the closing time on a mail or train—but as far as the launches are concerned, they run from San Francisco to Oakland, or San Francisco to Sausalito, and there is no specified leaving time.

The launch does not leave this side to be over in Oakland or Sausalito at any special time. They do not leave here until the papers are loaded on the boat. We have no approximate time when the papers are to reach Oakland. The launch sometimes does not leave this side until 2 o'clock, and sometimes until 3 o'clock in the morning. If there is any undue delay in taking the papers off the truck and putting them upon the launch, that is a matter we are interested in. My jurisdiction goes with a load right up to the time that the load reaches its point of destination. There are certain nights when the paper runs over 26 pages, and it was on those nights during 1922 that Miotti was in our employ. On those nights he reported for the purpose of assisting in the work of loading the papers on the truck, going with the truck to the points of destination, and assisting in taking the papers off the truck. When I directed him to go upon the truck and help the driver, I meant that he would help in putting the papers on, that he would accompany the driver to the depot or wharf, and that he would assist in taking the papers off the truck. I did not instruct the driver how to handle the packages at the point of destination. That is what he was there for. I read the written contract yesterday, but not before this accident. I did not have any other occasion for glancing at it, other than the fact that it is one of the issues in this case. Up to that time I did not know the terms of the contract at all. The responsibility of making train connections would be directly on me and indirectly on Mr. Mowry. After I turned the stuff over to him, he was the responsible party. Each night I made a report whether train connections were made. When I had a close run of it on the return of the truck, I would inquire whether they made the connection. When I sent Miotti or any one else, it was my purpose if he had the time to insure that they made the connection. The Chronicle paid Miotti's wages. In June, 1922, all of Miotti's work was not to assist upon Mowry's work. It was not practically all of his work. He worked in the mail room for me. He worked on the truck maybe two nights a week, and then worked in the mail room for me. On those nights that he worked on the truck, he did that work exclusively. He was with the driver on all occasions, both in receiving the load and discharging it. When Mowry asked for an assistant, he did not state that it was for the shortage of time, but for being a heavy paper. The reason for furnishing an assistant was because of the weight of the paper on those nights. Before I furnished Mowry an assistant, I would require him to give me a reason. Sometimes he got away without me giving him a helper. It was the custom, regardless of any reason given, to send out a man when the paper was over 26 pages, but at 12 o'clock at night you cannot go to work and pick up a man off the streets when the paper goes over 26 pages, so I did not require any additional reason given to me besides that it was the custom in there for a helper to be sent out."

David Murphy was called as a witness by the defendant. He testified:

"On the night the accident occurred nobody was in charge of transporting, loading and unloading. There was nobody in charge; I was the driver. I got my instructions from the mail room. Whenever instructions are issued from the mail room, they are given to me. When a report is made back to the mail room, as to deliveries that have been made, it is made to Mr. Pirie. I make the report; sometimes Miotti would make the report."

Charles A. Mowry was called as a witness by the defendant, and no questions were propounded to him by either party regarding who was authorized to give or did give instructions to Miotti.

Robert G. Miotti was called as a witness by the plaintiff. He testified:

"I was told to go and help the driver by Mr. Pirie, and when I was on the truck whatever the driver saw fit to tell me, I took the instructions from him, nobody would ask me. I was told to go up and help the driver. When Mr. Pirie told me to go up and help the driver I knew that he meant for me to help the driver in putting on his load and discharging his load at the point of destination. That is why, on each of those occasions when I went to the point of destination, I assisted in discharging the bundles of papers from the wagon. When Mr. Pirie asked me to go upon the wagon and help the driver, I knew that Mr. Pirie meant to go upon the wagon and help the driver load his wagon, go with him to the point of destination, and there assist the driver in discharging his load. I got that information from the word helping. Naturally, I would stay with him all night long. That is what my understanding was. Mr. Pirie was my immediate superior in the Chronicle office. It was not the driver who asked me on those occasions to go and help. From the time that I took my place upon the truck until I returned to the office of the Chronicle, I would take my instructions from the driver of the truck. For my employment in assisting to load and unload the truck carrying the papers down town, the Chronicle paid me. Mr. Mowry never paid me anything. I testified that I went on the truck under the direction of Mr. Pirie. I did not go in compliance with any request or order that came from Mr. Mowry or Mr. Murphy. When I testified that while I was on the truck I took instructions from the driver, I meant in this case it would have been Mr. Murphy, being that Mr. Murphy was driving the truck. I received very little instructions from Mr. Murphy because I was pretty well acquainted with the nature of the work, and it did not require but very little instruction. I knew the work before Murphy knew it. Mr. Pirie did not tell me what to do. He told me to go on the truck and help the driver. After Mr. Mowry came over there, whenever Mr. Pirie told me to go on the truck, I knew what he wanted me to do. I understood Mr. Pirie was asking me to help Mr. Mowry, not to drive the truck. To load and unload. I cannot point out any instructions that Mr. Murphy gave me except concerning the loading or unloading. Sometimes when we would have bundles that would go to certain places, he would tell me that those went to such and such a run, and would go for discharge to such and such a place. That would be his instructions. If, for example, we had a load that went out on train 54, the Sunday train which I think went to

Shasta, he would tell me it goes on such and such a truck down to the ferry. He would tell me that particular load went down to the ferry when we were unloading trucks. Sometimes we would have different trains, and we would carry more than one shipment in one load on the truck. The loads going to the ferry are unloaded onto trucks down at the ferry; they are not put on the boats at all. By loads I do not mean the ones going over on the John A. He would tell me on the truck. The loads that went to the John A. were not split. Sometimes we would be pressed for time, and he would tell me shake it up—he would tell me to hurry up—loading and unloading. He might tell me to move over in the seat and give him more room. That was the extent of it. The foreman of the mail room never gave me personally any directions how I should handle that work. The most in the way of instructions that he ever gave me was a direction to go and lend Mowry a hand. As far as I know, Pirie had authority to put me where he wanted to. I never had occasion to give Mr. Mowry instructions as to how he should do his work, nor to instruct Mr. Murphy how that work should be performed. I was told by Murphy to shake it up. I understood that to mean that because we were pressed for time, and trains had to leave at a certain time, and the train cannot wait for us, and we had to take care to get to the trains in a hurry. I do not remember that I was told by Murphy on any occasion while the papers were being discharged or unloaded from the truck, and placed upon the gasoline launch operated by Moss, to shake it up. When he told me to shake it up, I understood him to mean for me to work faster, because I more or less knew the time the trains left, and I understood the nature of his instruction at that time. The suggestion from Mr. Murphy, given at times, that I should shake it up, referred to deliveries at other points than on this launch. When he gave the instruction, I understood it to mean the particular load that we were unloading."

Except as we have set forth, no writing showing employment, or want of employment, was introduced. In examining witnesses for the purpose of ascertaining the nature of the employment, the rule stated in Wainiorek v. United Railroads, 17 Cal. App. 121, 132, 118 P. 947, was frequently violated, and in many instances the conclusion of the witness was adduced instead of the facts. The individuals were present in the courtroom and were called and examined on other subjects, but were not examined on the extent and nature of employment, as the procedure is delineated in Kast v. Miller & Lux, 159 Cal. 723, 727, 115 P. 932.

The story gathered from the foregoing evidence, is, without conflict, that, at the time and place of the accident and in the performance of the work which he was then performing, Miotti was working under Murphy as the representative of Mowry, and that, as such representative, Murphy possessed the right, either expressed or implied, to exercise exclusive direction and control of the conduct of Miotti. That is to say, Miotti was bound to obey Murphy concerning the control, management, and operation of the auto truck, and the loading and unloading thereof. The evidence is also clear and without conflict that from the time Mowry accepted his contract he had the full and complete power of selecting and discharging the persons who might be engaged in assisting in the performance of the labor such as was being performed on the night that the accident occurred. Under these facts, Miotto was at said time and place pro hac vice the servant of Mowry. Boswell v. Laird, 8 Cal. 469, 489, 68 Am. Dec. 345; Du Pratt v. Lick, 38 Cal. 691, 692; Billig v. Southern Pacific Co., 189 Cal. 477, 483, 484, 209 P. 241; 39 C. J. 1274, § 1462. The respondent earnestly calls to our attention the fact that Miotti had on numerous occasions acted in the same capacity before the night of the accident. Thereupon respondent urges the contention that such fact would take this case out of the rule above stated; but the respondent cites no authority supporting that contention. As against the contention, it may be noted that in many cases the facts were that the general employer had, over an extended length of time, loaned the services of his employee to the special employer. Taylor v. Western Pacific R. R. Co., 45 Cal. 323, 334. Moreover, the evidence shows without conflict that neither the appellant nor any general agent of the appellant, prior to the accident, knew that Miotto or any other employee of the appellant was assisting Mowry or his representative. Under these facts, it cannot be claimed that the contract between the appellant and Mowry contained provisions different or additional to those testified to by Mr. Leech. Neither may it be claimed that the appellant had become bound to furnish Mowry an assistant as by estoppel. 39 C. J. 1287, § 1481.

Cannon v. Fargo, 222 N. Y. 321, 118 N. E. 796, differs in its facts, but states no contrary doctrine. In that case, the question arose as to what were the rights of the plaintiff who was called upon by an express messenger to help the messenger in transacting the defendant's business. While so helping, he was injured through the negligence of the messenger. He sued. The defendant claimed the accident was caused by the negligence of a fellow servant. The Supreme Court of New York said:

> "When the servant, therefore, as a fact, becomes the servant of another, subject to his direction and to his control, and working for his benefit, that other assumes the liability of master, and the employee falls into the fellow-servant class. * * * The plaintiff in this case was neither loaned nor hired to the express company, nor was he subject to the direction and orders of the express messenger."

See the two lines of authorities—servants loaned or hired, and servants not loaned or hired—as set forth in an extended note to Sherwood v. Warner, 7 Ann. Cas. 98, at page 100.

As the uncontradicted evidence shows that Miotto was not, at the time of the accident, transacting the business of the appellant as its employee, the verdict is not sustained by the evidence.

The judgment is reversed.

We concur: PRESTON, Presiding Justice pro tem.; NOURSE, J.

80 Cal. App. 208

DRISCOLL v. CALIFORNIA STREET CABLE R. CO. (Civ. 5538.) *

(District Court of Appeal, First District, Division 2, California. Dec. 10, 1926. Hearing Denied by Supreme Court Feb. 7, 1927.)

1. Street railroads 🔑110(1)—Demurrer to laborer's complaint for injuries by street car held properly overruled.

In action by laborer in street to recover for injuries from being struck by street car, demurrer both special and general *held* properly overruled.

2. Master and servant 🔑400—Nonjoinder of city as party plaintiff in street laborer's action against third person for injuries held not to deprive court of jurisdiction (Workmen's Compensation Act).

Nonjoinder of city as party plaintiff in action by city employee for injuries when struck by street car *held* not to deprive court of jurisdiction, notwithstanding Workmen's Compensation Act (St. 1913, p. 279, as amended).

3. Parties 🔑80(3)—Defect of parties plaintiff, if any, held waived by failure to raise question in answer.

Nonjoinder of city as party plaintiff in street laborer's action for injuries from street car, if required, *held* waived by failure to raise question in answer.

4. Master and servant 🔑398—Third person injuring workman held not entitled to complain of his failure to give notice to employer of bringing of action (Workmen's Compensation Act, § 26, as amended by St. 1917, p. 854).

In city laborer's action against street railroad for injuries, failure of plaintiff to give his employer notice, required by Workmen's Compensation Act, § 26, as amended by St. 1917, p. 854, *held* not matter of which defendant could complain.

5. Municipal corporations 🔑217(3)—Third person sued for injuring street laborer held not entitled to question his status under civil service regulations.

Street railroad company as defendant in action for injuries to street laborer *held* not entitled to raise question whether plaintiff was a duly appointed laborer under provision of civil service regulations.

6. Street railroads 🔑117(5)—Street railroad's negligence as to street laborer held for jury.

In laborer's action for injuries sustained when struck successively by street cars coming from opposite directions while working at edge of trench between tracks, evidence of negligence in operation of cars *held* for jury.

7. Street railroads 🔑117(19)—Contributory negligence of street laborer struck by street cars held for jury.

In laborer's action for injuries from being struck successively by street cars coming from opposite directions while working at edge of trench between car tracks, evidence *held* not to show plaintiff's contributory negligence as a matter of law.

8. Street railroads 🔑98(4)—Street laborer is not required to constantly watch for street cars.

Laborer in street is not required to maintain constant watch or look continually for approaching street cars.

9. Appeal and error 🔑1033(5)—Party cannot complain of instruction unduly favorable to him.

Defendant cannot complain of an instruction placing an undue burden on plaintiff.

10. Street railroads 🔑117(35)—Liability of street railroad under doctrine of last clear chance for street laborer's injuries held for jury.

In action for injuries to laborer struck successively by street cars coming from opposite directions while working at edge of trench between car tracks, evidence *held* sufficient to warrant submission of question of defendant's liability under last clear chance doctrine.

11. Damages 🔑132(1)—$15,000 for permanent injuries to 64 year old street laborer held not excessive.

$15,000 damages for permanent and severe injuries to 64 year old street laborer causing confinement in hospital for year less one week *held* not excessive.

12. Trial 🔑414—Motion to strike out testimony held waived, where both counsel, without waiting for ruling, admonished witness and proceeded.

Where counsel for both parties, without waiting for ruling on motion to strike out testimony, admonished witness and proceeded with examination, motion was waived.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by William Driscoll against the California Street Cable Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright, Wright & Stetson and J. J. Dunne, all of San Francisco, for appellant.

Edwin V. McKenzie, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for injuries alleged to have been sustained by a collision with the cars of the defendant corporation. A trial was had in the trial court before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff in the sum of $15,000, and the defendant has appealed, bringing up the judgment roll and a bill of exceptions.

For many years the defendant corporation has maintained and operated a cable street railroad on California street in San Francisco. It has a double set of tracks. On the north side of the street the cars are operated from the east toward the west and on the

---

* Hearing denied by Supreme Court.

southerly track the cars are operated from the west toward the east. On the 26th day of March, 1923, the plaintiff and others, as the employees of the municipal authorities, were engaged in excavating between the two sets of tracks for the purpose of removing an old sewer and installing a new one. On that day the excavation was being made in that portion of the street bounded on the east by Octavia and on the west by Laguna. The work had so far proceeded that the trench was 2½ feet wide and from the edge of the trench to the adjacent rail on each side was about 2½ feet. In some places the trench was 7 feet deep, in others 8 feet, and in some places 9 feet. As occasion required, cribbing was inserted to retain the walls. Some of the laborers in the bottom of the ditch were engaged in throwing soil with shovels from the bottom up to and upon the top edge of the bank on the southerly side. The plaintiff stood upon the top edge of the bank and was engaged in shoveling the same soil south of the southernmost rail. The accident happened during the morning of March 26, 1923. Immediately before the accident the plaintiff occupied the position above stated at a point, as testified to by one of the witnesses, about 100 feet from the west end of the ditch. He was facing toward the east. Several witnesses for the plaintiff testified that, at about the same time, one of the defendant's cars approached from the east and one approached from the west, and that no bell was sounded. One of the workmen called out "coming up"—when a car was coming or anything they always gave the warning "coming up" or "coming down." When this particular warning was sounded the west-bound car was very close to the plaintiff, as one witness said, it was "on top of him." At the point of the impact there is a grade in the street of 4 to 10 per cent. from Laguna toward Octavia. The west-bound car was coming up grade and the east-bound car was going down grade. The east-bound car was going pretty fast. It was traveling at the regular speed. There was nothing in the block to obstruct the view of the men from seeing the cars in front of them nor to obstruct the view of the car men from seeing the workmen laboring in the street. There was a flag displayed on the west end of the ditch—about 100 feet from the place where the plaintiff was injured. When the warning was given the plaintiff either stepped or was knocked to the north, then the west-bound car came along and knocked him back to about the center of the east-bound car, which was still moving at that time. The bottom step of the west-bound car struck the plaintiff on his leg below his knee. The plaintiff at all times had his back turned to the west until he was struck. When he was struck and knocked against he east-bound car he hit that car with his hands and, getting no handhold, he fell into the ditch and onto the old concrete pipe which the laborers were engaged in removing. There was testimony that the plaintiff was hit by each car, and also that he was hit by both cars. After the plaintiff had been hit both cars came to a standstill and at that time they were 20 feet apart.

As epitomized by M. W. Fitzhenry, one of the witnesses called by the plaintiff, the entire story of the accident may be told in a few words. The witness had been working in the bottom of the ditch and came up to get a cigarette. He said:

> "I came up out of the trench facing west, saw this car coming up behind Mr. Driscoll's back and only 5 feet away, and sang out 'coming up', and made a dart for the sand pile. When I darted for the sand pile I saw Mr. Driscoll shoot on the opposite. When I started for the sand pile I looked where I was going. I saw Mr. Driscoll, too; I was looking directly at him. He ran to the opposite, to the north. At that time the west-bound car was right on top of him."

The plaintiff and others had been working in the same place several days and knew that cars ran west on the north track and east on the south track and were operated frequently. Nothing to the contrary appearing in the record, we may assume that the motorman on each car was fully cognizant that the sewer work was being done between the tracks on California street in the block bounded by Octavia and Laguna. The motorman of the east-bound car was not called as a witness by either party and his absence was not accounted for.

The appellant has filed a brief containing 296 pages and which contains nearly as many points. Many of those points are but an endeavor to state one point either in different language or to show that the point was made in the proper manner and at the proper time. In what follows we concede at once that the appellant was diligent and made its points in the proper manner. To avoid extending this opinion to undue length, we have tried to pick up the essence of the contention made by the appellant and rule the point although perhaps we have not specifically and directly replied to every single argument made by the appellant.

[1] 1. The defendant interposed a demurrer to the plaintiff's complaint. The demurrer was overruled and the defendant assigns the ruling as error. The complaint was drawn along the same lines as the complaint in Stein v. United Railroads, 159 Cal. 368, 113 P. 663. The demurrer interposed in the instant case, like the demurrer interposed in the Stein Case, was both special and general. The trial court did not err in overruling it. Stein v. United Railroads, supra.

[2, 3] 2. In points made in the beginning of its brief and in attacks made on the refusal of the trial court to give defendant's requested instructions numbers 3, 4, 5, and 6, the appellant contends that the superior

court did not have jurisdiction and that the plaintiff failed to join the city and county as a party plaintiff. It bases this contention on the provisions of the Workmen's Compensation Act. Whatever merit there would have been in the point under earlier statutes, there is no merit in the point under said act as it stood when this action was commenced. Deering's General Laws, 1923, Act 4749, § 26; Van Zandt v. Sweet, 56 Cal. App. 164, 204 P. 860. Moreover, the nonjoinder of the city and county as a plaintiff was waived because the appellant in its answer did not raise the point. Tingley v. Times-Mirror, 151 Cal. 1, 89 P. 1097.

[4] 3. Under the provisions of section 26 of the Workmen's Compensation Act as amended in 1917 (St. 1917, P. 854), among other things, it is provided that when the employee or the employer commences such an action he shall forthwith notify the other party in writing. The appellant calls to our attention the fact that this action was commenced by the filing of the complaint on the 9th day of April, 1923, and that the notice in question was not given until the 2d of July, 1923. Thereupon the appellant contends that the plaintiff was not entitled to maintain the action. The provisions of section 26 of the act in question show two things: One, that the Workmen's Compensation Act was not to be construed as a limitation upon the right of an employee to commence an action against a third person; and, second, that the provision just referred to is a matter for the protection of the employee and employer which those two persons alone are entitled to invoke. Neither of those persons has made complaint. This defendant is not entitled to do so. Furthermore, even when the point is presented by the employer or employee it has been held that noncompliance with the provisions of the statute is merely ground for a continuance. Van Zandt v. Sweet, supra; Forrest v. Fink, 71 Cal. App. 34, 234 P. 860.

[5] 4. Civil service regulations have been adopted in San Francisco which cover such positions as that claimed to be held by the plaintiff. The appellant claims that the plaintiff made no showing that he was a duly appointed laborer under the provisions of the civil service, and therefore that he was not a legal employee. The first answer to the point is that no issue of the kind was made by the pleadings. Nothing to the contrary appearing, we must presume that he had been regularly employed. If he had not been that was a question between him and his employer; but we know of no authority that would authorize the appellant to raise the question. It cites none.

[6] 5. The appellant contends that the evidence does not establish the fact that the accident was proximately caused by the negligence of the defendant or either of the motormen. Assuming that the jurors believed the evidence cited above and drew such inferences from that evidence as they were entitled to draw, the contention cannot be upheld. Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 186 P. 800; O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809; Bauhofer v. Crawford, 16 Cal. App. 676, 117 P. 931. It is not contended that the appellant did not have the right to operate its cars in California street. It cannot be contended successfully that the municipality, and the respondent as one of its employees and agents, did not have the right to repair a sewer between the tracks. Whether at the time of the accident the defendant's cars were, in view of all of the facts, operated with ordinary care, was a question for the jury. We may not state that the evidence in the record did not support the implied finding that the cars were not operated with reasonable care.

[7] 6. The appellant asserts that the case made by the plaintiff affirmatively establishes the contributory negligence of the plaintiff. Additional evidence pertinent to this point is the following, which was given by the plaintiff on cross-examination:

> "The tracks at the place where the trench was being dug are perfectly straight and there was nothing at all to prevent me from glancing up and seeing a car approaching. You could see that car half a block away if you were attentive and on the lookout. If I saw the west-bound car, there was nothing to prevent me stepping out of the way to the north. As cars approached they generally rang a bell; but I claim on this particular occasion I heard no bell ring. As cars approached you could hear a rumbling noise. I was pretty well occupied with my work there, and paying attention to it, and very likely did not pay attention to it; my mind was fixed on my work. Just before the accident my back was toward the west. I would not be sure that, just before I got injured, that I looked behind. While at work in that way *I kept a lookout for passing cars generally all the time.* At the time I got hurt it seems I didn't. I didn't see anything at all.
>
> "When the cars would come along there and a gong would be rung for example—some indication given that the cars were approaching—the men who were at work in and about the trench got out of the way promptly all of the time. It was an established practice of these men that as the car approached they got out of the way promptly and allowed the cars to pass on. I remember about hearing some warning just before I got struck, but I was struck just like that at the same time."

In making this point appellant cites the cases involving the rights, duties, and liabilities of ordinary pedestrians in the streets. However, it is quite clear that the plaintiff was at the time of the accident lawfully engaged in the performance of the duties of his master, the municipality, and that the performance of such duties required him to be where he was and necessarily limited his ability to guard and protect himself in the same manner and to the same extent that an ordinary pedestrian could guard and protect himself. In so far as the plaintiff could properly guard and protect himself and at the same time perform the duties he was employed by his master to perform, it may not be said as a matter of law that he omitted to exercise every care he could reasonably be called upon to exercise. Such is the general rule. King v. Green, 7 Cal. App. 473, 94 P. 777; State Compensation Insurance Fund v. Scamell (Cal. App.) 238 P. 780; 18 Am. & Eng. Ency. of Law, 586; 36 Cyc. 1530; I Thompson on Negligence, § 1302; 2 Thompson on Negligence, § 1463; O'Donnell v. Lange, 162 Mich. 654, 127 N. W. 691, Ann. Cas. 1912A, p. 847, and notes. As to street railroad companies, the same rule has not been applied in all jurisdictions. In Lewis v. Binghamton R. Co., 35 App. Div. 12, 14, 54 N. Y. S. 452, 453, the court said:

> "The question, therefore, seems to be narrowed down to this: Whether paintiff's omission to look out for the car, after he began the work of emptying his bucket into the cracks, should be considered negligence on his part. He swears he did not hear it approaching, nor see it, nor know that it was near him, until he was struck. Of course, if he had looked for a car at any time while it was coming that 1,500 feet, he could have seen and easily avoided it. But, under the circumstances, was the omission to so look negligence? The measure of his duty in that respect was quite different from that of a pedestrian. Ominger v. Railroad Co., 4 Hun, 159; Noonan v. Railroad Co. [62 Hun, 618] 16 N. Y. S. 678, affirmed 131 N. Y. 594, 30 N. E. 67; Smith v. Bailey, 14 App. Div. 283, 43 N. Y. S. 856. His work detained him on the track, and demanded his attention while there. The evidence shows that the tar had to be poured into the cracks while very hot, and therefore not much delay was allowed after bringing it from the vat; that plaintiff had to get his head down to about two feet from the track, and watch the tar, so it would enter the crack, and not overflow. Whether, under such circumstances, plaintiff was negligent in not keeping a better lookout for the car, was left to the jury. They have said that he was not, and I do not think we can say that, as a matter of law, he was negligent."

Speaking of the facts involved in an accident caused by a street car hitting a laborer who was doing track work in the street for another railroad company, the Supreme Court of Oregon, in Graves v. Portland Ry., Light & Power Co., 66 Or. 232, 243, 134 P. 1, 4 (Ann. Cas. 1915B, 500), said:

> "Another point urged for the reversal was the giving to the jury of the following instructions: 'One who is engaged in a public work as a street sweeper, where he must in the nature of things work near the track, is not required to exercise that high degree of care which would be exercised by an ordinary street pedestrian.' This was a concise and proper rule for the guidance of the jury in this case. It must occur to a reasonable mind that in this age of strenuous endeavor, in order to do efficient work and to scant not the measure thereof, the individual toiler must pursue his employment sometimes to the utter engrossment of his faculties, and, realizing the present necessity of concentration, the courts of modern thought have announced the rule that those persons engaged in work upon the public streets are not called upon to exercise the same diligence in avoiding accidents as pedestrians who use the street merely as a medium of locomotion. McGrath v. Metropolitan R. R. Co., 47 Misc. Rep. 104, 93 N. Y. S. 519; O'Connor v. Union R. R. Co., 67 App. Div. 99, 73 N. Y. S. 606; Dipaolo v. Third Avenue R. R. Co., 55 App. Div. 566, 67 N. Y. S. 421; 2 Thompson on Negligence, § 1463; Davies v. People's R. R. Co., 67 Mo. App. 598."

In Dinan v. Chicago & M. Electric Ry. Co., 164 Wis. 295, 159 N. W. 944, the Supreme Court of Wisconsin stated the record and its opinion on the facts as follows:

> "Upon this subject the court charged in substance that it is the duty of the ordinary traveler on a street to keep a vigilant lookout for approaching cars, but that where a person is lawfully performing work upon the street and the tracks of the street railway company with its knowledge, consent, or procurement, the relationship is different, and that such a person is not required to keep the same lookout as the traveler who unnecessarily drives along the track, but may assume that the warnings and precautions customarily used by the company will be given. * * * A man who is engaged in work upon the highway cannot, if he performs his duty, spend a large part of his time in looking for the approach of street cars or other vehicles. In a busy street he would accomplish little if he did so. Of course, he cannot let his thoughts go woolgathering and expect all users of the highway to give place to him; he must exercise some vigilance; he must keep that lookout for vehicles and cars which an ordinarily careful man similarly situated would keep, a man who is compelled to be in the street and to be giving attention to his work. Such care must manifestly be a lesser degree than the care required of a person who is on the highway for the purpose of travel alone, and may come and go at will. This court has affirmed the principle in Turtenwald v. W. L. I. & C. Co., 121 Wis. 65, 98 N. W. 948, and other courts have adopted the same rule. Graves v. Portland R., L. & P. Co., 66 Or. 232, 134 P. 1, Ann. Cas. 1915B, 500; Lewis v. Binghamton R. Co., 35 App. Div. 12, 54 N. Y. S. 452. See 2 Thompson's Com. on Negligence, § 1463. There are decisions which seem to favor a contrary doctrine, but we decline to follow them."

In California the question has not been presented to the courts as directly as in the above cases. However, an examination discloses that the rule in California is the same. O'Connor v. United Railroads, supra, is authority directly in point that the respondent in the instant case was not, under the facts, bound to be constantly looking behind him for an approaching car. In Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 P. 738, 903, a very similar set of facts was in volved. On the issue of contributory negligence the court did not directly express itself; however, it held that under the doctrine of the last clear chance the case should have gone to the jury.

In the case of Egan v. Southern Pacific Co., 15 Cal. App. 766, 115 P. 939, the plaintiff was a laborer employed in working on the tracks of the defendant. Speaking of the plaintiff's rights, at page 770 (115 P. 940) the court said:

> "Plaintiff, being rightfully upon the track and in the performance of a duty enjoined upon him by the defendant in the exercise of an employment upon said track, had a right to assume that the train would not be backed down upon him without warning, and it should not be said that he contributed to his own injury in the doing of that which his employment required that he should do."

In the case of Milosevich v. Pacific Electric Ry. Co., 68 Cal. App. 662, 230 P. 15, the plaintiff was a laborer employed by the Los Angeles Gas & Electric Corporation in laying pipe alongside of the defendant's railroad. It was claimed that he was guilty of contributory negligence. On page 672 (230 P. 19) the court said:

> "The evidence showed without contradiction that the deceased, at the time he was struck by the car, was facing the opposite direction from which the car was approaching. Being a workman whose duty required him to be on the street, he was not required to look continually for the approach of a car. 25 R. C. L. 1287; King v. Green, 7 Cal. App. 473 [94 P. 777]."

[8] 7. The appellant complains because the trial court refused to give its requested instructions, but we do not find that any error was committed. Several of the instructions involved the theory as to the appellant's rights weighed in the light of the Workmen's Compensation Act. Those rights have been treated by us elsewhere in this opinion. The appellant contended that it owed the plaintiff no duty excepting not to willfully or wantonly injure him. That contention was carried into some of the requested instructions. The appellant also claimed that it was the duty of the plaintiff to maintain a constant watch, to be on the alert, to exercise vigilance. It has been held that a person in the plaintiff's position was not required to look *continually* for the approach of a car. See Milosevich v. Pacific Electric Ry. Co., supra, and other cases cited under subdivision 6. The expressions used by the appellant are stronger words, and therefore they are more objectionable. Several of the requested instructions contained a set of facts not to be found in the record. Every sound legal proposition contained in any requested instruction which was pertinent to the facts contained in the record was fully covered by instructions which were given.

[9] 8. The trial court thereafter instructed the jury by giving 48 instructions. The appellant makes objection to many of them. We have carefully examined the record. Except as to instruction 16, the objections are without merit. As to instruction 16, it is claimed that it violates the rule in Boa v. San Francisco-Oakland Terminal Rys., 182 Cal. 93, 103–105, 187 P. 2, in other words, that it placed an undue burden on the *defendant;* whereas, an examination of instruction 16 discloses that it placed an undue burden on the *plaintiff.* It is patent, therefore, that the appellant may not complain.

[10] 9. The trial court gave two instructions on the last clear chance doctrine. The appellant claims they did not correctly state the law, and, furthermore, that said doctrine was not applicable to the facts of this case. As to the first contention, the appellant claims that the instructions violated the rule stated in Herbert v. Southern Pacific Co., 121 Cal. 227, 232, 53 P. 651. We have carefully read the instructions and we must hold that they did not conflict with the rule as stated in the Herbert Case.

Taking up the second part of the contention made by the appellant, it will be noted the appellant was operating both cars. Clifford, the motorman on the west-bound car, testified to facts showing that he saw the plaintiff in time to stop his car and that he rang his bell, continued to ring it, slowed down his car, and stopped the car. The motorman on the other car was not called as a witness. As to what he actually saw the evidence does not inform us. Now, if there had been no other car involved in the accident, except Clifford's car, it is clear that the case as made would have been a proper one in which to instruct on the last clear chance doctrine. Kramm v. Stockton Electric R. R. Co., supra. As another car happened to be involved and another motorman happened to be involved, such facts did not operate to remove from the case the last clear chance doctrine. The fact that Clifford said he stopped his car did not compel the jury to accept the statement as true. If Clifford saw the plaintiff, he must also have seen the other car. If he did, he must have realized that the plaintiff was about to be placed in the position of standing in between two cars going in opposite directions, and that there would be nothing for him to stand on, as that space was an open ditch, and that the plaintiff was in grave danger. The facts which we have recited show that the case was one in which it was not improper to instruct on the doctrine of the last clear chance.

[11] 10. The appellant claims that the judgment herein should be reversed for the reason that said verdict is grossly excessive. Before proceeding further with a discussion of the point, it should be stated that after the accident, on the same day, the plaintiff

was taken to the San Francisco Hospital; that he remained an inmate of the hospital one year, less one week. At the time he entered the hospital he had various contusions about the head and shoulders, and was suffering from traumatic pleurisy, and was under a great shock, and appeared to have an injury to his back and certain broken bones. Later X-rays were taken and with the aid of those rays it was ascertained that the fourth rib had a fracture throughout the bone. The fifth rib had a fracture. It also appears that the patient was suffering from a fracture and dislocation of the right elbow and a fracture of the shoulder blade. The injuries above mentioned caused the patient to go into pneumonia. Still later fatty degeneration developed and there was testimony to the effect that it would be progressive and was caused by the injury which the patient had received. At the time of the trial it was stated that the injured elbow had about 60 per cent. of a normal movement; that the patient was 64 years of age and had an expectancy of 11.68 years. While an inmate of the hospital the plaintiff received no wages, but incurred hospital expenses in the total sum of $1,372. At the time the plaintiff entered the hospital he was in a semiconscious condition and was suffering great pain. That pain decreased as his wounds and broken bones gradually healed. The jury returned a verdict in the sum of $15,000. Upon this appeal the decisions of the trial court and the jury on the subject of the amount cannot be set aside, unless the verdict is so plainly and outrageously excessive as to suggest at the first blush passion, or prejudice, or corruption on the part of the jury. Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83. We are quite unable to state that the facts in the instant case show that the verdict was excessive as that expression is defined in the case cited.

[12] 11. The appellant assigns certain rulings of the trial court made during the trial as errors. An examination of the record discloses not only that there was no reversible error, but in every instance except the first assignment the ruling was clearly correct. As to the first assignment, there was no ruling at all. Appellant's attorney made a motion to strike out, but, without giving the trial court an opportunity to rule on the motion, the attorney for the plaintiff admonished the witness, immediately thereafter the attorney for the appellant admonished him, and immediately thereafter he proceeded with the examination. The motion as made was waived.

We find no error in the record. The judgment is affirmed.

We concur: PRESTON, Presiding Justice pro tem.; NOURSE, J.

79 Cal. App. 413

PEOPLE v. SCHMIDT. (Cr. 2963.)

(Supreme Court of California. Nov. 26, 1926.)

1. Witnesses 🔑372(2)—State witness' testimony that he was enemy of any one who was not straight, and that defendant was not straight held improper.

State witness' answer to question, on cross-examination, as to whether he was an enemy of defendant, that "I am an enemy to anybody who is not straight, and he is not straight," was improper, and should have been stricken out by court and jury admonished to disregard it.

2. Criminal law 🔑1186(4)—Refusal to strike state witness' testimony that he was defendant's enemy because he was not straight held not reversible error (Const. art. 6, § 4½).

Refusal to strike out answer of state witness to question, on cross-examination, as to whether he was an enemy of defendant, that "I am an enemy of anybody who is not straight, and he is not straight," *held* not reversible error, especially in view of Const. art. 6, § 4½.

In Bank.

Petition by Oscar Schmidt for a hearing by the Supreme Court after affirmance of his conviction of obtaining money by false pretenses by the Court of Appeal (249 P. 832). Petition denied.

PER CURIAM. **[1, 2]** In denying the petition for a hearing in this case, we do not wish to be understood as approving the action of the trial court in refusing to strike out the answer of the witness Hurley to the question put to him on cross-examination, as to whether he was not an enemy of the appellant. The answer of the witness was improper, and should have been stricken out by the court and the jury admonished to disregard it. Under all of the circumstances of this case, however, we are not prepared to hold that this error was sufficiently grave to entitle appellant to a reversal of the judgment, particularly when we consider it in connection with section 4½, art. 6, of the Constitution.

---

79 Cal. App. 759

WESTINGHOUSE ELECTRIC & MFG. CO. v. JUSTICES' COURT OF CORCORAN TP. IN AND FOR KINGS COUNTY et al. (Civ. 5455.)

(District Court of Appeal, Second District, Division 2, California. Nov. 23, 1926.)

1. Justices of the peace 🔑81(1)—Service of summons from justice court outside county, in case not authorized by statute, held void (Code Civ. Proc. § 848).

Service of summons from justice court outside of county on agent for service of corporation, in action not falling within exceptions noted in Code Civ. Proc. § 848, wherein summons may be served outside county, *held* void.

2. Prohibition 🔑3(2)—Prohibition will not lie, where lack of jurisdiction is as to subject-matter; appeal being adequate remedy.

Prohibition will not lie, where the lack of jurisdiction is as to the subject-matter, since there is adequate remedy at law by appeal.

3. Prohibition 🔑10(1)—Prohibition will lie, where lack of jurisdiction is as to the person.

Where lack of jurisdiction is as to the person, prohibition will lie, since by pleading defendant submits to jurisdiction and by defaulting he is precluded from appealing on the merits.

Application by the Westinghouse Electric & Manufacturing Company for writ of prohibition to be directed to the Justices' Court of Corcoran Township, in and for the County of Kings, and the Justice thereof, commanding said Justices' Court to desist from further proceedings in an action pending in that Township. Peremptory writ granted.

Bordwell, Mathews & Wadsworth, of Los Angeles, and Livingston & Livingston, of San Francisco, for petitioner.

THOMPSON, J. [1] This action is submitted upon the petition for the writ of prohibition and the brief in behalf of petitioner; there having been no appearance for the respondent. From the petition it appears that an action was commenced in the respondent court by Otto E. Koepke and Harry Koepke, copartners doing business under the name and style of Corcoran Electric Company, against the petitioner herein, to recover the sum of $299.99 as damages. And it also appears that the summons in the action was attempted to be served upon Carl Heise, in the city and county of San Francisco; he being the designated agent and person upon whom process might be served, and that the action is not one falling within any of the exceptions noted in section 848 of the Code of Civil Procedure wherein the summons may be served outside of the county in which the court is situated. The petition further recites that a motion was made to quash the service of summons on the ground that the same was void under that section, but that petitioner's motion was denied and the justices' court of Corcoran township, county of Kings, will, unless prohibited, proceed in the action.

Under this state of facts the service of summons outside of Kings county was void, so that the sole question presented here is as to whether or not prohibition will lie to restrain the justices' court from exercising jurisdiction over the person of the petitioner, when, in fact, jurisdiction has not been legally acquired.

[2] We think it is the rule that, where the lack of jurisdiction is as to the subject-matter of the action, prohibition will not lie, for the reason that there is an adequate remedy at law by an appeal. To that effect are Hamberger v. Police Court, 12 Cal. App. 153, 106 P. 894, 107 P. 614, and Simpson v. Police Court, 160 Cal. 530, 117 P. 553.

In the case of Burge v. Justices' Court, 11 Cal. App. 213, 104 P. 581, service of the summons was outside of the county, but no motion was made in the justices' court to quash the service of summons, which differentiates that case from the present one.

In McDonald v. Agnew, 122 Cal. 448, 55 P. 125, while there is language used therein indicating that the defendant has an adequate remedy at law by an appeal, nevertheless, the real ground of the decision in that case is that the defendant demurred to the complaint after his motion to quash was denied, and, by demurring, submitted himself to the jurisdiction of the court. Therefore McDonald v. Agnew is of no assistance.

Germain Seed Co. v. Justices' Court, 41 Cal. App. 397, 182 P. 784, basing its opinion upon the cases mentioned herein, holds that mere want of jurisdiction will not justify the issuance of a writ of prohibition. As we have seen, however, these cases are not authority for that proposition where the lack of jurisdiction is of the person of the defendant.

As was said in McDonald v. Agnew, supra, and reaffirmed in Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 164 P. 792, if a demurrer or answer is interposed by the defendant, he submits himself to the jurisdiction and can no longer complain of the lack of jurisdiction. If, on the other hand, he does not submit to the jurisdiction, but permits judgment to go against him by default, he is precluded from appealing on the merits of the case; he having been foreclosed of his right to a trial de novo by his default. Lugo v. Superior Court, 55 Cal. App. 561, 203 P. 812; Wood v. Superior Court (Cal. App.) 248 P. 784.

[3] It is apparent, therefore, that if prohibition will not lie in this case, the petitioner here must waive either the lack of jurisdiction and submit to the jurisdiction of the court, or stand upon the defense of lack of jurisdiction and waive the defense on the merits. We do not think that the rule requires the petitioner to do either. We have examined the record in the case of Germain Seed Co. v. Justices' Court, supra, and find that the distinction between lack of jurisdiction of the subject-matter and lack of jurisdiction of the person was not called to the attention of the court, and we feel constrained to hold that, where, as here, lack of jurisdiction is as to the person, prohibition will lie.

Peremptory writ will issue.

We concur: WORKS, P. J.; CRAIG, J.

79 Cal. App. 748

SIEM v. COOPER. (Civ. 2930.)

(District Court of Appeal, Third District, California. Nov. 22, 1926.)

1. Vendor and purchaser 🔑302—Vendor may under contract declare whole purchase price due and institute action for balance on default in payment of installment.

Vendor may, at his election, in event of purchaser's default in payment of any installment of purchase price, declare whole purchase price due and payable, and institute action for balance remaining unpaid, where such procedure is provided for in contract.

2. Pleading 🔑87—Purchaser may allege mutual mistake in contract in answer without first denying its execution in form and effect averred by vendor.

Answer in action to recover balance on contract to sell land may properly allege mutual mistake of parties and mistake of scrivener in drawing contract, in providing for vendor's remedy in case of default in payments, without first denying execution of contract in form and effect averred by plaintiff.

3. Reformation of instruments 🔑45(3)—Evidence held to show mutual mistake in inserting in land contract provision allowing suit for balance of purchase price upon default in paying installment so as to justify reformation.

Evidence *held* to support finding of mutual mistake in inserting in contract for sale of real property provision that in event of purchaser's default in paying installments on purchase price, balance might be declared due and payable and action instituted therefor, so as to justify reformation of contract.

4. Reformation of instruments 🔑45(1)—Testimony justifying reformation of written instrument must be clear and convincing.

Testimony must be clear and convincing in order to justify reformation of written instrument.

5. Reformation of instruments 🔑46—Sufficiency of evidence justifying reformation of land contract held question of fact.

Sufficiency of evidence tending to justify reformation of written contract for sale of land *held* to be one of fact to be determined primarily by trial court.

6. Appeal and error 🔑1009(3)—Where evidence supporting judgment reforming land contract would make prima facie case, conflicting evidence will not authorize reversal.

Where evidence tending to justify reformation of contract for sale of land would make out prima facie case if standing alone without contradiction, judgment granting relief will not be reversed because there was contradictory evidence.

7. Reformation of instruments 🔑25—Purchaser's failure to read land contract held not to preclude reformation for mutual mistake.

Purchaser's failure to read contract under which he bought land *held* not to preclude reformation thereof for mutual mistake, since such failure may be explained by testimony.

8. Reformation of instruments 🔑19(1)—Mutual mistake will justify reformation of land contract without showing of actual injury.

Showing of actual injury is not required to obtain reformation of contract for sale of land, where there was mutual mistake as to material part of agreement.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by E. W. Siem against Cora A. Cooper. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. N. Graybiel, of Turlock, for appellant.

Samuel V. Cornell, of Turlock, for respondent.

PLUMMER, J. Action by plaintiff to recover balance alleged to be due on account of the purchase price of 40 acres of land situate in the county of Stanislaus. Defendant had judgment, and the plaintiff appeals and alleges as grounds for reversal that the court erred in overruling plaintiff's demurrer to defendant's cross-complaint, in not granting plaintiff's motion for judgment upon the pleadings, and that the testimony does not support the findings of the court. The action was begun by the administrator of the estate of F. W. N. Siem, deceased, and the complaint, after setting forth the usual allegations as to the appointment of plaintiff as administrator, sets forth the following: That on or about the 23d day of March, 1921, said F. W. N. Siem entered into a contract in writing with said defendant for the purchase of a certain tract of land, a copy of which contract is attached to the complaint and made a part thereof; that the sum of $500 had been paid on account of the principal sum agreed to be paid by said agreement; that a certain payment due on the 23d day of March, 1923, had not been paid; and that the whole contract had been declared due and payable by reason of the default of defendant to make the installment payment just referred to; that the amount still due on said contract was the sum of $3,000 and interest thereon at the rate of 6 per cent. per annum from the 23d day of March, 1922. The contract provides that upon making the payments set forth in the agreement, then and in that case, the party of the first part will execute and deliver to the party of the second part therein a good and sufficient deed of conveyance, transferring to said party of the second part the premises mentioned, free from any lien or incumbrance, etc., and then contains the following paragraph:

"It is agreed that time is of the essence of this agreement, and that in the event of the failure of the party of the second part to make the payments herein before mentioned, or any part thereof, or to perform any of the covenants herein contained, then the party of the first part shall be released from all obligation in law or in equity to convey said property and the party of the second part shall forfeit all right thereto and all moneys theretofore paid hereunder shall be treated as liquidated damages for the nonfulfillment of this agreement."

The answer of the defendant contains no denials as to any of the allegations of the complaint, but sets up by way of defense that by mutual mistake of the parties and mistake of the scrivener, the written contract as set forth in plaintiff's complaint does not truly exhibit the actual agreement of the parties thereto, in that it was intended by said contract so to provide and specify that, in the event of a default being made by the defendant in the payment of any sum specified in said contract, the sole and exclusive remedy of the said Siem, his successors and assigns, would be to declare a forfeiture of the sums of money already paid by the defendant, and not to give any action for specific performance, and that when the written agreement set forth in plaintiff's complaint was prepared for signature, neither of the parties observed that the contract as written provided that, in event of default, the balance of the contract might be declared due and payable and action instituted therefor.

[1] The law seems to be well settled that, under a contract such as appears in the writing attached to the plaintiff's complaint, the vendor may at his election, in the event of default in the payment of any installment, as provided for, declare the whole purchase price due and payable and institute action for the balance thereof remaining unpaid. Smith v. Mohn, 87 Cal. 489, 25 P. 696; Reed v. Hickey, 13 Cal. App. 136, 109 P. 38.

[2] Did the court err in overruling plaintiff's demurrer to the defendant's answer and in denying plaintiff's motion for judgment on the pleadings? This involves simply a question of procedure. While the usual form of pleading adopted by practitioners is to first deny the execution of the contract in the form and effect averred by the plaintiff and then set up the equitable matters relied upon as a defense and the facts upon which the defendant asks for a reformation of the writing in order that it may truly express the terms of the contract upon which there was a meeting of the minds of the parties entering into and executing the same, as appears in the case of California Packing Corporation v. Larsen, 187 Cal. 610, 203 P. 102, this, however, is not absolutely necessary. We find first a general statement of the law in 23 R. C. L. 356, as follows:

> "The relief may be granted whether the grounds therefor are set up affirmatively by bill or as a defense. The defense of reformation may be pleaded to all such bills in equity as a bill for specific performance, to set aside a deed, for an injunction, or to foreclose a mortgage. Under the reformed procedure, the defense may be pleaded to actions at law as well as to actions of an equitable nature."

And, also, as set forth in 34 Cyc. 978:

> "On proper averments mistake may be set up by way of defense and reformation of the instrument may be asked in the plea or answer."

The foregoing quotations relate only to substantive law and not to forms of pleading, but the identical question involved here as to the sufficiency of the defendant's answer and the form of pleading has been decided adversely to the appellant's contention in the case of McColgan v. Muirland, 2 Cal. App. 6, 82 P. 1113. We quote from that opinion:

> "The defendants answered, and in their answer, as a defense only, alleged in substance" * * * (Here follows all the matters constituting the equitable defense to the plaintiff's action.)

A demurrer to the defendant's answer was sustained by the trial court and reversed by the District Court of Appeal. The opinion in that case is quite lengthy, and shows that the form of pleading there adopted and identically followed in this case to be sufficient to tender the question of a defense to actions of this kind involving mutual mistake in the execution of a writing and relief sought by way of reformation.

[3] Are the findings supported by the testimony? The transcript shows that Mr. Siem and Mrs. Cooper signed two instruments in writing relating to the purchase of the 40 acres in question; the first writing was a simple optional agreement, by the terms of which the defendant was simply given the option to buy the land for a certain sum of money within a definite period of time, making installment payments during that period; that some question arose as to the certainty of the time when the installment payments were to be made; and that the writing first signed by the respective parties was taken to an attorney's office, where it appears to have been redrafted, was brought back to the office of the broker who was making the sale of the land for Mr. Siem, and then signed by Mr. Siem and Mrs. Cooper. The agent named Baldwin, who had charge of the sale of the property for Mr. Siem, testified that the selling price of the 40 acres was advanced in the sum of $500 on account of the merely optional form of the contract. His testimony on this subject is, that he was the agent for Mr. Siem in finding a buyer for the land; that Mr. Siem at first refused to sell the property on an optional contract; that he would let Mrs. Cooper have the property if she would take a deed of the property and give him a mortgage back. "I told him that Mrs. Coo-

per said she would not buy it in any way except on an optional contract." Mr. Baldwin then testified that he drew up a contract of that kind, which was signed by the parties; that this contract was taken to an attorney's office for inspection on account of some question as to the definiteness of the dates of the installment payments; that the witness went to the office of the attorney and got the second contract and brought it back to his office for the parties to sign a short time after the signing of the first written instrument. At that time, in the presence of Mr. Siem and Mrs. Cooper, upon inquiry made by Mrs. Cooper, the witness stated that the wording of the first contract had not been changed. The testimony of the witness in this particular is as follows:

> "She (referring to Mrs. Cooper) said: 'Now, I am depending on you to know that this is according to the agreement between Mr. Siem and myself in your office here, that this is an optional contract.' She (Mrs. Cooper) said: 'Has the wording been changed in any way?' I said: 'It is the same; with the exception of the wording in regard to the date of the payment here I believe it is just the same.'"

The testimony indicates that the second writing was then signed without having been read by the defendant. Mr. Baldwin further testified with regard to the terms of the original contract as follows:

> "Mr. Siem and I went over there—he was in my office at different times for three days before he would agree to sell the property that way, and that was the fair and square agreement in my office between Mr. Siem and Mrs. Cooper and myself. He was to let her have this property on an optional contract, and I sold the property for him for $500 more than it was listed for on these terms, and he said that he would take a chance on it in that way."

The testimony of Mrs. Cooper is to the same effect. Her testimony is that she carefully read the written instrument drawn by Mr. Baldwin; that such writing was simply an optional contract and provides only for a forfeiture of the moneys which she might have paid thereon in the event of a failure to complete the contract; that when the second writing was brought back from the attorney's office by Mr. Baldwin, to his office, she was informed in the presence of Mr. Siem that there was no change except as to the dates; that they both then signed the contract.

This, in substance, is the summary of the evidence upon which the court found that there had been a mutual mistake and that the defendant was entitled to a reformation of the instrument so as to correctly express the agreement of the parties. Further testimony was given by the witnesses to which we have referred along the same line, but we think the foregoing summary sufficient.

[4-6] The law requires that the testimony justifying reformation of written instruments must be clear and convincing. The question of the sufficiency of the evidence, however, is one of fact to be determined primarily by the trial court, and where the evidence, if standing alone without contradiction, would make out a prima facie case, an appellate court will not, because of contradictory evidence, reverse the judgment granting relief. 22 Cal. Jur. pp. 742, 743, § 24.

[7] We have not found any really contradictory evidence in the instant case. It is true that the attorney to whose office the first agreement was taken for inspection is of the opinion that he did not write the second agreement and that no second instrument was drafted in his office, and while such testimony may in one sense be deemed contradictory evidence, we think the trial court was fully justified in coming to the conclusion that such testimony did not in any way weigh against the verity, clearness, and convincing character of the evidence which we have just herein set forth, nor is the fact that the defendant failed to read the second instrument sufficient to preclude the trial court from granting relief. Such failure is an act to be explained, and where the testimony sufficiently explains such failure, it is removed from the case just as other acts of failure might be removed. 22 Cal. Jur. 726, § 14.

[8] The reason why the second instrument was not read by the parties signing the same appears to be satisfactorily explained by the testimony of the agent of the vendor, who had charge of the instrument and was negotiating the sale of the property, this testimony being to the effect that the second instrument was identical in terms with the first. The mistake as found by the trial court being of a material part of the agreement or transaction, relief does not depend upon a showing of actual injury. 22 Cal. Jur. 718, § 9, and the cases there cited.

Some minor reasons have been urged for reversal, but they are not of sufficient importance to require discussion thereof. We may also add that the cases cited by appellant are not reviewed herein because they are considered inapplicable.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J., THOMPSON, Justice pro tem.

79 Cal. App. 723

MURACO v. DON. (Civ. 3172.)

(District Court of Appeal, Third District, California. Nov. 22, 1926.)

1. Fraud 🔑41—Complaint for damages for false representations of seller of business held to state cause of action.

Complaint for damages for false representations made by seller of shoe repairing business, who agreed to sell good will and not to enter same business, *held* to state cause of action.

2. Pleading 🔑208—Demurrer to complaint on grounds of ambiguity and unintelligibility must point out ambiguous and unintelligible portions.

Demurrer to complaint on grounds of ambiguity and unintelligibility will be overruled, where it does not point out ambiguous and unintelligible portions of complaint.

3. Pleading 🔑129(1)—Allegations of verified complaint, not controverted by specific denials in answer, held taken as true, where defect was not waived (Code Civ. Proc. § 437, subd. 2, and section 462).

Allegations of verified complaint, in action for false representations by seller of shoe repairing business, not controverted by specific denials in answer, *held* taken as true, where plaintiff did not waive defect, but objected to controverting evidence on ground that allegations were admitted, in view of Code Civ. Proc. § 437, subd. 2, and section 462.

4. Fraud 🔑66—Finding value of business sold was less than amount paid held insufficient to support judgment for damages.

In action for false representations by seller of shoe repairing business, finding that actual value of such business was less than amount paid *held* not of itself sufficient to support judgment for damages.

5. Appeal and error 🔑1071(1)—Defect in finding that value of business sold was less than amount paid held immaterial, where judgment for buyer was based on seller's failure to comply with certain promises.

In action for false representations by seller of shoe repairing business, that finding that value of business was less than amount paid would not support judgment *held* immaterial, where judgment for plaintiff was based on defendant's failure to comply with certain promises constituting part of consideration for purchase of business.

6. Good will 🔑7—Finding seller of business impaired good will held to support judgment for buyer.

In action for false representations by seller of shoe repairing business, finding, supported by evidence and admissions, that defendant impaired good will of business, contrary to agreement, and diverted repair work from shop sold, and that weekly receipts of business were less than defendant had represented, *held* to sustain judgment for plaintiff of $500.

7. Pleading 🔑377—Trial 🔑397(1)—Finding and proof as to damages admitted by pleading held unnecessary.

Where damages were admitted by pleadings, in that defendant failed to specifically deny allegations of verified complaint, finding as to such damages, and proof thereof, is unnecessary.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Joseph Muraco against H. Don. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Wright, of Visalia, and H. C. Cross, of Tulare, for appellant.

Feemster & Cleary, of Visalia, for respondent.

PLUMMER, J. Plaintiff had judgment for the sum of $500, from which judgment the defendant appeals and assigns three grounds for reversal, to wit: That the court erred in overruling the defendant's demurrer to the plaintiff's complaint; that the evidence is insufficient to support the findings; and that the findings do not support the judgment.

The complaint alleges that on or about the 19th day of February, 1923, the defendant was the owner of a certain shoe repairing business in the city of Visalia; that the defendant, for the purpose of inducing the plaintiff to purchase said shoe repairing business and the machinery connected therewith, falsely and fraudulently represented to the plaintiff that the weekly income of said business had, for a long time prior to said date, been not less than the sum of $200 per week, and that said business was worth the sum of $3,000; that if the plaintiff would purchase said business the defendant would convey to the plaintiff said business and the good will thereof and would not re-enter the shoe repairing business in the city of Visalia while the plaintiff continued to operate said shoe repairing shop and conduct said business.

It is further alleged in the complaint that the statements and representations made by the defendant to the plaintiff were fraudulent and false, known to be such by the defendant, and made by the defendant to the plaintiff for the express purpose of inducing the plaintiff to purchase the same for the sum of $3,000. It is further alleged in the complaint that said business was not worth the sum of $3,000 and was of the actual value of a sum not exceeding $1,500. It is further alleged that the weekly receipts of said business received by the defendant prior to the sale thereof to the plaintiff had not been the sum of $200 per week and that after the date of the sale of said business and transfer of same by the defendant to the plaintiff the weekly income thereof was about the sum of $70.40.

It is further alleged in the complaint that, had said business been as represented by the defendant, it would have been worth the sum of $4,000. The complaint in paragraphs 6, 7, and 8 sets forth the execution of a bill of sale and that at all times the defendant intended to retain for himself the good will of said business and intended to re-enter and continue said shoe repairing business in the city of Visalia; that said representations and agreements to convey the good will of said business and not to re-enter the same were false and fraudulent, etc.; that, after the execution of the bill of sale referred to in which the defendant purported to convey the good will of said business to the plaintiff and in which the said defendant agreed not to re-enter the shoe repairing business in the city of Visalia so long as the plaintiff continued in the shop transferred to the plaintiff, the defendant did continue in said business; that prior to the sale of said business and transfer of the same to the plaintiff a large number of the established customers of said shoe repairing shop were in the habit of leaving and did leave shoes to be repaired at a certain shoe store in the city of Visalia then and there conducted by the defendant for the purpose of having the same repaired at the shop transferred by the defendant to the plaintiff; that it was unknown to the plaintiff that a large part of the business of said shoe repair shop was derived from shoes left to be repaired at the said shoe store belonging to the defendant; that, as a part of the fraudulent scheme referred to in the complaint and for the purpose of cheating and defrauding the plaintiff and for the purpose of retaining for himself and destroying the good will of said shoe repairing business, the defendant diverted all the said shoe repair business coming to his shoe store away from plaintiff's shoe repair shop and directed said customers to shoe repairing shops other than that transferred to the plaintiff; that the said defendant made arrangements with other shoe repair shops in the city of Visalia whereby he received a percentage or commission on all shoe repair business sent to said shops in Visalia other than the shop conducted by the plaintiff.

It is further alleged in the complaint that, by reason of the fraudulent statements and representations of said defendant, and by reason of said fraudulent acts of the defendant, plaintiff had been damaged in the sum of $4,000.

[1, 2] The agreement of purchase is attached as an exhibit to the complaint, from which it appears that the purchase price of said shoe repairing shop and business was the sum of $3,000. There is also attached to the complaint as an exhibit the bill of sale executed and delivered by the defendant to the plaintiff purporting to convey to said plaintiff all the personal property contained in the shoe repair shop referred to, the good will of the business, and, among other things, said bill of sale contains the following:

> "And first party (defendant) agrees not to re-enter shoe repair business in Visalia so long as second party continues in shop at place above described."

To this complaint the defendant interposed a demurrer alleging: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the complaint is uncertain, ambiguous, and unintelligible. This demurrer was overruled and we think properly. The complaint to which we have referred was probably subject to demurrer on the grounds of ambiguity and unintelligibility in certain particulars and the demurrer on these grounds would have been good, if the demurrer itself had pointed out the ambiguous and unintelligible portions. The demurrer simply uses the words "uncertain," "ambiguous," and "unintelligible," which, of course, fails to direct the attention to any portion of the complaint alleged to be uncertain, or ambiguous or unintelligible, and therefore was properly overruled.

[3] The answer filed by the defendant denies that the weekly receipts of said business had, for a long time prior to the sale, been less than the sum of $200 per week, denies that he represented to the plaintiff that the business was worth the sum of $3,000. The answer then admits that the defendant told the plaintiff he would convey the good will of said business, but denies that he represented or told the plaintiff that he would not re-enter the shoe repairing business in Visalia so long as defendant continued to operate said shoe repair shop. This denial appears to have been made in the face of the express language which we have quoted from the bill of sale containing such an agreement on the part of the defendant. The defendant then practically admits the making of the promises to transfer and convey the good will of the business and not to re-enter the same in the following denial:

> "Denies that his offer to convey the good will of said business and refraining from entering said business in Visalia as alleged was made without any intention of complying therewith."

Nor does the defendant deny the making of the other representations set forth in the complaint, the denial being couched in the following language:

> "Denies that each and all of the statements and representations were made by defendant for the purpose of cheating and swindling the plaintiff by inducing him to purchase said repair shop for the sum of $3,000.00; denies that there was any misrepresentations, or any deceit, or any false representations for the purpose of cheating

the plaintiff, as alleged, or otherwise, or at all; denies at the time the defendant made any statements to the plaintiff that the weekly receipts had been much less than the sum of $200.00 per week."

And then as to the value of the business, the answer contains the following:

> "Defendant denies that, on the 19th day of February, 1923, the said repair shop and business on said date was of the actual value of $1,500."

As to the allegations in the complaint that the defendant intended to retain the good will of the business for himself, the answer contains the following:

> "Denies that there was any statements made by the defendant as alleged, or otherwise, or at all, wherein the good will of the business was attempted to be retained by the defendant; denies that he attempted to retain the good will of the business."

Finally, the last paragraph of the answer contains the following:

> "Defendant denies generally and specifically each and every allegation set forth in paragraph 6, paragraph 7, and paragraph 8 of plaintiff's complaint."

These paragraphs of the complaint contained all the allegations concerning the actions of the defendant in diverting business from the shop conveyed by the defendant to the plaintiff, the intention of the defendant to retain the good will of the business for himself, the making of arrangements with other shoe shops whereby he (defendant) obtained a commission on all shoes sent from his shoe store to other shops than the plaintiff's to be repaired and upon shoes left by former customers of his shoe store sent to other shops to be repaired, and also the allegation that, by reason of the fraudulent statements, representations, and acts of the defendant, the plaintiff had been damaged in the sum of $4,000.

The complaint in this action was verified. Therefore subdivision 2 of section 437, Code of Civil Procedure, applies, and each and every material allegation therein must be controverted by specific denials; and under section 462, Code of Civil Procedure, where such allegations in the complaint are not controverted by the answer, they must for the purpose of the action be taken as true.

This defect in the answer of the defendant was not waived during the trial, as the record shows when the defendant attempted to introduce evidence controverting the allegations of the complaint as to the diversion of business, etc. The plaintiff objected to the introduction of the same on the ground that such allegations had been admitted by the pleadings. The objection of the plaintiff, however, was overruled by the court. No evidence was introduced by either party on the question of the damages suffered by the plaintiff. The allegations in the complaint that the defendant had caused the plaintiff to suffer damages in the sum of $4,000 was not controverted by any specific denial in the answer, as we have said, and therefore, under the sections referred to, must be considered as admitted. The trial court, however, did not act wholly upon the admissions contained in the pleadings, as the language of the trial court, in considering the question of damages, shows. The words used are as follows:

> "The admitted averments that the value of the property sold was at the time of sale not more than $1,500 does not appear to be conclusive, as all the facts and circumstances developed in the case must be considered. The same is true as to the admitted averment that, if the statements and representations had been true, the shop and business would have been worth $4,000."

[4] The court found, among others things, that the defendant represented that the weekly receipts of the shop were not less than $200 per week, but that the receipts were much less than such sum per week. The court also found that on account of other representations of the defendant the plaintiff was induced to believe that the business was worth the sum of $3,000 and was induced to pay said sum for said business; that the defendant agreed to transfer and did purport to transfer the good will of said business, etc., and not to re-enter the shoe repairing business, and that said statements and promises were made without any intention of conforming thereto; that the representations and promises were made for the purpose of cheating and defrauding the plaintiff. The court then found the value of the business in the following language:

> "That at the time of the purchase of said shoe repair shop and business from said defendant by said plaintiff, as hereinbefore set forth, the said shoe repairing shop and business was not of the value of $3,000, but that, on the contrary, the said shoe repairing shop and business was of the value of much less than $3,000."

[5] This finding, in and of itself, is insufficient upon which to predicate a judgment for damages. This, however, is immaterial, for the reason that the court did not base its judgment for damages upon the difference between the true value of the shop, including the business, and the amount which was actually paid therefor by the plaintiff. After finding that the defendant fraudulently diverted business from the plaintiff's shop, the court concludes its findings as follows:

> "The court finds that by reason of the false and fraudulent statements and misrepresentations made by the defendant, H. Don, to plaintiff, Joseph Muraco, as hereinbefore set forth, and by reason of the promises made by said defendant, H. Don, to said plaintiff, Joseph Muraco, as hereinabove set forth, without any in-

tention of complying with said promises, and by reason of the failure of said defendant thereafter to comply with said promises, the said plaintiff, Joseph Muraco, is damaged in the sum of $500.00."

By reason of this finding it will be seen that the court based its judgment for $500 in damages upon the failure of the defendant to comply with the promises theretofore made by the defendant to the plaintiff, which, according to the allegations of the complaint, constituted part of the consideration for the purchase of the business and shop by the plaintiff from the defendant. The pleadings, as we have stated, interposed on the part of the defendant, fail to deny the damages alleged to have been suffered by the plaintiff, in the sum of $4,000.

[6, 7] The testimony in the transcript shows and the admissions of the pleadings establish that the defendant impaired the good will of the business, contrary to his agreement; that the defendant diverted repair work from the shop that he had transferred to the plaintiff; and that, after the transfer of said business by the defendant to the plaintiff, the average weekly receipts were not more than the sum of about $70. This finding, even though it cannot be figured accurately in dollars and cents just what the good will of the business may be worth, amply sustains the judgment of the court in fixing the damages in the sum of $500. Had the findings been properly drawn in relation to the value of the business to show how much less than $3,000 the business was worth, then, and in that case, a much greater sum in damages might have been allowed. Thus the complaint alleges payment of $3,000 for the business by reason of the fraudulent representations of the defendant and then the answer of the defendant admits the value of the business as not exceeding $1,500. The findings which we have referred to omit to specify how much less than $3,000 the business is found to be worth, but, as we have stated, the judgment does not rest upon this finding, which is clearly defective. Had the damages awarded been based upon the difference between the true value of the property and the amount paid, then the admissions in the pleadings would have obviated any finding whatever as to the amount of the damages. However, as we have said, the amount of damages upon whatever based is admitted by the failure of the defendant to specifically deny the same. It is well settled that there can be no necessity for a finding as to a fact admitted by the pleadings, nor is there any necessity for making proof thereof. See Welch v. Alcott, 185 Cal. 731, 198 P. 626, and the cases cited and rules of law relating to admissions in pleading set forth on page 754 (198 P. 626) of the opinion in that case. To the same effect is the decision in the recent case of Aronson & Co. v. Pearson (Cal. Sup.) 249 P. 191.

In view of the admissions in the pleadings, we think the evidence sufficient to support the findings and the findings sufficient to support the judgment.

It is therefore ordered that the judgment of the trial court be and the same is hereby affirmed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

MEMORANDUM DECISIONS

79 Cal. App. 708 1

Joseph HAMMELL, Plaintiff and Appellant, v. Joseph W. ATKINSON, Defendant and Respondent. (Civ. 4665.) (District Court of Appeal, Second District, Division 1, California. Nov. 15, 1926.) Appeal by the plaintiff from a judgment of the Superior Court of Los Angeles County, John M. York, Judge, in an action to foreclose mortgage on real property. Reversed. Lewis & Lehman, of Los Angeles, for appellant. Ellis & Vickers and Elmer H. Howlett, all of Los Angeles, for respondent.

CONREY, P. J. The judgment was entered pursuant to an order sustaining respondent's demurrer to the plaintiff's second amended complaint and after failure of the plaintiff to further amend his complaint. The sole question raised by the demurrer and involved in this appeal relates to the statute of limitations. It is admitted that at the time of the commencement of this action the right of action was barred, unless such right had been preserved by an agreement of the debtor waiving the benefit of the statute of limitations. In the mortgage executed by the defendant it was provided that "the pleading of the statute of limitations as a defense to any demand secured by this mortgage is hereby waived." Appellant contends that, for several reasons urged by him, this agreement of waiver was invalid. In all essential particulars the same questions of law were before the Supreme Court of California in Brownrigg v. De Frees, 196 Cal. 534, 238 P. 714, and before this court in the recent case of McGee v. Jones, 249 P. 544. It is sufficient to say, upon the authority of those decisions, that there appears to be no doubt that defendant's demurrer to the complaint in the present case should have been overruled. The judgment is reversed.

I concur: HOUSER, J.

Mr. Justice YORK, being disqualified, takes no part in this decision.

---

79 Cal. App. 660 2

F. T. KENNEDY et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.* (Civ. 5442.) (District Court of Appeal, First District, Division 1, California. Nov. 8, 1926. Rehearing Denied Dec. 7, 1926.) Application for certiorari to annul an order of Industrial Accident Commission awarding compensation for injuries. Award affirmed. R. P. Wisecarver, of San Francisco, for petitioners. Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari to annul an award of the Industrial Accident Commission, in which compensation was awarded to one W. A. Spence on the theory that he was an employee of petitioner. It was and is contended that Spence was not an employee of Kennedy, but that he was operating as an independent contractor. Briefly stated, the facts are as follows: F. T. Kennedy is a general contractor who at times subcontracts various portions of his work. He had a contract to erect certain buildings at the Boy Scout camp in East Oakland. The work of shingling the buildings was let to one W. A. Spence, who agreed to do this work for $1.50 per thousand shingles laid and 3½ cents a foot for the hips and valleys. While employed at his work, Spence fell from the roof of one of the buildings, sustaining a fracture of the pelvis. Thereafter, on July 30, 1925, he filed his application for adjustment of claim with respondent Commission against Kennedy and his insurance carrier, Royal Indemnity Company. A hearing was held on August 12, 1925, and on September 15th following the Commission made and filed its findings of fact and award, wherein it was determined that the applicant was employed as a shingler by Kennedy and that the injury complained of arose out of the employment, and compensation was awarded at the rate of $20.83 a week, beginning June 23, 1925, and until the further order of the Commission. A petition for a rehearing was filed and denied, and the present proceeding in review followed. No useful purpose would be subserved by an extended review or analysis of the facts. They are on all fours with the case of Hillen v. Industrial Accident Commission (S. F. 12001) 250 P. 570, decided by our Supreme Court on November 3, 1926. On the authority of that case the award must be and it is hereby affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

*Rehearing denied December 7, 1926.

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8591

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING